THE

INDIAN DECISIONS

(NEW SERIES)

Being a re-print of all the Decisions of the Privy Council on appeal from India and of the various High Courts and other Superior Courts in India reported both in official and non-official reports from 1875

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ALLAHABAD, VOL. I.

(JANY., 1875 TO MAY, 1880)

MADRAS

THE LAW PRINTING HOUSE, MOUNT ROAD

1911

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DEDICATED

TO

THE LEGAL PROFESSION IN INDIA

AS AN HUMBLE TRIBUTE OF GRATITUDE FOR THEIR LONG, UNIFORM AND UNSTINTED PATRONAGE.

PREFACE.

I BEG hereby to offer the legal profession in India the first volume of the INDIAN DECISIONS, NEW SERIES. As announced by me elsewhere, the INDIAN DECISIONS, NEW SERIES, is devoted to the *verbatim* re-print of all the judgments of the several High Courts in India and of the Judicial Committee of the Privy Council, since the year 1875, reported both in the official and in the non-official reports of the country. The volume now placed before the learned public is the first volume of the ALLAHABAD SECTION of the INDIAN DECISIONS, NEW SERIES, and comprises the judgments of all the cases decided by the Allahabad High Court from January, 1875 up to May, 1880 and by the Judicial Committee of the Privy Council on appeal from the Allahabad High Court and from the Judicial Commissioner of Oudh and reported in the official, as well as in the private, reports relating to that period. All the cases reported in volumes I and II, and a few cases—not more than 8—reported in volumes III and IV, of the I.L.R., Allahabad Series, will be found among the cases re-printed in this volume, which contains, also, such of the Allahabad cases as are not reported in the I.L.R., Allahabad Series, but are to be found in the Allahabad Weekly Notes, the I.L.R., Calcutta Series, the Bengal Law Reports, the Calcutta Law Reports, Sutherland's Weekly Reporter, the Law Reports Indian Appeals, Baldev Ram Dave's P.C. Judgments, Sutherland's P.C. Judgments, Saraswati's P.C. Judgments, and the Indian Jurist pertaining to the period specified above.

The imperfections of our legal Codes have justly enhanced the value of judge-made law, which is every day developing, and, side by side with its growth, a knowledge of the law is also rapidly spreading among the people. Judges and practitioners alike keenly feel the necessity of keeping themselves abreast of the current of modern case-law. But, the cost of acquiring a complete collection of all the decisions of the highest Judicial tribunals of the land, even commencing from the date of the establishment of our present High Courts up-to-date, is becoming very prohibitive, at least to the majority of the learned profession. Many of the back numbers of the I.L.R. Series and of the private reports, relating to so recent a period as that covered

by the years 1875 to date, are difficult to obtain and the chances of their being re-printed have become problematic. There is abundant evidence of the fact that the majority of the learned public are anxious to possess themselves of a comprehensive and cheap publication, which will bring together all our modern case-law, now scattered in the bewildering multitude of official and non-official reports, if any publisher should resolutely and earnestly come forward to supply this long-felt need. This want of a consolidated and comprehensive edition of the decisions of the several High Courts is all the more intensely felt from the circumstance, that the I.L.R. Series do not report all the important cases decided by our High Courts, the total number of cases decided by our High Courts being greater than that which any particular report, official or private, publishes, and, also, from the circumstance already referred to that such cases are scattered over a large number of different reports.

The publication, therefore, of a consolidated and moderately priced edition of all the decisions of our High Courts, reported in the various official and private journals, was the *magnum opus* which, with the sole object of obviating the difficulty abovementioned of a considerable portion of the members of the legal profession, personally witnessed by him during his long practice at the Bar, my revered uncle, the late Mr. T. V. SANJIVA ROW, had set to himself to accomplish, and which he, in the midst of his manifold duties, had been slowly conserving all his resources to realise. My uncle's aim in this respect was threefold: to publish a *verbatim* re-print of all the Privy Council decisions published in the Moore's Indian Appeals and in the several reports of Acton, Knapp, etc., decided up to the year 1873; to publish, also, a *verbatim* re-print of the rare decisions of the old Supreme Courts and Sudder Dewanny Adawlats in India; and, further, to bring out a consolidated and comprehensive, but yet a cheap, edition of all the modern reported case-law. The first of these objects he endeavoured to realise in the publication hitherto known as the INDIAN REPORTS, but which has now ceased to exist, owing to the dissolution, in consequence of his death, of the partnership under which the publication was begun. The second object, my late uncle had in view, I have diffidently attempted to carry out in my recently started publication, the INDIAN DECISIONS, OLD SERIES, the first volume of which has already been placed before the profession. But, the third and last object aimed at by him was the one he most dearly cherished, and most ardently worked for, and, with the view of eventually taking up this work it was that he started the LAW PRINTING HOUSE, two years ago. And, though his untimely death has prevented him from carrying out his most important object, I have, as previously announced by me, resolved for the sake of the learned constituents to accomplish that object also.

The chief object of inaugurating the present publication, and, at the same time, the justification for issuing it, are in the words of my late lamented uncle, "to place within the easy reach of all practitioners, high or low, opulent or otherwise, a publication containing *in extenso* all the decisions of the highest Judicial tribunals of the land in such a manner as would meet" all their requirements and for a fair and moderate price.

The present volume, it will be observed, collects together all the Allahabad cases scattered in 35 volumes of private and official reports relating to the period between 1875 and 1880. The advantages of such a consolidation cannot be too highly valued. This feature, taken into consideration along with the chronological order in which these cases are arranged, *i.e.*, according to the dates of the judgments, and irrespective of the order in which they are found in the original reports, will, it is hoped, greatly conduce to a historical study of our case-law, a study, which, under a legislature which periodically amends, repeals and re-enacts almost all the enactments in force in the country, must be very essential and important for a clear and useful knowledge of the law.

The facilities which this series will afford the practitioner will be that the original paginations of the various cases, as they are to be found in the respective reports, have been, to render citation easy, indicated in the body of the judgments by means of thick black figures enclosed in rectangular brackets; where the decisions are reported in the I.L.R., as well as in the private reports, the original pages of the I.L.R. only are indicated, and, where more than one private journal reports a case or cases, the original pages of the report more frequently cited in the Courts, are indicated; and the reports thus preferred are underlined by thick lines. Again, where the same case is reported in more than one report, the repetition is pointed out at the top of each case and in the margin by the familiar (=) equal to symbol.

The novel feature about this publication is that each case is provided with an analytical, exhaustive and original head-note, the various points dealt with in the decision being split up into separate paragraphs, wherever possible, and printed with appropriate catch-words. The head-notes specially prepared for the LAWYER'S REFERENCE series, which have long ago earned the approval of the learned public, have been adapted for this publication, as far as possible. The late Mr. Sanjiva Row prayed the Government of India to grant him permission to make a *verbatim* re-print of the back numbers of the I. L. R. Series up to a certain period, and, after his death, a similar memorial was submitted to them by me also. But, they have not as yet deigned to make any reply; and, from the pressure of the heavy work always

before them, and from the important issues involved in the prayer, it would seem to be unreasonable to trouble them for a speedy answer. This circumstance, together with the fact that a very large section of the learned public are earnestly pressing me to bring out a publication of this kind, has compelled me to depart from the time-honoured practice of re-producing the head-notes of the official reporter, a departure, which, I trust, the profession will have no reason to complain of, and which, if reasonably considered, may not be without its own advantages, but which, however, will not preclude me from availing myself of the official head-notes, etc., should the Government of India graciously deem it fit to grant me, in future, the permission I have prayed for. The same consideration has induced me to omit the official statement of facts and the arguments of counsel, a further reason therefor being that the facts of the case and the arguments of counsel are generally discussed in the judgments of the learned judges themselves; though, wherever quite necessary, a brief statement of the facts of the case is also given.

At the end of the head-note of each case, the previous cases that have been considered in, and the subsequent cases that may have considered, the particular case have been noted. A copious and exhaustive general index has been appended to the volume which is calculated to serve as a complete digest of the case-law in the volume.

Two tables of cases, one by the volume and page of each report from which the cases have been re-produced in this volume, and the other in the alphabetical order of the names of the parties, have been furnished to facilitate reference. These tables will be consolidated at the end of the series relating to each province, when such consolidated table will serve as a key to the volumes of each province.

Particular attention is invited to the price of the volume, Rs. 7, which, considering the labour and research it has cost, its size, which covers more than a thousand pages, its printing and binding and general get-up, specially designed to make the work a permanent and enduring book of reference, I hope, the learned public will recognise to be only too moderate.

It is proposed to issue the volumes of this series at the rate of one volume every month and effective arrangements have been made for it. I wish, also, to say that, if a large number of subscribers earnestly require it, the publication of the judgments relating to the other provinces will also be simultaneously taken up.

In conclusion, I beg to state that the legal profession will only recognise in this publication an earnest desire on my part to serve them

more than anything else and, if it should, even in the smallest measure, facilitate the work of the judge and the lawyer in the administration of justice, I shall feel amply rewarded.

I wish to avail myself of this opportunity to express my sense of indebtedness to Mr. M.M. MURZBAN, Bar-at-Law, Bombay, who has been so kind as to transfer to me the rights he acquired from Mr. W.K. PORTER of the ALLAHABAD WEEKLY NOTES, to re-produce *verbatim* the head-notes, statements of facts, etc., etc., of all such cases reported in the Allahabad Weekly Notes, as have not been reported in the Indian Law Reports Series, for the purposes of this series, which goes a great way to facilitate my work in this great undertaking, and to other professional gentlemen who have been rendering me unfailing assistance in the publication of this work.

THE LAWYER'S COMPANION OFFICE,
MADRAS,
Dated, 25th October, 1911.

T. A. VENKASAWMY ROW.

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ABBREVIATIONS EXPLAINED.

REPORTS.

Agra H. C. R.	...	Agra High Court Reports.
A. or All.	...	Indian Law Reports, Allahabad Series.
A. L. J.	...	Allahabad Law Journal.
A. W. N.	...	Allahabad Weekly Notes.
Bal. or Baldev.	...	Baldev Ram Dave's Privy Council Judgments.
B. L. R.	...	Bengal Law Reports.
B.	...	Indian Law Reports, Bombay Series.
B. H. C. R. or Bom. H. C. R.	...	Bombay High Court Reports.
Bom. L. R.	...	Bombay Law Reporter.
Bur. L. R.	...	Burma Law Reports.
C. or Cal.	...	Indian Law Reports, Calcutta Series.
C. L. J.	...	Calcutta Law Journal.
C. L. R.	...	Calcutta Law Reports.
C. P. L. R.	...	Central Provinces Law Reports.
C. W. N.	...	Calcutta Weekly Notes
Crim. L. J.	...	Criminal Law Journal of India.
I. A.	...	Law Reports, Indian Appeals.
I. C.	...	Indian Cases.
I. J. or Ind. Jur.	...	Indian Jurists.
L. B. R.	...	Lower Burma Rulings.
M.	...	Indian Law Reports, Madras Series.
M. H. C. R. or Mad. H. C. R.	...	Madras High Court Reports.
M. L. J.	...	Madras Law Journal.
M. L. T.	...	Madras Law Times.
M. W. N.	...	Madras Weekly Notes.
M. I. A.	...	Moore's Indian Appeals.
N. L. R.	...	Nagpore Law Reports.
N. W. P. H. C. R.	...	North-West Provinces High Court Reports.
O. C.	...	Oudh Cases.
P. R.	...	Punjab Record.
P. L. R.	...	Punjab Law Reporter.
P. W. R.	...	Punjab Weekly Reporter.
Sar. P. C. J.	...	Saraswati's Privy Council Judgments.
S. L. R.	...	Sind Law Reporter.
S. D. A.	...	Sudder Dewany Adawlat Reports.
Suth. P. C. or Suth. P. C. J.	...	Sutherland's Privy Council Judgments.
T. L. R.	...	Travancore Law Reports.
U. B. R.	...	Upper Burma Rulings.
W. R.	...	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	Applied.
Appr.	...	Approved.
Cons.	...	Considered.
D. or Dist.	...	Distinguished.
Disc.	...	Discussed.
Diss.	...	Dissented from.
Expl.	...	Explained.
F.	...	Followed.
F. B.	...	Full Bench.
Not F.	...	Not followed.
Obs.	...	Observed on.
P. C.	...	Privy Council.
R.	...	Referred to.

THE
INDIAN DECISIONS
NEW SERIES
ALLAHABAD—VOL. I.

PRIVY COUNCIL.

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the Court of the Financial Commissioner of Oudh.

SYUD MEER WAHID ALI *v.* RANEE SADHA BEBEE. [15th Jan. 1875.]

3 Suth. P.C.J. 82.

Act XXVI of 1866 (Oudh Sub-settlement)—Evidence.

To entitle a person to a sub-settlement of lands under Act XXVI of 1866 (Oudh Sub-settlement), he must prove that he, or some person under whom he claims, has within the prescribed period held these lands as an under-proprietor under the talookdar or the predecessor of that talookdar. It is not sufficient for him to show that he has been a proprietor of those lands by a title adverse to the talookdar. [3 Suth. P.C.J. 4, *R.*].

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Mr. *T. H. Cowie* and Mr. *C. W. Arathoon*, for Appellant.

JUDGMENT.

[82] SIR JAMES COLVILE delivered judgment as follows :—

Whatever may have been the questions originally in dispute between the parties appellant and respondent on this appeal, they are now reduced to this,—whether the appellant is entitled to a sub-settlement of Taluka Beoramow upon the terms on which that sub-settlement was decreed to him by Mr. Nicholson, the Settlement Extra Assistant Commissioner, on the 23rd November 1867. The case must be taken to admit that the respondent, as the talookdar of this property, has those proprietary rights which are assured to talookdars of Oudh holding talookdari sunnuds by "The Oudh Estates Act, 1869," and the only question is whether the respondent, whom we may treat as alleging himself to be the zemindar of Taluka Beoramow, is entitled to a sub-settlement under the terms of "The Oudh Sub-Settlement Act, 1866."

Now, in order to entitle him to such a sub-settlement, it was necessary that he should prove that he, or some person under whom he claims, had within the prescribed period held these lands as an under proprietor under the talookdar or the predecessors of that talookdar. It was, indeed, contended by Mr. Arathoon **[83]** that it was sufficient for him to show that he had been a proprietor of those lands by a title adverse to the talook-

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dar, and that although he might have lost his right to engage for the Government revenue under the peculiar laws that have prevailed in the province of Oudh since the reconquest of that province, it was to be presumed that, having once had the better title to the lands, he had still a right to a sub-settlement. But it does not appear to their Lordships that this broad proposition can be maintained, or that it receives any support from the decision of this Board, which has been referred to in the case of The Widow of Shunker Sahai *v.* Rajah Kishen Pershad.* The material question, therefore, to be decided was whether the relation of superior and under proprietor had ever existed between the two parties.

The case made by the appellant was shortly this:—Rajah Newaz Khan was the proprietor of Taluka Beoramow. He was the common ancestor of Ali Buksh Khan, the respondent's husband, through whom she claims, and Peer Gholam Khan, whose widow, the mother-in-law of the appellant, was one Sada Bibi. Ali Buksh Khan having dispossessed Peer Gholam Khan's branch of the family, Sada Bibi appealed to the King's Court, and in 1847 obtained a decree declaring her to be proprietor of Beoramow. She had previously transferred her rights by deed of gift to her son-in-law, the appellant, and he, by virtue of this decree, obtained possession of the taluka. Ali Buksh Khan, however, continued to disturb him in that possession, and in 1851 the two parties came to an agreement, the terms whereof were embodied in an ikrarnamah executed by Ali Buksh Khan, to the effect that the appellant should hold Beoramow as subordinate proprietor under Ali Buksh Khan, who was to hold the kubooleut for that as well as for the Taluka Mahona, to which he was entitled in his own right. This state of things subsisted until the annexation of the province in 1856.

The extra Assistant Commissioner, Mr. Nicholson, held that this case, including the execution of the ikrarnamah, had been established. The Commissioner, Mr. Capper, held that the ikrarnamah was not proved, and further that "the respondent had failed to prove that the relationship of over and under proprietor was ever established between the parties." This was the ultimate decision upon this cardinal issue of fact. There was then a special appeal to the Financial Commissioner, and the grounds of appeal were four. They were as follows: "That the Court of first instance had of necessity far better opportunity of testing the genuineness of the ikrarnamah under which plaintiff (appellant) claims, and that the grounds on which the Commissioner had set aside the ikrarnamah are insufficient. 2nd, That the village papers and accounts from 1858 to 1862, filed by appellant, together with the Coomedan's perwanah, are additional proofs of the genuineness of the ikrarnamah. 3rd, That the circumstances of the canoongoe having been unfavourably reported of on a previous occasion is no proof that his evidence in appellant's case is untrustworthy." Now as to these first three grounds, it is obvious that they all go to the genuineness of the ikrarnamah, and that they simply raise a question as to the effect of the finding of Mr. Capper upon the fact of the execution or genuineness of that instrument, and the appreciation that he should have given to the evidence in support of it. The 4th ground is, "That appellant has on no occasion either confined his claim to a nankar or waived his right to a sub-settlement; on the contrary, a reference to appellant's petition of 8th December 1863 will show that appellant then asserted his present rights." The order of the Financial Commissioner dismissed the special appeal, and it is against that order that the present appeal is brought.

*See 3 Suth. P.C.J. p. 4.

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The point to which their Lordships have, in the first instance at least, to direct their attention, is whether,—they being merely in the position of the Financial Commissioner who had to deal with a special appeal,—there are any grounds upon which they can interfere with the finding of Mr. Capper, which was in effect that [84] the relation which it was necessary to establish in order to entitle the appellant to a sub-settlement, never existed between the two parties. Their Lordships have to observe that, so far as the title of the appellant depends upon the proof of the ikrarnamah, there can be no ground whatever for interfering upon special appeal with the judgment of Mr. Capper on that pure question of fact; and though it is not necessary for them to do so, they may add that, as far as they can see, the reasons given by Mr. Capper are sound, and that they, if sitting as judges of the fact, would probably, on the same evidence as to the execution of that instrument, have come to the same conclusion. The fourth ground of appeal seems to refer specially to an observation which was made by Mr. Capper, to this effect: "Before Mr. Forbes, Assistant Settlement Officer, and Mr. Currie, Settlement Commissioner, it has been admitted for Wahid Ali, that he held nothing under the Rajah but his nankar; and in his petition to the Financial Commissioner of 12th March 1865 reasserting his proprietary title, he is silent as to having held under the present talookdar." Now as to the admission that the appellant held under the Rajah nothing but his nankar, it is undoubtedly stated by Mr. Currie, in the judgment delivered by him in one of the earlier proceedings at page 7, that the appellant had admitted having held nothing but nankar under the Rajah, and this seems to have been the ground of Mr. Capper's observation. But, at most, it is an observation which follows his finding, to the effect that the appellant had failed to prove the relationship, and does not appear very materially to have influenced that decision, though it may have been used to construct it. And considering the inconsistency of the cases which were put forward by the appellant at various times in the course of this long litigation, their Lordships cannot feel certain that no such admission was ever made before Mr. Currie.

The argument which Mr. Arathoon founded on the finding of Mr. Capper, that Sada Bibi did obtain a decree in the King's Court in favor of his title and against that of Ali Buksh Khan, had already been dealt with. It was more plausibly urged by him that Mr. Capper's judgment might be impeached, upon special appeal, upon the ground that he had decided the case on the failure of the appellant to establish the genuineness of the ikrarnamah, and had altogether omitted, and as it were rejected, from his consideration other and independent evidence which ought to have led him to the conclusion that the alleged relationship of over and under proprietor had existed between the appellant and the respondent. Their Lordships, however, are unable to come to this conclusion. They think that there is nothing to show that the evidence in question was altogether rejected by Mr. Capper, or that it was of such a character that it ought necessarily to have led him to a contrary conclusion to that to which he came. And assuming for the sake of argument that he may have failed to give to this or that portion of the evidence the full weight which their Lordships, sitting as a tribunal competent to determine the facts, would have assigned to it, they must observe that this would be no ground for reversing his decision upon the facts on special appeal. In the course of the argument some attempt was made to reopen generally Mr. Capper's decision. It appeared, however, that the appellant some time ago petitioned this Committee for special leave to appeal against

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that decision, and that the petition was dismissed. This circumstance, independently of the general practice recently adopted by their Lordships, of not allowing such applications to be made at the hearing of an appeal, necessarily precluded them from treating this otherwise than as a special appeal. They may, however, observe, that so far as they can form an opinion from what they have seen in the record or heard in argument, they are not disposed to think that the appellant would have succeeded in disturbing Mr. Capper's finding on the facts, had it been open to him to question its correctness by regular appeal.

Their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the Financial Commissioner, with costs.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the Court of the Financial Commissioner of Oudh.

RAJAH MAHOMED AMEER HUSSUN KHAN *v.* THAKOOR MONOO SINGH AND OTHERS. [16th January 1875.]

3 Suth. P.C.J. 85.

1875 JAN. 16. PRIVY COUNCIL. 3 Suth. P.C.J. 85.

S. 19, cl. 4, Punjab Code—Mortgage—Interest—Discretion of Court.

According to the Punjab Code it is declared that the period during which interest is demanded must not exceed 12 years. Where the Court thought 42% per annum (the rate of interest agreed upon in a mortgage) unjustly usurious, it, looking to s. 19, cl. 4 of the Punjab Code, allowed 12 years' interest at the rate of 12% per annum.

Mr. *Leith, Q.C.*, and Mr. *C. W. Arathoon*, for Appellant.

JUDGMENT.

[85] SIR BARNES PEACOCK delivered the following judgment:—

This is a suit brought by Rajah Mahomed Ameer Hussun Khan, who was the son of Rajah Nawab Ally Khan, the Talookdar of Mahmoodabad in Seetapore, to recover possession of certain estates which he alleged had been mortgaged to him by Monoo Singh and other persons who are made defendants in this suit, and are now the respondents. The mortgage was executed in November 1850, and the mortgagor stipulated in the mortgage deed that the mortgagee was to be let into possession, to be at full liberty to enjoy the lands, to be at liberty to fell the trees or assign such produce to any person to whom he might think fit to give it, and he also promised to pay moonafah or interest at the rate of 3½ per cent. per mensem.

The mortgage then proceeded:—"At the end of the harvest of the year we will in one lump sum make good the original amount together with interest, etc., to the mortgagee from our own pocket, and without availing ourselves of the assistance of any other party, and thus effect the mortgage at the time of redemption." They probably mean "and thus *redeem* the mortgage."

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3 Sath. P.C.J. 85.

The first decree was given by the settlement officer, Mr. Gordon Young, in which he decreed to the Rajah Ameer Hussun Khan the principal sum of Rs. 7,659-5-9, and half as much, namely, Rs. 3,829-10, as interest, making a total of Rs. 11,489. Then he went on, "This sum must be paid within one year or possession will be given to the Rajah, and till paid into Court it will bear interest at 6 per cent." An application was made for a review of that judgment, and in the grounds for the review the Plaintiff claimed principal and interest, at the rate stipulated, as well as the profits which had accrued during his dispossession. It appears that he had been dispossessed in 1264, when the Government made the summary settlement with Monoo Singh and the other defendants. He claimed therefore instead of the principal and half the amount of principal as interest, to have interest awarded to him at the rate of 3½ per cent. per mensem according to the terms of the deed, and to have the profits of the lands which had accrued during his dispossession. Upon that the same Settlement Officer, Mr. Gordon Young, altered his original decree, and decreed as follows:—" The Court decrees possession of the estate of Burchutta to Rajah Ameer Hussun Khan, possession to be had from the 15th of the ensuing Jeth, unless the sum of Rs. 7,659-5-9 principal + 14,360-10, interest, total 22,019-15-9, be paid by defendant through **[86]** the Court, such money to be raised otherwise than by sale or mortgage of the hypothecated property."

From that decision an appeal was preferred to the Commissioner. He reversed the judgment altogether, and holding that the mortgage had been executed merely by the son, and that it was not binding on the defendants, he dismissed the plaintiff's suit, with costs. From that there was an appeal preferred to the Financial Commissioner, and he upheld the first (not the second) decision of Mr. Gordon Young in which he awarded Rs. 7,659-5-9 with interest, calculated at half the amount of the principal, Rs. 3,829, making a total of Rs. 11,489. An application was made to the Financial Commissioner for a review of that judgment, and he, after hearing the case, thought that the original amount of interest at 3½ per cent. was usurious, and having heard the case argued, he said, that under the circumstances he held that the decree as it stood, that is the original decree made by the Financial Commissioner himself, was equitable, and he refused to alter his order. The ultimate judgment then stood that the plaintiff was entitled to recover possession unless the defendant should within a certain time pay the amount of principal and half the amount of principal by way of interest.

From that judgment there is an appeal to Her Majesty in Council, and the only question which is raised here, is whether the amount of interest which was awarded was a fair and equitable amount, or one which could legally stand? The plaintiff before us does not claim the profits as well as the interest, but he says that half the amount of principal was an inequitable and insufficient amount to be awarded to him under the mortgage bond. It is admitted that the Punjab Code has been extended to Oudh, and in s. 19 of the Punjab Code (paragraphs 4 and 5 at page 34 of the Code), it is enacted, that "the Courts are not bound by any restrictions with regard to usury. Debtors and creditors are allowed to arrange as to the terms and conditions of interest in whatever manner they may deem most conducive to their mutual benefit. The Courts will decree whatever rate may have been agreed upon *bonâ fide* between the parties. If no special rate shall have been agreed upon, then the Court will fix what may appear an equitable amount with reference to the custom of the locality, the usage of trade, or the merits of the transaction.

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3 Suth. P.C.J. 85.

It will be remembered that the rates of interest vary for different classes of cases and in different places. If in any case the amount of interest shall be deemed unjustly usurious, the Court will decree only as much as may appear just under the circumstances." Now the Financial Commissioner determined that the amount of 3½ per cent. per mensem, or 42 per cent. per annum, was unjustly usurious, and to that extent their Lordships agree with him. The question then comes to this, whether the amount which the Financial Commissioner has fixed, namely, half the amount of principal by way of interest, is such as appears to their Lordships to be equitable under the circumstances? It appears to their Lordships that interest equal to half the amount of principal would not be much more than about 4 per cent. per annum, and that in their Lordships' opinion would be too low a rate of interest to be allowed upon a mortgage in which 3½ per cent. per mensem had been agreed upon. Their Lordships think that 3½ per cent. per mensem is unjustly usurious. On the other hand they are of opinion that the amount of one half the principal is not sufficient amount. They think that a fair amount of interest would be at the rate of 12 per cent. per annum for the time during which the plaintiff was out of possession of the estate, and that he ought not to have any interest at all during the period in which he was in possession. Assessing the amount for the whole period during which the plaintiff was out of possession, from 1264, Fusli, down to the present time, would be giving him about seventeen years' interest. Now, according to the Punjab Code it is declared that the period during which interest is demanded must not exceed twelve years. Their Lordships, therefore, **[87]** are of opinion that, looking to the Punjab Code, a fair amount of interest to be allowed to the plaintiff would be twelve years' interest at the rate of 12 per cent. per annum. That amount of interest calculated in round numbers would be about Rs. 11,000, and their Lordships are of opinion that the plaintiff ought to recover the principal sum, namely, Rs. 7,659-5-9, together with Rs. 11,000 as interest, making a total of Rs. 18,659-5-9.

Their Lordships, upon the whole, will humbly recommend Her Majesty that the decree of the Financial Commissioner be varied by awarding to the plaintiff as interest Rs. 11,000 instead of one half of the principal, making the total sum for principal and interest Rs. 18,659-5-9; and by directing that the defendant have one year from the date of Her Majesty's Order in Council for the purpose of paying that amount. If the above amount be not paid within that time the plaintiff to be put into possession of the estate. Their Lordships are of opinion that the appellants are entitled to their costs of this appeal.

PRIVY COUNCIL.

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, and Sir Montague E. Smith.

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3 Suth. P.C.J. 141.

On Appeal from the High Court at Allahabad.

POORUN SINGH AND OTHERS *v.* THE GOVERNMENT OF INDIA. [10th March 1875.]

3 Suth. P.C.J. 141.

Officer appointed to consider and revise revenue assessed on certain estates—Government, proprietary rights of.

An officer appointed to consider and revise the revenue assessed on certain estates, is not empowered to convey away the proprietary rights of the Government in those estates.

Mr. *J. D. Bell*, for Appellants.

Mr. *Cowie, Q. C.* and Mr. *Bigland Wood*, for Respondent.

JUDGMENT.

[141] SIR BARNES PEACOCK delivered judgment as follows :—

This suit was brought by the plaintiffs to have it declared that they are possessed of, and absolutely entitled to, the full proprietary rights in Mouzah Dharaotee Pergunnah Koonch, Zillah Jaloun. There is no dispute in this case as to the facts, and it appears that the plaintiffs who are now the appellants were originally the proprietors of the Mouzah. They had acquired it by purchase at a sale for arrears of revenue. The revenue assessment was admittedly very high, and the plaintiffs being unable to pay that revenue parted with their estate. Subsequently, in consequence of two sales for arrears of revenue, the proprietary rights became vested in Government by reason of their purchase at the last sale for arrears of revenue. The question then is, whether the Government has ever parted with those proprietary rights to the plaintiffs, entitling them to maintain the suit to have it declared that they are now entitled to the proprietary rights in the estate? It is contended that the proprietary rights were parted with by the Government, and substantially regranted to the plaintiffs by the revenue settlement which was entered into with them in the year 1860. At that time there was a 30 years settlement of the pergunnah which would expire in the year 1871, but the revenue assessed upon the different estates in the pergunnah was so high that it was determined they should be revised and lowered in those cases in which it should be found necessary. The officer who was first appointed to consider the amount of assessments was told that his primary duty was merely a fiscal one; that he had no judicial power to exercise, and consequently it is clear that he had no power to convey away the proprietary rights of the Government.

It is contended that two letters, one of the 30th April 1860, which is set out at page 2 of the Supplementary Record, and the other of the 14th June 1860, which is set out at page 34 of the Original Record, amount to a sanction on the part of the Government to the re-grant to the plaintiffs of their proprietary rights. The Commissioner in his judgment, at page 50, has commented upon these letters. He says :—"The first plea I pronounce untenable. In it the appellants, though necessarily acknowledging the absolute property of Government in the village in suit at the time of

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the revision of settlement, assert or apparently intend to assert that Government by its letters No. 359, dated 30th April 1860, and No. 615, dated 14th June 1860, sanctioned the settlement with them as proprietors. This was clearly not the case. After a careful perusal of these letters I am unable to perceive a single sentence or portion of a sentence which supports the plea. The letters are clear and simple. There is no possibility of misunderstanding their drift and meaning. The first, No. 359, sanctions the proposed reduction of jumma in Pergunnah Koonch, and does nothing more. The second, No. 615, merely **[142]** sanctions the reduced jummas in the other pergunnahs of Jaloun district." Their Lordships, having carefully considered those letters, entirely concur with the Commissioner in the view which he has taken of them. The Commissioner decided against the plaintiff who appealed to the High Court. The only ground of appeal is this, namely.—"The decision of the Lower Court is bad, because it is clear that even if Government did not in so many words hand over the property to appellants, yet it clearly and distinctly sanctioned the acts of its officers who did so, and who, not once but in many instances, deliberately and distinctly recognized the appellants as absolute proprietors of the property in dispute." The learned Judges of the High Court went fully into the matter and have given their reasons in detail. Their Lordships concur in those reasons, and consider that the High Court was right in confirming the view which had been taken of the case by the Commissioner.

Under these circumstances their Lordships will humbly recommend Her Majesty that the decree of the High Court be affirmed, and that this appeal be dismissed, with costs.

The High Court have made some remarks with regard to the hardships of the case. Their Lordships have no power to deal with them, but certainly it does appear rather hard that after the plaintiff had had the settlement made with him an alteration should be made at the expiration of that settlement, and that the recommendation of the Commissioner should be carried out, namely, to settle half with Ram Dyal, and to sell the other half of the estate.

Mr. Cowie. Those observations, my Lords, will be conveyed to the Government.

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15 B.L.R. 221.

3 Suth. P.C.J. 148.

2 I.A. 205.

3 Saraswati's P.C.J. 495.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

GAJADHUR PERSHAD *v.* THE TWO WIDOWS OF EMAM ALI BEG AND OTHERS. [18th March 1875.]

15 B.L.R. 221 = 3 Suth. P.C.J. 148 = 2 I.A. 205 = 3 Saraswati's P.C.J. 495.

Appeal to Privy Council—Preliminary objection—Practice.

An objection that an appeal has come before the Privy Council without proper authority should be taken at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, the Judicial Committee feel obliged to yield to it.

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But it is clearly competent to the Judicial Committee to hear it at any stage of the appeal; and it has not been unusual to entertain it when the appeal is called on, and before the argument upon the merits has been commenced.

Where on the calling of an appeal and before the entering into the merits of the case, a valid objection was taken by the respondent, and the appellant, thereupon, made an application to the Privy Council to grant him special leave to appeal, *nunc pro tunc*, *held* that the Judicial Committee had discretion to grant such special leave.

Special leave to appeal *nunc pro tunc* was refused in this case where one of the principal question was that the proper amount was not paid into Court under a compromise the alleged deficiency being Rs. 7 only. Leave to appeal refused in the present case on the ground that the rights of the appellant might be ascertained and enforced more satisfactorily in some other proceedings than by their Lordships under the irregular appeal sent up by the Court in India.

Mr. *Leith*, *Q. C.* (Mr. *J. Arathoon* with him), for the Appellant.
Mr. *Doyne*, for the Respondent.

JUDGMENT.

[223] Their Lordships' judgment was delivered by Sir M. E. Smith :—

This case comes before their Lordships under circumstances of great irregularity in the proceedings. The leave to appeal granted by the Judicial Commissioner, Mr. Currie, is clearly *ultra vires*, and therefore the appeal is now before them without any proper authority. Mr. Doyne has taken the objection that the appellant is in that position. He was met by a counter objection on the part of Mr. Leith that the respondents could not now be heard to object, inasmuch as they had not done so at an earlier period when they first became aware that the irregular petition of appeal had been lodged. Their Lordships think that the right practice is to take objections of this kind at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, their Lordships feel obliged to yield to it. But although their Lordships think that the objection should be taken at an early period, it is clearly competent to them to hear it at any stage of the appeal; and it has not been unusual to entertain it when the appeal is called on, and before the argument upon the merits has been commenced. Mr. Doyne has taken it at that time, and their Lordships think his objection ought to prevail. Mr. Leith then suggested that he desired to apply to this Board for special leave to appeal; and no doubt there have been cases where, upon the appeal being called on and the objection discussed, their Lordships have given special leave to appeal, *nunc pro tunc*, directing that the petition to appeal should go to Her Majesty with the report upon the appeal itself. An appellant, however, cannot be in a better position with regard to the application than that in which he would have stood if he had made it at an earlier period; and their Lordships have had to consider whether or no this is a case in which they ought to grant special leave to appeal; and they have come very clearly to the conclusion that it is not.

It seems that the plaintiff is mortgagee, and the original defendant, Emam Ali Beg, was mortgagor. Emam Ali Beg is **[224]** dead; his two widows are on the record, and there is a third party now on the record as an intervenor, the Rajah of Bhinga, the respondent, who became a purchaser of the estate from Emam Ali Beg or of some interest in it. The original suit was for foreclosure of the mortgage in which various questions as to the right to tack and other matters arose; and it seems that before a decree of foreclosure was finally obtained, a compromise was entered into between the plaintiff and Emam Ali Beg. The compromise contained

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the following terms:—"That the plaintiff is to get Rs. 10,000, the balance remaining after remission of a certain sum on account of interest recently accruing out of the aggregate amount of the principal, costs, and interest accruing up to the month of November 1868. That from 1st December 1868 the defendant is to be liable for interest at the rate of Rs. 1-8 per cent. per mensem. That the defendant's rights and interests in the village are to remain as before hypothecated to plaintiff, mortgagee. That defendant is to put the plaintiff in possession of the estate, and to have the mutation of names effected in the Collector's Register of Proprietors, before Bysakh 1276 F. Plaintiff is to appropriate the proceeds towards payment of the interest due. Defendant is to pay to plaintiff the whole amount in cash due to him within two years from this day, in the case of the mutation of names having been effected in favor of and possession given to plaintiff."

It seems that the defendant did pay into Court a sum of about Rs. 10,700, the Rs. 700 being for interest in pursuance of this compromise, and that the plaintiff refused to accept it or to take it out of Court, upon the ground that by the terms of this compromise he was entitled to have the possession of the estate for two years, and a mutation of names and afterwards to get this money. He petitioned the Court to give effect to this contention; but the Deputy Commissioner rejected the application and stated that the petitioner refused the money at his own risk, and would receive no interest from the time it had been paid into Court. This rejection was confirmed on appeal. The money having been thus refused, it appears that an order (dated 26th April 1869) was made by the Deputy Commissioner **[225]** for the repayment of the deposit of Emam Ali Beg. That was an irregular proceeding. The money ought not to have been paid out without notice. However, that was done. Thereupon began a set of proceedings on the part of the plaintiff, the mortgagee, to have the compromise carried into effect, which has led to the present appeal. It seems that the plaintiff contended that he was entitled to have a decree of foreclosure in consequence of the withdrawal of the money. It is sufficient to say that the Deputy Commissioner held that he was entitled to the money, but not to a decree of foreclosure. The officiating Commissioner reversed that decision, and held that he was entitled to foreclose. The case then came before Mr. Capper, the Judicial Commissioner, and, on the 28th June 1870, he made a decree reversing the decree of the officiating Commissioner, setting up that of the Deputy Commissioner, and holding that the plaintiff could not have that relief. In the course of his judgment Mr. Capper says,—"It is not denied that this was a full payment of the sum due under the compromise, and, consequently, on that date all the conditions and stipulations of the mortgage contract, and all rights accruing under it to the mortgagees actually ceased, and were at an end." He also says the Rajah, the intervenor, "has agreed in Court to repay the Rs, 10,725 withdrawn, and it is asserted that this amount is actually in deposit in the treasury of the Deputy Commissioner." It appears Mr. Capper was not rightly informed, and that this money had not been so deposited, although it had been agreed that it should be. It is against this order that their Lordships are now for the first time, in March 1875, asked to grant special leave to appeal.

Several subsequent proceedings have taken place. There was a petition for review, heard by Mr. Capper himself, who rejected it; and then the plaintiff filed proceedings which it is difficult to characterise. There is a claim or petition to revive the decree of foreclosure, which had been reversed on appeal, another petition to review Mr. Capper's decision,

and to revive the decree of the 5th January 1869, upon the ground that this money having been taken out after it was deposited, the plaintiff ought to be restored to the former state of things. [226] But matters had greatly changed. The Rajah of Bhinga had come in as purchaser, and his rights as purchaser have never been tried. There are, it appears, conflicting contentions on the part of the Rajah and the representatives of Emam Ali Beg which have not been determined. These petitions came on before Mr. Ouseley, the then officiating Commissioner, and he, it appears, felt some difficulty in dealing with them. He says in his judgment :—" It seems to me that at this stage of the proceedings the only thing that can be done is to call on the Rajah of Bhinga to show cause why he should not pay the money which he agreed in Court to pay." The counsel for the Rajah apparently objected to that on the ground that the case was not heard in review of judgment, and that the Court could not call on his client to show cause why he should not pay the money. It does not appear what was done before Mr. Ouseley upon that objection.

Then the case comes before Mr. Currie, who apparently feeling the same difficulty, declined to admit a review of the order. He says this :—" As Mr. Capper has already declined to admit a review of this order, and as the entire facts of the case as above detailed were before him at the time he passed his order, I do not feel justified in admitting his order to review : but taking the entire circumstances into consideration, and being of opinion that the plaintiff was justified in urging his claim to possession under the deed of compromise, and that the defendant fraudulently withdrew the money out of deposit before that point was determined, I am of opinion that the case is one which may properly be appealed to Her Majesty's Privy Council."

The Judicial Commissioner, therefore, feeling unable to give any relief himself, without any application apparently on the part of the plaintiff, grants leave to him to appeal to Her Majesty in Council, which, as already observed, it was beyond his power to do.

Under these circumstances, their Lordships think it would be a wrong exercise of their judicial discretion to grant the special leave now applied for. There are only two grounds on which it is suggested that the appeal ought to be heard. The first [227] is that Emam Ali Beg did not pay the proper amount into Court under the compromise. It seems to have been suggested in the course of the proceedings that a small sum of Rs. 7 had not been paid in. Whatever may be the case in a proceeding where the party is entitled to avail himself of the strict law, it is obvious their Lordships would not give special leave to appeal upon any question of that kind. The other and substantial ground upon which alone leave could be granted, if at all, is that there is a large sum of money, to which the plaintiff is clearly entitled, withdrawn under the circumstances already alluded to. How that sum is to be recovered, and what are the rights of the plaintiff, arising from its withdrawal, and against whom, it is not for their Lordships, in dealing simply with the preliminary question of leave to appeal, to determine. It is enough to say that they think those rights may be ascertained more satisfactorily in some other proceedings than by this tribunal under the irregular appeal which has been sent up.

Their decision dismissing the appeal being upon the ground that the appeal is not properly before them will not of course prejudice any rights the plaintiff may have either against the representatives of Emam Ali Beg or the Rajah of Bhinga.

Under these circumstances, their Lordships will humbly advise Her

Majesty to dismiss the appeal. But this being upon a preliminary objection, only taken when the appeal was called on to be heard upon the merits, their Lordships think that there should be no order as to costs.

Appeal dismissed.

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MAY 13.

PRIVY COUNCIL.

15 B.L R. 228.

3 Suth. P.C.J. 170.

2 I.A. 210.

24 W.R. 75.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the High Court at Allahabad.

SAH MUKHUN LALL PANDAY *v.* SAH KOONDUN LALL AND ANOTHER. [13th May 1875.]

15 B.L.R. 228 = 24 W.R. 75 = 3 Suth. P.C.J. 170 = 2 I.A. 210.

1. *Act XX of 1866, S. 88—"District Court"—Jurisdiction of High Court, N.W.P.*

For the purposes of Act XX of 1866, "District Court" means the principal Court of original Civil Jurisdiction in a District and includes the High Court in its ordinary original Civil Jurisdiction.

The N. W. P. High Court having no ordinary original Civil Jurisdiction is not competent, under Act XX of 1866, S. 88, to direct the registration of an instrument, the registration of which has been refused by the Registrar and the Registrar-General.

2. *Ibid, Ss. 22, 24, 84, nature of—Registration—Limitation.*

Ss. 22 and 24 of Act XX of 1866 make it imperative that the instruments therein referred to shall be presented for registration within four or at most eight months, from the date of their execution: but the Act fixes no time within which the registration must be completed.

Where a deed of sale is presented for registration within the period required by S. 22, and is accepted by the Registering officer, who, without the vendors appearing, registers it by mistake, and the registration is declared by a competent Court to be invalid, the Registering officer may, although the period of four months has expired, proceed to compel the appearance of the vendors, and, on their admission, register the deed. Such registration may be effected by the Registering officer voluntarily, and without an order from the District Court under S. 84, notwithstanding that an application by the parties concerned to have it registered has been refused by the Registrar, and that the Registrar-General has deemed the first (invalid) registration to be due registration.

3. *Ibid, Ss. 19, 21, 36, 49, 88—Effect to be given to S. 49.*

It is not clear that the words "unless it shall have been registered in accordance with the provisions of this Act" in S. 49, are not, especially as regards strangers to the deed, confined to the procedure on "admitting to registration" without reference to any matters of procedure prior to registration or to the provisions of Ss. 19, 21, or 36 of the Act, or other provisions of a similar nature. In considering the effect to be given to S. 49, that section must be read in conjunction with S. 88, and with the words of the heading of part X, "Of the effects of Registration and Non-Registration."

It is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of Ss. 19, 21 or 36 or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in S. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. 15 B.L.R. 228 (235).

Mr. *Doyne*, for the Appellant.

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15 B.L.R. 228.

3 Suth. P.C.J. 170. 2 I.A. 210. 24 W.R. 75.

JUDGMENT.

SIR BARNES PEACOCK gave judgment as follows :—

[230] The respondents in this appeal were plaintiffs in the suit. They sued to set aside the auction-sale of one-half of Mouzah Naila, which the defendant, the now appellant, on the 20th March 1871, caused to be sold in execution of a decree which he had obtained on the 24th August 1868, against Gungha Singh and others, and which half of the mouzah he himself purchased at that sale for Rs. 11,025.

The claim was founded upon a deed of sale executed by the said Gungha Singh and others, by which they conveyed the property in dispute to the plaintiffs. It was at one time contended that the property was under attachment at the time of the execution of the deed of sale; that the deed was not proved to have been executed on the 10th July 1868 the day of its date, and that it was collusive. But those objections have been abandoned, and it must now be taken that the deed was executed *bonâ fide* and for a valuable consideration on the said 10th July 1868 before the property was under attachment.

The principal question to be determined is whether the plaintiffs are entitled to avail themselves of the deed. It was contended on the part of the present defendant that the deed was not admissible in evidence, and that it could not be acted upon or held to have conveyed to the plaintiffs the property comprised therein, and the ground upon which he relied was that the deed had not been registered in accordance with the provisions of Act XX of 1866. It is not disputed that the deed was presented for registration to the proper officer in due time, *viz.*, on the 22nd October 1868, within the period of four months from the date of its execution: but the vendors did not appear before him. They were consequently summoned under **[231]** the provisions of S. 37, but did not appear on the day fixed for their attendance, whereupon the registering officer having satisfied himself by the depositions of witnesses, and otherwise, that the deed had been executed by the vendors, registered it.

After the execution of the deed, *viz.*, on the 12th November 1868, the property was attached in execution by the present defendant, under his decree against the vendors, whereupon the present plaintiffs intervened and objected, under S. 246 of the Code of Civil Procedure (Act VIII of 1859) that the property had, before attachment, been conveyed to them by the deed of the 10th July. It was at that time admitted by all parties, including the present defendant. that the plaintiffs were in possession of the property, and that the deed of sale had been registered; and under those circumstances the property was, on the 15th December 1868, ordered by the Subordinate Judge to be released. (Record, p. 36.)

Subsequently a suit was brought by the appellant, the present defendant, against the respondents, the present plaintiffs, to set aside the deed of sale as collusive, and as having been executed whilst the mouzah was under attachment and been illegally registered. The Subordinate Judge, on the 29th May 1869, held that the mouzah was not under attachment at the time of the execution of the deed, but that, inasmuch as the deed had been registered in the absence of the vendors, it must be considered as an unregistered document and was not admissible in evidence, and consequently that it could not take effect in opposition to the rights of the decree-holder so as to preclude him from selling the property in execution of the decree. The case was appealed to the High Court, who, on the 10th November 1869, affirmed the decree (1). They said (page 41) :—

(1) 1 All. H. C. Rep. 168.

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"The law directs (S. 36) that no document shall be registered under the Act unless the persons executing such document, or their representatives, assigns, or duly authorised agents, appear before the registering officer. The Registrar was not authorised, therefore, to register this deed in the absence of the vendors and of their agents, merely because he was satisfied that there had been a sale pursuant to a **[232]** previous agreement for purchase, and further, a power given to the vendors' agents authorising them to procure registration. The 40th Section of the Act contains powers for compelling the attendance before the Registrar of persons whose presence is necessary for the due registration of deeds, but there is no provision enabling registering officers to proceed of their own authority to register in the absence of such persons.

"We are of opinion that the opinion of the Subordinate Judge is correct. It has been argued that the deed, having been, in fact, registered, is entitled to the privileges of a registered deed, notwithstanding any error on the part of the Registrar, but it is clear (S. 49) that, unless a deed has been registered in accordance with the provisions of this Act, it must be regarded as unregistered, notwithstanding that it may, in fact, have been improperly admitted to registration."

On the 29th August 1870, the plaintiffs again applied to the registering officer to have their deed registered, but the application was refused by the Registrar. (Record, p. 43.) His grounds for refusal were thus stated:—

"This deed has been declared to have been illegally registered and was to be treated as not having been registered. Application is now made for registration, but is refused as being presented beyond the proper period."

The refusal to register was not endorsed on the deed.

On appeal to the Registrar-General he refused to order the deed to be registered upon the ground that it must be deemed to have been duly registered on the 10th November 1868 (p. 42); whereupon the plaintiffs petitioned the High Court, who, on the 24th February 1871, held that the plaintiffs were entitled to have the deed registered and directed its registration in the proper manner after the usual enquiries. They said (p. 45):—

"The deed was duly presented for registration within four months from the date of execution, but it was not then duly registered in accordance with the provisions of the Act, as we have already determined. Having considered the reasons given by the Registrar and the Registrar-General for subsequently refusing registration, we think them insufficient. The deed is entitled to registration, no legal impediment appearing, and we direct its registration in the proper manner, after the usual enquiries."

[233] On the 18h March 1871, the plaintiffs petitioned the Judge of Cawnpore, stating that the sale of the property under the defendant's execution had been fixed for the 20th of that month, and relying upon the order of the High Court, prayed that the sale of the property under the execution might be postponed: but the application was refused upon the ground that the deed had not then been registered. The sale accordingly took place on the 20th March 1871, when the property now in question was purchased by the defendant for Rs. 11,015, of which Rs. 10,081 were retained in satisfaction of decrees which he had obtained against the vendors and their representatives, including the decree of the 24th August 1868, and the remainder was paid by him in cash (p. 93).

On the 20th April 1871, more than thirty days after the order of the

High Court, the plaintiffs petitioned the Registrar that the vendors and the heirs of the deceased vendors might be summoned, and the deed registered according to the requirements of the law (pp. 90, 91). Thereupon compulsory process was issued, and the deed was registered on the 16th and 25th May and 5th June 1871.

On the 20th April 1872 the present suit was commenced. The case was heard by the Subordinate Judge, who held that the deed had then been legally registered, but that the sale to the plaintiffs was collusive, and that the claim to set aside the auction-sale could not be maintained, inasmuch as in the former suit between the same parties it had been held that the defendant, the present respondent, was entitled as against the plaintiffs, the present appellants, to bring the property to sale under the execution; and he dismissed the plaintiff's suit.

Upon appeal the High Court held that the deed was not collusive; that it was executed *bonâ fide* for a valuable consideration; that it had then been registered, and that the rights created by it must be held to have come into existence at the time the deed would have commenced to operate had no registration been required; and they reversed the decree of the Subordinate Judge, and decreed the claim of the plaintiffs for the establishment of their rights. They also held that the present suit was not barred by the decision in the former **[234]** suit, as the point therein decided was not whether the appellants would have been entitled to resist the sale in execution if their deed had been duly registered, but whether or not the deed had at that time been duly registered.

The only questions now to be determined are—

1. Whether the subsequent registration of the deed was valid and effectual to render the deed admissible in evidence and operative; and

2. Whether the suit is barred by limitation under S. 246, Act VIII of 1859, in consequence of its not having been commenced within one year from the date of the order of the Subordinate Judge of the 18th March 1871, refusing to postpone the sale.

There can be no doubt that the registering officer acted in contravention of S. 36 in registering the deed without the vendors having appeared before him; but it is not necessary for their Lordships to determine whether the registration was a nullity, or whether the error was one of which a stranger to the deed could take advantage. It may, however, be observed that there are no words in S. 36 declaring that the registration of a deed shall be null and void if made without the appearance of the persons who executed it; and it is very doubtful whether the words of that Section are not merely directory to the registering officer for the benefit of the parties to the deed, and whether his acting without the appearance of the parties and upon evidence instead of the admission of the parties of the execution deed was more than a defect in procedure within the meaning of S. 88. Again, it is not clear that the words "unless it shall have been registered in accordance with the provisions of this Act" in S. 49, are not, especially as regards strangers to the deed, confined to the procedure on "admitting to registration" without reference to any matters of procedure prior to registration, or to the provisions of Ss. 19, 21, or 36 of the Act, or other provisions of a similar nature. In considering the effect to be given to S. 49, that Section must be read in conjunction with S. 88, and with the words of the heading of part 10, "Of the effects of Registration and Non-Registration." Now, **[235]** considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is, by the Act, rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances

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of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of Ss. 19, 21, or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in S. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under S. 83, or upon petition under S. 84, as the case may be: but if he registers where he ought not to register, innocent persons may be misled and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights. It is unnecessary, however, to express any opinion upon this point, as it has been decided between these parties that, notwithstanding the first registration, the deed must be considered as unregistered. Neither of the parties appealed from the decision, and, therefore, whether right or wrong, in point of law, they are both bound by it in this suit, and it must be assumed as against them in this appeal that the first registration was a nullity.

The plaintiffs do not rely upon the registration of the 10th November 1868, but on the registration of the 16th and 25th May and the 20th June 1871.

The defendant contends that those acts of registration were inoperative.

"1. Because in ordering the subsequent registration, the High Court acted without jurisdiction, and their order and all proceedings had thereunder are nullities, and the respondents' alleged deed is inadmissible in evidence.

[236] "2. Because, irrespective of the question of jurisdiction, the High Court, in so ordering registration after the lapse of more than eight months from the alleged date of the deed, impugned the express provisions of the Registration Act; and their order is not binding upon this appellant, who was not a party before the High Court at that time.

"3. Because, assuming that the High Court had jurisdiction and that their order was in accordance with the provisions of the Registration Act, the respondent did not present his alleged deed within thirty days after the making of the said order."

As to the first of those reasons, their Lordships are of opinion that the High Court, in ordering the registration of the deed, acted without jurisdiction under S. 84. That Section authorizes a petition to the "District Court," which is defined to mean the "Principal Court of original jurisdiction in a district, and includes the High Court in its ordinary original civil jurisdiction." The High Court of the North-West Provinces, however, has no ordinary original civil jurisdiction, either in Cawnpore, or in any other district.

It was not, however, necessary to have an order from the District or other Court to authorize the re-registration. The deed had been presented for registration within the period required by S. 22, it had been accepted for registration, and it had been registered in fact. The vendors having neglected to appear before the registering officer on the 10th November 1868, that officer might have proceeded, under S. 40, to compel their attendance; but instead of doing that, he, by mistake, registered the deed, after satisfying himself that it had been executed.

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When it was declared by a competent Court that the registration was invalid, the registering officer might still have proceeded to compel the appearance of the vendors, and, upon their appearance and admission of the execution of the deed, to register it. Though the statute makes it imperative to present an instrument for registration within four months from the date of its execution, no time is fixed within which a deed presented and accepted for registration must be registered; and, indeed, from the nature of the [237] requirements of the Act, the period within which the registration must be completed could not have been fixed.

It does not appear to their Lordships that the orders of the Registrar-General and of the Registrar of the 11th October and 20th September 1870 respectively, imposed upon the plaintiffs the necessity of petitioning the District Court under S. 84, to order the registration of the deed, or precluded the registering officer from voluntarily registering it, after the appearance of the vendors and their admission of its execution. Those orders, made whilst there was a *de facto* registration in existence, do not appear to amount to a refusal to register or to order registration within the meaning of the 82nd Section. The latter of those orders assumes that there was a registration. Indeed, it was not even stated as one of the reasons for this appeal that the registrations made on the 16th and 20th May and 5th June 1871, were invalid because they were made after those orders. If the registering officer was influenced by the order of the High Court to do that which he might have done without it, the fact that the High Court acted without jurisdiction did not invalidate the registration.

The High Court having acted without jurisdiction, the second and third objections to the registration fall to the ground.

As to the objection on the ground of limitation, their Lordships are of opinion that the refusal of the Subordinate Judge of the 20th March 1871 to postpone the sale under the execution was not an order under S. 246, but was a mere refusal to order a postponement of the sale under S. 247.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

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PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

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MIRZA AHMED ABBAS KHAN *v.* SAH MUTHRA DASS AND ANOTHER.

[13th May 1875.]

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Bonâ fide purchaser of Government paper -Transfer—Seals of native ladies of rank—Estoppel.

A purchaser, however *bonâ fide*, of Government papers transferred to him by endorsement purporting to bear the seals of a native lady of rank to whom the notes were made payable, but which seals were put on after her death, can gain no title by such unauthorised use of the seal.

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Where a plaintiff is aware of the sale of the notes under such circumstances by his brother, he, even in the absence of direct proof, may be presumed to have acquiesced in what was done by his brother in the disposal of the notes, and therefore is, equally with him, precluded from impeaching the sale.

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Mr. *Leith*, *Q.C.* and Mr. *J. H. W. Arathoon*, for Appellant.
Mr. *Mackeson*, *Q.C.* and Mr. *John Edwards*, for Respondents.

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JUDGMENT.

[175] The appellant and the first respondent are the respective representatives of the plaintiff, Ikbalooddowlah, and of Benarsee Dass, defendant No. 1 in a suit brought in the Court of the Civil Judge of Lucknow against Benarsee Dass, and the plaintiff's brother Mokurumooddowlah, to recover nine Government promissory notes of the amount of Rs. 27,000, which the plaint alleged to have been wrongfully sold and transferred by the brother to Benarsee Dass.

Although these transactions took place some time between November 1857 and March 1858, the plaint in this suit was not filed until the 6th September 1864.

The Civil Judge dismissed the suit and his decision was affirmed on appeal by the Judicial Commissioner. The plaintiff having appealed to Her Majesty in Council, these judgments were reversed, and a rehearing ordered, with liberty to the parties to amend their pleadings and evidence. Further written statements were accordingly filed, and further evidence given, and after several hearings, remands, and rehearings, the Courts in India have concurred, but for different reasons, in dismissing the suit.

Before adverting to the evidence bearing on the question upon which their Lordships' decision will turn, it will be convenient to refer to the general history of the case, which is shortly stated in the judgment of this Committee in the former appeal, and reported in 12 Moore I. A., p. 507, as follows:—

"The plaintiff was the eldest son of his mother (Sitara Begum), who died possessed of a considerable property, consisting of land, moveables, and certain promissory notes, of which those in question are part. It was a Mahomedan family. The family consisted of two sons and a married daughter. The eldest [176] son (the plaintiff) claimed the land under an alleged gift from his mother in her life-time, a gift the validity of which was disputed by his brother at least. The sister survived her mother but a few days [this is an error; she in fact survived her mother about three years]; the brother and sister were entitled to the mother's property as heirs under the Mahomedan law; the brothers taking equally each the double of their sister's share, and on their sister's death they took certain shares with her husband in the sister's share. Soon after the mother's death, the sons and daughter proceeded to make some division of the moveables; the elder son claimed the land, and that title was litigated by the younger brother, but it does not appear with what justice or success. The more valuable part of the moveable estate consisted of Government paper amounting to Rs. 59,100, in which each son's share would be of the value of Rs. 23,640, and the daughter's of Rs. 11,820. The daughter is stated to have received her share of this part of the property; the daughter's husband appears to have disclaimed.

"The plaintiff's right of suit in this action is founded upon an alleged illegal dealing by the younger brother with his elder brother's share of this property, and he seeks to extend his right and remedy against the

first defendant by treating him as an illegal purchaser under and consequent upon his brother's alleged spoliation. The mode in which the plaintiff alleges this wrong to have been effected is this, viz., that the notes were secured under the separate seals of the heirs in a house belonging to the estate, in which the mother died, and her sister continued to reside; that the younger brother, about the commencement of the Mutiny, broke the seals, carried off the property, and alone sold and purported to transfer it."

The judgment proceeds thus :—

"If this statement be true, and reference be had to the nature of the property sought to be recovered in this suit, viz., Company's paper, and reference also be had to the first defendant's letter of the 30th July 1865 [the real date of this letter is the 19th December 1863], it follows that the first defendant would be under the legal obligation of showing title to the notes purchased. The law applicable to the acquisition of title to notes passing by indorsement, as these appear to have been capable of being passed, must not be confounded with that applicable to the acquisition of title in ordinary chattels."

The result of the proceedings in India, prior to the first appeal to Her Majesty, was as follows.

The Civil Judge of Lucknow had dismissed the suit on the grounds that it was barred by limitation, and that the plaintiff had recovered judgment against his brother in a former suit, in which a purchaser of other notes, named Sheonath, had been joined as a defendant. The Judge also found there was collusion between the brothers in bringing this and the former suit. The Judicial Commissioner had based his judgment on the short, and if taken alone, insufficient ground that Benarsee Dass was a *bonâ fide* purchaser for value of the notes.

This Committee recommended Her Majesty to reverse these judgments, because, in their opinion, the Courts in India had not sufficiently considered the nature of these Government notes, which required indorsement to pass the property, observing that there was no distinct evidence of the state of the indorsements on the paper, and that no evidence was given of any legal transfer of it. They held also that the claim was not barred by limitation, nor by the decree in the former suit. The judgment pointed out the requisites of a legal transfer by indorsement, but added the following remarks, which have an important bearing upon the present appeal :—

"An invalid transfer might still confer a valid equitable title, either in part or in entirety ; but such a transfer being exceptional and dependent on special circumstances, cannot be raised by legal intendment or presumption. Consequently [177] the plaintiff's case requires an answer, unless met on other grounds; those on which the Court proceeded, of suspected collusion between the brothers, would, if alleged and proved, have constituted a valid defence."

It is added—

"A plaintiff, however, ought not to have a defence of this sort urged against him at the hearing, without due notice by the pleadings and issues of a case of fraud."

In conclusion, their Lordships were of opinion that the facts ought to be inquired into on proper pleadings and evidence, and that if the plaintiff should prove a *primâ facie* title to the notes, "the defendant ought to be called on to show, if he can, title in himself, or some grounds displacing the plaintiff's right to complain of his acts."

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Upon a review of the evidence and judgments in the Record now sent up, their Lordships are clearly of opinion that the plaintiff has failed to prove such indorsement of the notes as would be sufficient in itself to transfer the legal property in them. Whether the indorsements were open or special does not appear, but, whichever they were, they were made by affixing the seal of the mother, to whom it seems the notes were made payable. This act was done after her death, by the hand of the plaintiff's brother, under the circumstances hereafter mentioned, and it is nowhere suggested that the indorsement purported to be other than the mother's.

Much evidence has been given with a view to show that ladies of rank commonly indorsed Government notes by putting their seals on them, and that it was not unusual for purchasers to buy notes, bearing such seals, from members of their families in the confidence that the seals were properly affixed. The Courts below have found that Benarsee Dass bought these notes in the *bonâ fide* belief that the seal had been properly affixed, and their Lordships are not disposed to dissent from that finding; but this alone cannot avail, for it is obvious that a purchaser, however *bonâ fide*, can gain no title by an unauthorized use of the seal.

The defence, therefore, must rest upon the ground which was principally relied on at the bar, viz., that special circumstances are shown which in equity preclude the plaintiff from defeating the sale. It is clear that the plaintiff's brother who sold, or took part in the sale of the notes, as papers bearing genuine indorsements, is precluded from asserting that such indorsements are not genuine; and the contention for the defendant is that, as between the brothers, the plaintiff has acquiesced in what was done with the notes, and that both are now acting in collusion to set up a false case with a view to obtain their value from the defendant. If this is made out, it cannot be disputed that it would be inequitable to allow the plaintiff to succeed in the suit. And the question, which is mainly one of fact, is, whether such a case has been established.

It would be difficult to arrive at a satisfactory conclusion on this defence from the conflicting and obscure evidence of the witnesses who were examined on different occasions and in various stages of the cause, without the light to be obtained from a review of the acts and conduct of the brothers.

The case of the plaintiff, made by the plaint and other proceedings, was that just before the battle of Chinhut (in one proceeding it is said two days before) the brother broke open the lock and seals of the box in the family house in which the notes were kept, took away the notes with the mother's seal, and afterwards sold the notes. The motive suggested for this trespass was the claim made by the plaintiff to the immoveable property under an alleged gift from the mother.

This case, which, in effect, represents that the brother, taking advantage of a time of anarchy, seized the notes with the intention of appropriating them to his own use, is not supported by the evidence. What really appears to have happened [178] is very different. The rebellion was breaking out, and the family house, being near the Residency, was in a position in which it was likely to be exposed to military occupation. The notes would obviously have been unsafe in this house, and it appears that the brother removed them to his own He gave the married sister her share of the notes, about Rs. 12,000. On the next day both brothers appeared before the High Priest, and, so far from the plaintiff's brother then desiring to appropriate the notes to himself, he offered to place them

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in the hands of the High Priest. He, however, declined to take charge of them, and they remained in the brother's possession.

What next followed is the subject of much conflicting evidence. A few general facts, however, distinctly appear. The rebel forces being in possession of the city, the leaders of the rebel Government required the native nobles to contribute money to its support. The plaintiff and his brother were related to the family of the ex-King of Oudh, and were called on for heavy contributions. It appears that the plaintiff was more relactant than his brother to comply with these demands. A guard was placed at the door of his house, and he was for some time imprisoned, no doubt with the object of inducing him to submit to them. It appears, however, he must have been released before the notes were sold to Benarsee Dass, which, according to Gooroo Mull the broker, was only eight days before the British forces recaptured Lucknow.

There is no doubt that the notes got into the hands of the rebel leaders, and that they were sold, and the Begum's seal affixed to them by the brother at their instance, the proceeds finding their way to the rebel Treasury. It is also clear that other property of the plaintiff was attached and sold by the rebel Government, and the proceeds disposed of in the ame way. These facts appear in the testimony of several witnesses, and especially of Wajid Ally, one of the leaders of the rebellion.

The notes were sold at a considerable discount; but the full price then attainable for them appears to have been paid. The sellers were those who believed in the probable success of the rebellion, whilst those only who had faith in the restoration of British rule were willing to become purchasers.

It appears that none of the nobles yielded very willingly to the demands of the rebel Government, and that the contributions were in some measure forced from them. Wajid Ally says:—

"All the ameers (nobles) had in fact to supply money to the State. I do not think they would have paid voluntarily. The money was demanded, and they made it good as best they could."

He also says, with apparent truth:—

"There were three or four motives for this:—1st. If the party did not give voluntarily, the State would have used force; 2ndly. The party wished to propitiate the then existing Government; and, 3rdly. People were in hopes, if the rebellion was successful, that by assisting the State in its difficulties they would be recompensed afterwards."

It is not satisfactorily shown that the plaintiff was personally concerned in delivering the notes to the rebel Government, or that he personally took part in the sale. Some witnesses examined before the Civil Judge after the last remand to prove his actual participation in the disposal of the notes do not give satisfactory evidence on the point.

Other witnesses were called to show that at all events the plaintiff knew of the sale to Benarsee Dass. The Collector of Mehsool, a tax of 5 per cent., which appears to have been levied by the rebel Government on the transfers of notes, proved that he applied to the plaintiff for the mehsool payable on the transfer of these notes, and was told by him that Benarsee Dass was responsible for it. Another witness corroborates this statement. Even if these witnesses are not altogether to be relied on, it is difficult to suppose, looking at the whole case, that **[179]** the plaintiff was really ignorant of the manner in which these notes were dealt with, and that they were sold at the instance and for the benefit of the rebel Government.

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It may be that the notes were obtained and sold under such circumstances of duress on the part of the rebel Government that the plaintiff might have impeached the sale. But he has not put forward that case. If such a case had been made, questions would have arisen whether he, as well as his brother, had not yielded, however reluctantly, to the exactions of the rebel Government, and acquiesced from some of the motives referred to in Wajid Ally's evidence in the sale dictated by its leaders.

The conduct and proceedings of the plaintiff and his brother, after the restoration of British rule, are next to be considered. The first attempt to recover the notes sold to Benarsee Dass was made, not by the plaintiff, but by his brother. As early as October 1858 Mokurumood-dowlah applied to the Assistant Commissioner of Lucknow in a summary proceeding to obtain possession of them from Dhunput Roy, one of the persons engaged in the sale. Dhunpat's answer was, that Mokurumood-dowlah sold the notes, through his agency, to Benarsee Dass. Wajid Ally was called as a witness for the defence, and at that early period stated that the sale took place as a contribution to the wants of the rebel Government. The Assistant Judge was of opinion that "the notes were apparently sold, and not stolen as plaintiff represents, and that the plaintiff was a principal in the matter," and he dismissed the claim as one fit for a civil tribunal. Although the plaintiff does not appear as a party in this proceeding, it may be properly used to show that his brother, with whom the plaintiff is now said to be colluding, and on whose evidence he relies, was the first to make an effort to recover the notes sold to Benarsee Dass, and that he did this on false grounds. This proceeding is also important as showing that the sale to Benarsee Dass was openly discussed, and could hardly have remained unknown to the plaintiff, and further that the British Courts were open as early, at least, as October 1858. Lord Clyde had re-captured Lucknow in March, Lord Canning's Proclamation had been issued in April, and the British rule had been restored throughout the province of Oudh in the early part of that year.

No step whatever appears to have been taken by the plaintiff until the 21st May 1860. He then applied to the Assistant Commissioner, stating that his brother had "got the notes as a plunder," and praying that, "after they are compared with the register, the purchasers of the stolen notes may be called for, and the notes restored;" and he prayed that "his brother may be dealt with according to law."

The Commissioner declined to interfere, saying that the dispute should be decided by a competent Court. The plaintiff was apparently conscious that the lateness of the application required explanation, and he therefore stated, as a reason for the delay, that, "shortly after the rebellion broke out, he was unable to take any step for their recovery, and was obliged to keep himself quiet." If this means that he was obliged to keep quiet during the rebellion, the necessity ceased upon the restoration of British rule; if, on the other hand, it means that he was afraid of the British Government, the excuse is obviously a pretence, for his brother, who was, apparently, a more pronounced partizan of the rebel Government than himself, did not fear to appeal to the British Commissioner as early as October 1858.

No further proceedings, either criminal or civil, were taken by the plaintiff at that time against his brother, nor, indeed, were any ever brought by him against his brother alone.

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In November 1862, the brother, and in April 1863, the plaintiff, applied for a certificate of succession to the mother's estate. Both applications were refused, on the ground that the certificate could be granted to neither until their respective [180] claims had been decided in a regular suit. The Judge of the Civil Court, Mr. Fraser, in his first judgment in the present suit, describes these applications as "a sham fight" between the brothers. Whether this description be true, must depend on the inferences arising upon the rest of the case.

The suit to be now adverted to, and the proceedings in it, are strongly relied upon by the respondent's Counsel to prove collusion. It was a suit brought by the plaintiff against his brother and one Sheonath, a native banker, in March 1863, to recover the plaintiff's two-fifth shares of the notes, viz., Rs. 26,340 from his brother, and Rs. 2,500 from the other defendant, Sheonath, as the purchaser of notes of that value. It appears from the judgment of the Civil Judge, Mr. Fraser, that the brother made admissions which established the plaintiff's case. These admissions of the brother were to the effect that he had broken the seals, taken away the notes, and carried them to his own house, because of the plaintiff's claim to the immoveable estate, and that he was afterwards induced by the rebel Government to give them up, and affix the mother's seal. Sheonath made no defence. Accordingly the Judge, acting on the brother's admission, made a decree against him for Rs. 23,640, and ordered two notes of the value of Rs. 2,500, in Sheonath's hands to be sold, and the proceeds divided among Sitara Begum's heirs.

This decree is dated on the 24th April 1863, only six weeks after the plaint. The rapidity with which this decree was obtained, and the facts that it was passed upon admissions, that Sheonath made no defence, and allowed a decree to pass against him for the entire value of the notes in his hands without deducting Mokurumooddowlah's share, and that no execution was taken out by the plaintiff against his brother, are relied on as circumstances showing the suit to have been collusive.

This Committee, in adverting on the first appeal to this suit, alluded to the fact that the plaintiff had taken no steps to enforce this judgment against his brother, observing, "There is no proof that the brother is insolvent, or incapable of satisfying that judgment." Notwithstanding this intimation, no attempt was made by the plaintiff upon the remand to show the inability of his brother to satisfy the judgment, or to account for his not enforcing it against him.

To add weight to the inference arising from this circumstance, it has been proved on the remand that whilst the above suit was going on, another was pending in which the brother sued the present plaintiff for Rs. 15,000 as the value of his share of the mother's immoveable property. It appears that this suit was compromised on the 13th May 1863, upon the terms that the present plaintiff should pay his brother Rs. 3,000, viz., Rs. 1,700 in cash, and Rs. 1,300 when the present plaintiff got all the mother's notes, which had been lost. A strong inference arises from this compromise that the judgment obtained by the plaintiff against his brother for Rs. 23,640 on the 24th April was, as between themselves, collusive and illusory, when it is found that the plaintiff instead of issuing execution, or otherwise enforcing it, compromised the other suit by making a present payment to his brother of Rs. 1,700. The other part of the compromise, viz., the agreement of the plaintiff to pay a further sum when he got the notes which had been sold, is a still stronger indication that the brothers were then acting in concert to get back the

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notes, or their value, from the purchasers, since this further payment is made to depend on the attainment of that object.

Another circumstance in this suit against the brother and Sheonath bears directly on the present. On the 22nd October 1863, the plaintiff petitioned the Court that the notes for Rs. 27,000 which Benarsee Dass had bought should be attached and sold in execution of the decree against his brother. And on the 11th December, an officer of the Court issued an injunction to Benarsee Dass not to part with the notes until further order, and to bring forward any objections he might have. In answer to this order Benarsee Dass wrote, on the 19th December, [181] stating that the notes (a list of which he enclosed) had been purchased by him during the rebellion, and afterwards resold in Calcutta.

This irregular injunction appears to have been issued without the sanction of the Judge. It was undoubtedly an attempt to obtain by indirect means possession of the notes in the hands of Benarsee Dass, and it is said by the respondent that this was the main end and object of the suit.

The present suit was then brought in September 1864. The first hearing was before Mr. Fraser, the Judge who had decided, in the plaintiff's favor, the suit brought against the brother and Sheonath. He came to the conclusion that the brothers were acting in collusion. Referring to the former suit, he intimated that he had been imposed upon in it; and that he was satisfied that it had been collusively brought to assist the attack intended to be made on Benarsee Dass, who was the largest purchaser of the notes, and not to obtain satisfaction from his brother.

Although the Civil Judge having heard both suits was certainly in a favorable position to form a correct opinion on the conduct of the parties, it was thought by this Committee that his decision was based on an issue not sufficiently raised, and upon evidence insufficiently developed.

On the first hearing upon the remand, and after an issue raised, and further evidence taken, the then Civil Judge, Mr. Lincoln, after an elaborate review of the history of the suit, came to a distinct finding that there was collusion between the brothers.

On appeal the Judicial Commissioner (Mr. Capper) thought further evidence was necessary and remanded the cause. His opinion appeared to be that the gist of the case was, whether the mother's estate had been completely divided.

Mr. Lincoln, having taken the evidence of Dhunput Roy, again found that, in his opinion, collusion was conclusively proved. Another appeal led to a further remand by the then Judicial Commissioner (Mr. Couper) who thought the question should be tried, whether the plaintiff sanctioned or was aware of the sale.

Mr. Lincoln again took further evidence, and reported thus:—

"The evidence now adduced conclusively proves that if the plaintiff was not a party, he was fully aware of the sale of the notes by his brother."

He further reported—

"There is reason to believe the proceeds were appropriated by the rebel Government as the contribution of the brothers towards the support of the *de facto* Government, of which they were members, and in the maintenance of which they were equally interested."

On a third appeal to the then Judicial Commissioner (Mr. Currie), the decree of the Civil Judge was affirmed, but upon the ground that as the Lower Court had found that a division of the notes had taken place,

and that it had not been proved that the notes in question fell to the plaintiff's share, and as that finding had not been traversed on appeal, it must be taken to be admitted by the plaintiff. Their Lordships are constrained to say that the ground on which Mr. Currie bases his decision cannot be supported. It was clearly open to the plaintiff to question this finding upon appeal, though it may not have been distinctly traversed, and in their view the finding, when looked at, is not supported by the evidence.

But their Lordships, after considering the inferences arising from the evidence, and the conduct of the parties, to which they have already adverted in some detail, see no sufficient grounds for overruling the finding of Mr. Lincoln that the plaintiff was aware, during the rebellion, of the sale of the notes, and of the circumstances under which they were sold, and that the brothers have since been acting in collusion to recover the notes or their value from the defendant.

Collusion of this kind, with knowledge of the facts, being found, it ought to be presumed against the plaintiff, even if it were not directly proved, that he **[182]** acquiesced in what was done by his brother in the disposal of the notes, and therefore is, equally with him, precluded from impeaching the sale. Consequently this suit, in which, moreover, he has put forward a case not resting on the real facts, but in which he has treated his brother as a delinquent, in his dealings with the notes, cannot, in their Lordships' opinion, be sustained. They have, therefore, to state that their advice to Her Majesty will be to dismiss this appeal with costs.

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FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

LYELL (*Defendant*) *v.* GANGA DAI (*Plaintiff*).* [1st June 1875.]

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Goods of a dangerous nature—Duty of persons sending—Notice—Act XVIII of 1854, S. 15—Negligence—Act XIII of 1855—Suit for compensation for destruction of life.

A person, who sends, for conveyance by rail, an article which he knows to be of a dangerous and explosive nature, is bound, both on the general principles of law, and by the special provisions of the Railway Act XVIII of 1854, to give notice of its contents to the Company's servants. He is also bound to take all reasonable precautions to preclude the risk of accident. Failure to do either of these things will render him liable for the consequences, whether they occur in a manner he could have contemplated or not.

Mode of assessing damages in a suit for compensation or destruction of life under Act XIII of 1855 discussed.

[65] On appeal by the defendant to the High Court, the learned Judges of the Division Court (Stuart, C.J., and Pearson, J.) before which the appeal came on for hearing differed in opinion.

JUDGMENT OF THE DIVISIONAL BENCH.

The judgments of the learned Judges were as follows :—

STUART, C. J.—It has been with no little difficulty and hesitation that I have arrived at the conclusion that we ought to dismiss this appeal, at

* Appeal under cl. 10 of the Letters Patent, No. 2 of 1875.

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least substantially, for I must propose a modification of the Subordinate Judge's decision and order.

Mr. Lyell, the defendant, is no doubt, under the circumstances, entitled to much consideration, and even to a certain sympathy; and, if the nature of the case had admitted of it, I would have been glad to have determined his liability to be merely nominal. His manifest good faith in the whole transaction, the absence of any, motive or idea on his part inconsistent with conduct entirely innocent, nay, the fact that by the manipulation of the dangerous materials which caused the explosion, the filling and packing of the bottles, and the careful preparation of the box for transit by railway. Mr. Lyell and Mr. Pollard exposed themselves to the greatest possible risk, a risk that might have cost them their lives, are all surely sufficient to absolve Mr. Lyell from liability in any grossly culpable sense. But notwithstanding these just claims to consideration and sympathy, he cannot be relieved of liability, and a liability proportionate in some degree to the nature of the plaintiff's claim, and to the extent of the loss she has suffered. Of the serious nature of that loss there can be no doubt, and it is not disputed that her husband's death was occasioned by the explosion of the box at the railway station.

On the evidence it is not easy satisfactorily to determine what it was that occasioned the fatal explosion. The weight of it is, I think, against the suggestion that it was occasioned by friction. The more reasonable conclusion is that the explosion was spontaneous while the box was lying on the railway platform, owing in all probability to some unexplained chemical action among the contents of the bottles, and such is the theory suggested by the plaint itself, for, in claiming damages, that pleading alleges that Mr. Lyell " sent to the Allahabad railway station a box containing combus-**[66]**tible and dangerous substances for despatch to Gwalior, without notifying the nature of its contents, as he was bound to do by law, and the said box was placed as usual in the railway station near the place where the plaintiff's husband was performing his duty. Suddenly the said box, owing to its having been filled with explosive materials, exploded, and thereby the plaintiff's husband was wounded in so serious a manner, that, despite of his being placed and treated in the Government hospital, he did not recover, but died from the effects of the injury he had received," and such, as well as we can see and understand, was the truth of the matter. But with reference to Mr. Lyell's liability, it is, in my view, immaterial how the explosion took place. It may be that Mr. Lyell's professional knowledge and experience were not such as to have led him to anticipate such an accident, especially by spontaneous explosion; and any want of such knowledge and experience on his part is, on the evidence, not to be wondered at. That circumstance of itself, however, does not relieve him of liability. As a skilled and professed chemist, he was bound to protect the public, whether railway clerks or others, to the utmost of his power, and with the use of every precaution against any possible consequences of his dealing with and sending by railway, or by other means of carriage, chemical substances which, it appears from the evidence, both he and Mr. Pollard knew to be explosive, and therefore dangerous; and even if they did not know as much, they must be assumed and taken to have known, at least Mr. Lyell, as a professed and skilled chemist, must be taken to have known, the real and dangerous character of the contents of the box, and he cannot be excused for not having notified that fact to the railway company and the public by a distinct inscription on the box of the word

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" dangerous," or some other equally suitable term, or in some other way, or by some other means. Indeed, it appears from the record that he was aware of the importance of such a precaution ; and as to S. 15, Act XVIII of 1854, no doubt that enactment is penal, and contemplates a criminal prosecution, but such a law does not interfere with, much less take away, the civil remedy. On the contrary, I consider it assists a civil suit for damages, by the warning it has placed on the Statute Book to all persons in the position of the defendant to be careful to use all proper precautions against accidents of this kind.

[67] However, therefore, Mr. Lyell's conduct may be explained and in a sense palliated, his legal liability to the plaintiff, is, in my opinion, undoubted, and he must pay damages. The only question, therefore, that remains is how, and to what amount, these damages ought to be assessed.

The impression made upon me at the hearing of this appeal was that, if there was a case for damages at all, these should be merely nominal, and that the lowest possible figures would, under all the circumstances, have satisfied the justice of the case. But the anxious consideration I have since given to it has convinced me that such a result would neither be consistent with the nature of the suit, nor with fairness to the plaintiff. Her loss is extreme, and, the defendant's liability to her being once reached, her claim for compensation must, in principle as well as in substance, be admitted. The law in force in India on this subject is regulated by Act XIII of 1855, which, on the preamble that "it is often times right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him," proceeds to enact that the party injured may maintain an action, and that "every such action shall be for the benefit of the wife, husband, &c.," and that "in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death." There are no children in the present case, so that the loss is that of the plaintiff herself exclusively. The Subordinate Judge, in considering the question of damages, very properly takes into account the deceased's age, which he estimates was from 30 to 35 years, adding that, "by all accounts the deceased was a strong, healthy, robust man, and that it is not improbable that he might have lived to the age of 70 years," and he decides upon an allowance of Rs. 200 a year, or Rs. 17 per month, which required an investment of Rs. 5,253. It appears to me, however, that the Subordinate Judge has conceived an undue estimate of native life. The proportion of natives who attain the age of 70, is, I believe, very small and the atmosphere, work, and attendance at an office connected with a railway station, such as that in Allahabad, is, in my opinion, not favourable to longevity, and all things considered, it appears to me that the offer suggested by Mr. Howard (on the assumption of his client's liability) is a fair one. That suggested offer was a monthly **[68]** allowance of Rs. 15 secured by the investment of Rs. 3,000. Whether the investment of such a sum would produce a monthly allowance of Rs. 15, or whether it is necessary that the plaintiff should have such a monthly allowance I do not determine, but I consider that I sufficiently meet the legal conditions of the suit and the just claims of the plaintiff by awarding to her as damages the sum of Rs. 3,000. To that extent, therefore, I would modify the decree of the Subordinate Judge and *quoad ultra* dismiss the appeal, with costs in both Courts.

I have not thought it necessary to say anything respecting the posi-

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tion of Mr. Pollard in the case. He, no doubt, was also a skilled chemist and was stated to have been, and I presume still is, member of the Pharmaceutical Society, and if he had acted on his own responsibility without reference to his connection with Mr. Lyell, his separate liability would have been undoubted. But he was at the time the servant of Mr. Lyell, was, so to speak, Mr. Lyell's hand in the matter, and, as the Subordinate Judge puts it, his omission or neglect was the omission or neglect of his master. But I need not enlarge further on this subject, as Mr. Pollard's immunity from liability was, I believe, not disputed by the plaintiff's counsel.

PEARSON, J.—The real cause of the explosion by which the plaintiff's husband lost his life does not appear to me to have been ascertained beyond all doubt. There is no evidence whatever to show, and I think that there is no reason to suppose, that the box which exploded contained either potassium or fulminating powder; and I must, therefore, proceed upon the assumption that the explosion is attributable to the detonating powder. The learned witnesses are agreed that such an explosion might be occasioned by heat, percussion, or friction, and are inclined to surmise that, in this instance, the explosion must have been occasioned by friction which might have resulted from the breaking of the bottle containing the detonating powder, or from the other bottles coming into contact with it, or from such an accident as a fall. But there is no evidence to show that any thing occurred which could cause friction. On the contrary, the evidence goes to show that the explosion took place when the box was lying upon the ground, without any application of force to it, and, so to speak, spontaneously, and yet most of the learned **[69]** witnesses seem to be of opinion that such spontaneous explosion is impossible. Dr. Waldie, indeed, in answer to the question, "supposing it were approved that the box suffered no violence of any sort prior to explosion, what would you be disposed to attribute the explosion to," answered, "I should now suppose that, under the circumstances, the explosion might have taken place owing to chemical action having arisen between the ingredients constituting the detonating powder." He does not, therefore, reject the hypothesis of spontaneous explosion as wholly out of the question; and this hypothesis is, as I have already remarked, most in accordance with the evidence of what actually occurred. The detonating powder was composed of one part sulphur and three parts chlorate of potash. Whether or not it is the case, as the learned advocate for the appellant informs us, that such a composition, when the potash has been pounded too finely or the sulphur is not quite pure, is liable to spontaneous explosion, I cannot determine. The learned witnesses were not examined on the point. They all seem to intimate that they would not have anticipated the explosion of the powder in transit in a well secured bottle properly packed. That Mr. Pollard who prepared the powder did not know it to be liable to spontaneous explosion may be assumed as certain, for, had he known it to be so, he would never have exposed himself to the risk involved in mixing it. But I must conclude that he did know, or ought to have known, that its explosion might be caused by friction, and that, in its transit by railway, it was not exempt from the risk of friction, and that he was, therefore, legally bound to mark distinctly its dangerous nature on the outside of the package, or to give notice thereof in writing to the book-keeper or other servant of the company to whom it was delivered for the purpose of being forwarded. This duty he neglected to perform, and for that neglect he may have been punishable; but it is contended that,

although he would have been liable to an action like the present had the death of any person ensued upon an explosion of the detonating powder caused by friction in the transit of the box containing it, he cannot be held liable for the consequence of its spontaneous explosion, which he could not be expected to have foreseen as probable, at a time when the box was lying untouched on the railway platform, and which could not have been prevented by **[70]** any precautions which the railway company could have taken, even had they been made aware of what he knew, or should have known, there was a danger arising from the possibility of friction in the event of the bottle containing the powder being broken, or the other bottles being brought into contact with it by a violent shaking of the box. This contention, which is founded on the presumption that it cannot be the intention of the law to hold a man answerable for an event which he could not reasonably be expected to have foreseen, appears to me to be sound and cogent, on the assumption that the explosion was spontaneous, and I prefer to adopt the hypothesis that it was spontaneous, supported as it is by the evidence of what really occurred, and Dr. Waldie's opinion that, under the circumstances evidenced, it might have been spontaneous, rather than the opinion of the other learned witnesses who believe that it could not have occurred spontaneously, and that it must have been due to friction, although there is no proof of friction having taken place. On this view of the case, I would decree the appeal and dismiss the suit, but order the parties to bear their own costs in both courts.

The defendant appealed to the Full Court, under the provisions of cl. 10 of the Letters Patent, against the judgment of the learned Chief Justice.

Mr. *Howard*, for the Appellant.

The *Junior Government Pleader (Babu Dwarka Nath Banerjee)*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

[71] STUART, C.J.—I listened with great attention to the able argument of Mr. Howard, the counsel for Mr. Lyell, in support of the reasons of appeal, but after carefully and anxiously considering all that he urged with reference to the facts, the evidence and the authorities which he cited, I see no ground for altering the opinion I originally formed on the question of Mr. Lyell's liability to the plaintiff, and the amount to be assessed as damages to her for the loss of her husband. I would, therefore, affirm the judgment of the Divisional Bench, and dismiss the appeal with additional costs.

PEARSON, J.—After hearing the case re-argued in appeal before the Full Court, I find no reason to alter the opinion expressed by me after hearing it argued in appeal before the Divisional Bench; and will add only a few remarks which will proceed, as did my former judgment, on the hypothesis that the explosion of the detonating powder was spontaneous. On that hypothesis, I still consider it to be most material to determine whether the death of the plaintiff's husband was the result of the defendant appellant's illegal omission to comply with the requirement of S. 15, Act XVIII of 1854. My opinion on that point is that the misfortune cannot be held to have been due to that illegal omission. Had the appellant informed the book-keeper or other servant of the railway company to whom the package containing the detonating powder was deli-**[72]**vered, that it contained detonating powder which was liable to explosion by friction or percussion, I cannot suppose that any other step would have been deemed necessary than to take care that the package should be secured

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from the risk of explosion by friction or percussion; for detonating powder is shown by the evidence not to have been regarded as being of so dangerous a nature as to require other precautions than are needed to obviate that particular risk; the risk of spontaneous explosion being one which has never heretofore been apprehended. No precautions that could have been used to avoid the risk of explosion by friction or percussion would have avoided the risk of spontaneous explosion. Under the circumstances, it seems to me now, as before, that, although the illegal omission of which the appellant was guilty may have been punishable under the Railway Act, the present suit for damages on the ground that Gampat Rai's death was caused by that illegal omission cannot be sustained, the defendant not being justly liable on account of his illegal omission for what was not directly or presumably a consequence thereof. Putting out of sight the illegal omission on which the plaintiff's claim is based, there might have been a question whether the defendant could be justly held liable for what was certainly a consequence of his having prepared the detonating powder and having sent it to the railway premises for despatch by passenger train; and, in deciding such a question, it would, in my opinion, be necessary to consider whether the result which occurred was a natural and probable consequence which should have been foreseen by him; and upon the hypothesis, which I have adopted, that the explosion of the detonating powder was spontaneous, and upon the evidence which shows that such a spontaneous explosion is a thing altogether new to scientific experience, I should conclude that he ought to be exonerated from liability. Nor can I conceive that the illegal omission of which he was guilty can render him responsible for an event which was not a consequence of that omission, and which he could not reasonably have been expected to foresee and provide against. If A were to throw upon B some dirty water, of which the natural and probable effect would be to soil and spoil his clothes, and the dirty water by an unexpected and extraordinary action were to ignite the clothes and cause him to be burnt to death, I should be loth to maintain that A was responsible [73] for the effect which, contrary to all expectation and previous experience, had been actually produced, notwithstanding that his conduct in doing what was likely to cause injury to B's clothes was wrong and unjustifiable.

It was not contended in the pleading before the Full Court that the explosion was proved to have been caused by friction, or that it could not have been spontaneous. What was contended was that whether it was caused by friction or was spontaneous, was a matter of no importance, the appellant being equally liable for what happened in either case, by reason of his illegal omission. This contention, for the reasons above-mentioned, I am unable to admit.

TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following judgment:—

There is, it must be admitted, no direct evidence to show the immediate cause of the explosion. Two out of three gentlemen examined as experts deposed that the powder could not have exploded spontaneously; the third, while admitting that in his experience he had never known the compound explode without friction or percussion, deposed that, assuming it proved that prior to the explosion the box had not suffered violence of any sort, he should attribute the explosion to "chemical action having arisen between the ingredients constituting the detonating powder." This answer is not elucidated by any further explanation. The coolie who had brought the box to the station deposed that it had not fallen or received a

shock from the time he received it up to the time he placed it inside the counter, and that "no one kicked at the box, for nobody went that way," by which we understand him to mean that no one entered the passage in or near which he had placed the box. This answer does not exclude the possibility that the clerk while writing the receipt may have struck the box with his foot. The coolie was standing outside the counter at a distance of a yard from it. It does not appear that from the place in which he stood he could see the box. Another witness, Ganpat Rai, who spoke to the deceased just before the explosion, stated the counter was so constructed that a person outside could not see what was placed inside it. If the coolie could have seen the box from the place at which he stood, it is not likely that he would have kept his eyes [74] on it, and if a blow was given to the box the explosion which would have immediately followed it would have rendered the sound of the blow inaudible. Even then if the compound be capable of spontaneous explosion, the evidence would fail to satisfy us that in the present instance it had so occurred.

We regard this point, however, as immaterial. That the appellant had reason to believe the compound was explosive is shown by the conversation which took place between him and Mr. Pollard, and it was incumbent on him, both on the general principles of law, and by the special provisions of the Railway Companies Act, XVIII of 1854, to give notice of its contents to the company's servants. Had such notice been given, looking to the evidence of the station-master, it is possible the box would never have been received for despatch, and it is in the highest degree improbable that, had the deceased received notice of the dangerous nature of its contents, he would have permitted it to be placed in immediate contiguity to him. The case appears to fall within the principle of *Farrant* v. *Barnes* (1) cited in the Court of first instance. *Lynch* v. *Nurdin* (2) establishes the principle that a person may be liable for the consequences of an accident resulting from his own negligence in combination with other causes which he did not contemplate. In that case the defendant left his cart and horse unattended in the street; the plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt; it was held the defendant was liable to make compensation for the injury sustained by the plaintiff.

Furthermore, assuming that the explosion was spontaneous, it could not have occurred had the appellant followed the practice he had hitherto pursued of sending the ingredients of the powder in separate bottles. With a knowledge of the highly explosive character of the preparation, he omitted a precaution which his own practice proves he considered reasonable to preclude the risk of accident.

The sum awarded to the respondent appears to us by no means incommensurate with the pecuniary injury sustained by her. We would, therefore, affirm the decree and dismiss the appeal with costs.

(1) 31 L. J., C. P., 137; 11 C. B. N. S. 553; 8 Jur. N. S. 865.
(2) 4 P. & D. 672; 1 Q. B. 29; 5 Jur. 797.

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3 Suth. P.C J. 195.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RAJAH AMEER HUSSUN KHAN *v.* MUKHDOOM SINGH AND OTHERS. [25th June 1875.]

3 Suth. P.C.J. 195.

Mortgagee in possession—Usufruct—Interest—Construction of mortgage deed.

A mortgagee in possession, desiring to have the usufruct of the property and also interest at the stipulated rate from the time of the mortgage down to the period of redemption, should show to the Court that such was the intention of the parties. (3 Suth. P.C.J. 15, *F.*)

Mr. *Cowie*, *Q.C.*, for Appellant.

Mr. *C. W. Arathoon*, for Respondents.

JUDGMENT.

[196] This is an appeal from a decision of the Judicial Commissioner of Oudh, which affirmed the judgments of the Assistant Commissioner, and of the officiating Commissioner who heard the case on appeal from the Assistant Commissioner.

The suit was brought by Mukhdoom Singh, Mohun Singh, and Esree Singh against the Rajah Ameer Hussun Khan to redeem talooka Rawapoor, which they alleged had been mortgaged to one Oomrao Singh for Rs. 3,067, and after his death had got into the possession of the Rajah Nawab Ali Khan, in consequence of a sub-mortgage from the widow of Oomrao Singh. The defendant (the present appellant) is the son of the Rajah Nawab Ali Khan, and his case appears to be that the Rajah was in possession from a period prior to the settlement in 1858; that in that year he was admitted as talookdar to the talook, and he claims to hold it free of any claim on the part of the original mortgagors.

That the respondent, Mohun Singh, was entitled to the talook, and mortgaged it to Oomrao Singh, is not disputed in the present appeal, nor was it disputed in the Courts below. The mortgage made to Oomrao Singh is of the English date of July 1846. It is a usufructuary mortgage of a very formal and precise kind; and states that Mohun Singh, the son of Purtab Singh, mortgaged the talook to Thakoor Oomrao Singh for the sum of Rs. 3,067, and fixes the amount of interest at "rupees three and two annas per cent. per month." The mortgage also states that possession had been delivered to the mortgagee, and it contains this clause:—"I moreover agree that whenever I be disposed to redeem I engage to repay every fraction of a pie of the principal and interest in a lump sum, at the time when crops are not standing on the ground at the end (fallow portion of the agricultural year) of the month of Jeith, and then have the estate redemed."

It appears to be clear that the mortgagee, Oomrao Singh, was put into possession. It is admitted that as against Oomrao Singh the right to redeem has been in no way foreclosed or barred, and the question, and the only question in this case, upon the merits, is whether the Rajah

Nawab Ali Khan came in under the mortgagee's title, or whether he came in as a stranger to it, so that he can hold the estate by virtue of title or possession against both the mortgagor and the original mortgagee. The Assistant Commissioner and the officiating Commissioner have found as a fact that there was a sub-mortgage from the widow of Oomrao Singh to Rajah Nawab Ali. It is said that they have found this fact upon insufficient evidence. Undoubtedly the evidence is slight, but upon a review of it, and giving full weight to the considerations which have been presented by the learned Counsel for the appellant, their Lordships think that there is enough, in the absence of the proof which might have been expected from the defendant, to show that he did obtain possession in some way under the original mortgagee, either by a sub-mortgage, or by some arrangement with the widow of Oomrao Singh.

That the claim to treat the Rajah as a mortgagee was not put forward for the first time after the settlement is clear from a petition, dated the 12th June 1856, of Mohun Singh. "After the usual petitionary address the petitioner states that the estate of Rawapoor, etc., the petitioner's ancestral landed property, was mortgaged to Rajah Nawab Ali Khan, and at the time the settlement was in progress"—that is, the settlement before the mutiny—"the Court ordered the petitioner to arrange for the payment of the redemption money." That, of course, is no evidence that there was such a mortgage; but it is proof that the case upon which the plaintiffs now rely was put forward at this early period. The petition, no doubt, does not state that the mortgage was to Oomrao Singh, and that by sub-mortgage the land [197] got into the possession of Nawab Ali Khan; but it sufficiently shows that it was then contended that in some way the Rajah held as mortgagee.

In the present suit the evidence consisted of two depositions of witnesses given at the time of the settlement, and of the evidence of one of the plaintiffs. The deposition of Amjud Ali, who was the vakeel of the Rajah Nawab Ali Khan at the settlement, has been mainly relied on by the Courts below. It seems that the Rajah was at that time a minor, and that his estate was under the care of the Commissioner. This deposition has the character of a statement of claim on the part of the minor Rajah; and treating it in that way it certainly affords evidence that at that time the claim of the Rajah to a settlement was put on the ground that he was mortgagee. The statement in the deposition is this:—"The villages of Koomhurya and Mahurya were mortgaged by Hoolas and Moonno Singh to Oomrao Singh, talookdar of Rihar, whose widow, after his death either in 1254 or 1255 Fuslee, re-mortgaged them, along with the talooka of Rawapoor, to my master. The deed of mortgage is in my possession, and the amount is therein mentioned. I do not remember the exact amount; and ever since the re-mortgage we have continued in possession." The Rajah was in possession, The vakeel had to account for his possession, and this is the statement which he gives, and upon which it appears that action was taken; for in 1264 Fuslee, according to this man's statement, the lease was executed in favour of the Rajah. There is a deposition of Duryao Singh, Canoongoe of Tehsil Biswan, to the same effect, but that cannot be regarded as legitimate evidence, because it is not shown that the man was dead, and he certainly did not stand in the relation of agent to the Rajah.

Then there is the positive evidence of one of the plaintiffs who was examined in the present suit, Esree Singh, who is the grandson of Mohun Singh. He says:—"In 1254 Fuslee Mohun Singh mortgaged the estate

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in question to Oomrao Singh for Rs. 3,067. One year after the date of the mortgage he died. He was talookdar of Rihar. His widow mortgaged it to Rajah Nawab Ali Khan for Rs. 5,200 in 1256 Fuslee. Ever since up to the annexation he held. No term for redemption was fixed."

The original mortgage being beyond dispute, and there being this evidence that the Rajah held under a sub-mortgage, an answer was certainly called for on the part of the Rajah; and the answer he gives appears to be entirely unsatisfactory. He does not rely upon mere possession and say, I got in as a trespasser, and am entitled to hold the talook by virtue of possession and protected by the Statute of Limitations; but he sets up an affirmative title that the chuckladar leased it to him, and he has entirely failed to prove that title. He has asserted, but has not proved it. Their Lordships think therefore that, under the circumstances, they cannot say that the two Commissioners, who found the facts, were wrong in coming to the conclusion that the Rajah did hold the talook, by some title derived from the original mortgagee; and, that being so, they think that the judgment of the Judicial Commissioner upon the main question should be supported. Mr. Capper, the Judicial Commissioner, who first heard the special appeal, differed from the Commissioners below, thinking the evidence was insufficient, but upon review Mr. Currie came to the opposite conclusion. Therefore three Commissioners in Oudh have thought that this evidence was sufficient.

What has just been said disposes of the main question in the case.

Then another question arises, whether the decree of the Judicial Commissioner should stand with respect to the interest. It is immaterial to enquire whether the Judicial Commissioner had power to vary the decree of the officiating Commissioner in the way he has done, since their Lordships have the whole record before them upon general appeal, and may direct the right order, if this be not the right one.

Upon the construction of the original mortgage to Oomrao Singh, which must govern this question, it appears to them that the usufruct was to be set against the interest, and that it was not the intention of the parties that the mortgagee should **[198]** have both the usufruct of the property and be paid interest at the stipulated rate of 43 per cent. from the time of the mortgage down to the period of redemption. It would require very clear words to induce their Lordships to put such a construction upon the deed. (See on this point a judgment of this tribunal, *Seth Seetaram and another* against *Argoon Singh*, delivered on the 19th February 1874.*) If it had been shown that the usufruct would not have amounted to the stipulated interest, other questions would have arisen, and possibly an account might have been decreed; but Mr. Cowie, on the part of the appellant, has exercised a wise discretion in desiring that the matter should remain, if their Lordships were of opinion that he was not entitled both to the interest and the usufruct, where the Judicial Commissioner has placed it, so far as this claim to interest is concerned.

In the result their Lordships will humbly advise Her Majesty to affirm the decree appealed from and to dismiss this appeal, with costs.

* 3 Suth. P.C.J. 15.

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PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

QUEEN *v.* GHOLAM ISMAIL AND ANOTHER. [2nd July 1875.]

1 A. 1.

Ss. 4, 297, Cr. P.C., 1872—Judicial proceedings—High Court's powers of revision.

Where, on the acquittal of the petitioners on a charge of murder, and during the pendency of an appeal from the acquittal, they were arrested and brought before the Magistrate who ordered the detention of the petitioners in custody, until the decision of the case in appeal.

Held, by Turner, C. J., that the proceeding of Magistrate was not a judicial proceeding and the High Court had, therefore, no power under S. 297, to set aside the order.

Held, by Pearson, J., that the Magistrate's order, whether a judicial proceeding or not, was not such a proceeding within the terms of the definition contained in S. 4, and that the High Court, could not, therefore, interfere with the order.

Held, by Spankie and Oldfield, JJ., that the Magistrate's proceeding should be held to be a judicial proceeding and the High Court had, under S. 297, the power to interfere.

Mr. *Raikes* and Mr. *Colvin*, for the Petitioners.

The *Government Advocate* (Mr. *Warner*), for the Crown.

JUDGMENT.

[5] TURNER, OFFG. C. J.—In the course of the argument the learned Government Advocate has contended that the Court has no discretion to admit or reject an appeal duly preferred by an officer on behalf of Government, under the provisions of S. 272, Code of Criminal Procedure, and that consequently the order of this Court calling for the record is tantamount to an admission of the appeal. I believe the Court is agreed that the provisions of S. 278 apply equally to appeals presented under S. 272 against judgments of acquittal, as to other appeals. The point is, however, immaterial because whether the Court merely calls for the record, which is the effect of Mr. Justice Oldfield's order in the present case, or whether the appellate Court decides to hear the appeal, the Magistrate has no greater power in the one case than in the other to order the detention of the accused. Whether he has or has not the power in the view I take of S. 297, this Court is not now called upon to determine. For the purpose of the argument it may be assumed the order of detention is illegal, but has this Court the power to interfere with it? If it possesses such power, it is only in virtue of the provisions of S. 297, Code of Criminal Procedure. In England the legality of an order for the detention of a person can be determined by the issue of certain writs. It was at one time doubtful whether this Court possessed the powers of issuing such writs, but that doubt has been set at rest by the 82nd section of the Code, which expressly declares that neither the High Court nor any Judge of such High Court shall issue any writ of *habeas corpus*, mainprise, *de homine replegiando*, nor any other writ of the like nature, beyond the Presidency towns. To European British subjects, and to such persons only, the 81st section of the Code accords the

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privilege, if they are detained in custody, and consider their detention illegal, of applying to the High Court for relief.

[6] The legislature having thus clearly manifested its intention of preventing the summary interference of this Court in cases in which natives of this country might complain of illegal detention, it appears to me that the Court would establish a precedent at variance with the spirit and letter of the law, if it ordered the release of the petitioners without being satisfied that it had power to deal with the case under the provisions of S. 297, Code of Criminal Procedure. Whether a case is called for by itself or reported for orders, or comes to its knowledge, the High Court, as a Court of Revision, has only power to deal with it under the provisions of that section, and the powers of the Court are defined in these terms:—"If it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit." Thus the interference of the High Court under this section is limited to judicial proceedings. Can it be said that the Magistrate's order is such a proceeding within the meaning of that term in the Code? The 4th section of the Code defines it to mean "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence." By the expression "a proceeding in which evidence is or may be taken," I understand "a proceeding in which evidence is or may be legally taken." The Magistrate did not pass any order on recorded evidence, nor was any evidence recorded. Was his proceeding a proceeding in the course of which evidence might be taken? He certainly did not contemplate taking any evidence, and in my judgment he was not competent to take any evidence; he was not holding an enquiry with a view to commitment, nor did he contemplate any such inquiry, nor did he make any commitment except to the custody of the jailor. He did not make an order sending the petitioners for trial to a superior Court, and at the same time give directions for their intermediate custody. He simply gave an order to the jailor to detain them until the result was known of proceedings he believed to be then pending. The Magistrate knew his judicial functions had been fulfilled by the commitment to the Sessions Court. In order to prevent the petitioners from absconding in the event of the appeal being decided against them, he ordered their detention to custody, and he did not contemplate any other [7] proceeding of any kind. It is argued that Mr. Robertson issued the order for the detention of the petitioners under color of his office as Magistrate. That may be, but it does not necessarily follow that his proceeding was therefore a judicial proceeding within the meaning assigned to that term in the Code.

The learned counsel for the petitioners cited *Moonshee Syed Abdool Kadir Khan* v. *The Magistrate of Purneah*(1). I need not advert to the doubts expressed by Mr. Justice Pearson during the argument, and felt by me, as to the soundness of the ruling in that case, that S. 297 applies to any interlocutory as well as to a final order, because I believe we are agreed that the Magistrate's order in the present case was intended to be a final order; but I would point out that the case cited is clearly distinguishable from the case before the Court. In the case cited the orders with which the High Court interfered were passed in proceedings in which evidence might be taken. The Court consequently had before it

(1) 11 B.L.R. Ap. 8.

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a judicial proceeding which fell within the definition. It may appear strange that the Court has no power to interfere as a Court of Revision if a Magistrate illegally orders the detention of persons in custody without holding any judicial proceeding, and yet that the Court should be authorized to interfere where the Magistrate has passed such an order in the course of a judicial proceeding; but the legislature may have had in view emergencies in which it would be essential to the preservation of the public peace to debar the interference of this Court, and may have legislated to provide for such emergencies at the risk of some hardship to individuals.

For the reasons I have given I would inform the Judge that this Court has no power to set aside the order.

PEARSON, J.—On the question whether the Magistrate's order directing the two men to be detained in custody pending the appeal in the High Court is a judicial proceeding or not, my opinion is it is not such a proceeding within the terms of the definition contained in S. 4, Act X of 1872.

It was not a proceeding in the course of which evidence was or could be taken. The Magistrate did not contemplate any enquiry, [8] nor was he competent to make any enquiry in the case, which had passed out of his jurisdiction and was not before him. The High Court being for this reason unable to interfere with the Magistrate's order under the provisions of S. 297, the case was not one which could properly be reported by the Sessions Judge under S. 296 of the Act; nor could that officer properly admit the men to bail under S. 390 of the same.

The order passed by him under the last-mentioned section cannot, however, be set aside as null for want of jurisdiction by the High Court, not being a judicial proceeding within the terms of the definition contained in the law.

SPANKIE, J.—In my opinion, we have the power to set aside the Magistrate's order as illegal.

Under S. 297 of Act X of 1872, if in any case either (1) called for by itself, or (2) reported for orders, or (3) which comes to its knowledge, it appears to the Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

There are thus three ways in which cases of irregularity and material error may come before the Court, but the material error must have occurred in a judicial proceeding.

By S. 4 of the Act a judicial proceeding means any proceeding in the course of which evidence is or may be taken, or in which any judgment or final order is passed on recorded evidence.

It has been argued, first, that the interference of the Court can only be exercised where the order referred to in S. 297 has been final; and secondly, that the order in the case before us was not made in any proceeding in which any evidence was or might have been taken, or in which any final order was passed on recorded evidence.

In order to determine whether or not the Court's interference is limited to those cases only in which a judgment, sentence or (final) order has been passed, it is necessary to consider those sections which lead up to S. 297.

[9] S. 293 directs that all subordinate Courts shall send to the High Court such periodical statements or calendars of trials held by such Courts as the High Court prescribes, exhibiting the offences charged, the

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offences of which the accused persons are convicted, and the sentences or orders passed upon them.

Under S. 294, and probably upon the examination of any such periodical statements, as well as on any motion directly made to itself, the Court may call for and examine the record of any case tried by any subordinate Court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court.

Now the language here is explicit enough. The record called for is the record of any case (actually) *tried* by any Subordinate Court and consequently disposed of, and the High Court is to satisfy itself, (1st) as to the legality, (2ndly) or propriety, and (3rdly) as to the regularity of the proceedings. This section appears to give to the Court supervising power. It is not only to satisfy itself as to the legality or propriety of the sentence or order passed, but as to the regularity of the proceedings in the case. Assuming that it may satisfy itself that there has been material error in any judicial proceeding of the Court, the High Court would be acting rightly in noticing it.

S. 295 empowers any Court of Session or Magistrate of the District, at all times, to call for and examine the record of any Court subordinate to such Court or Magistrate, for the purpose of satisfying itself or himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court.

Here the Sessions Judge, as the judicial head of the district, has conferred upon him large powers to supervise the proceedings of the officers subordinate to him, and the Magistrate of the District has the same power as regards those directly subordinate to himself; and both the Court of Session and the Magistrate of the District, when they do exercise this power, are to satisfy themselves as to the legality of any sentence or order passed, and as to the regularity of the proceedings of the subordinate Courts. But **[10]** though the words "sentence or order passed" may, at the first glance, appear to be the sentence or final order passed referred to in S. 294, yet on closely considering the language of the section a wider supervision seems at least not to be forbidden. The interference may be exercised *at all times*. It has been argued that this may mean that the Court of Session is not to wait until it has an opportunity of examining the statements, nor the Magistrate to wait until he has seen the outturn of the work for the month; but that he may call for any case, whenever he pleases, for the purpose of examining it, either as to the sentence or order passed, or the regularity of the proceedings. This doubtless is so, but the words may have another meaning as well, when the other words "call for and examine the record" are read with them.

S. 294 is clearly directed to cases absolutely tried and disposed of, and the words "record of any case tried" are used. But this is not so in S. 295, the words there used being "at all times call for and examine the record," not of any case tried, but of any Court; and as those words were not in the former Act, I regard them as having been deliberately used for a deliberate purpose. Under S. 434 of Act XXV of 1861, the Sessions Court and Magistrate had power to call for and examine the record of any Court immediately subordinate to such Court or Magistrate for the same purpose that a Court of Session or Magistrate may do so now. The words that have been added appear to me to give the Court of Session a larger power, and that extends beyond interference limited to cases which have been tried and disposed of. It is not only the record of any case

that has been tried that may be examined, but it is "the record of any Court," and it may be called up not only when the case has been disposed of, but "at all times," and when, at least so I think, the record may not have been completed, but may be in course of formation, before a case has been actually disposed of, and whilst it is under trial. It is not only the legality of the sentence or final order that may be looked at, but also the legality of any order that may be in any sense final as it affects the person under trial though it may not be the final order disposing of the case. In fact the legality and regularity of the proceedings are to be looked at, whilst a case may be pending [11] so that they may be checked before it is too late, or before injustice has been suffered for which it may be difficult to obtain redress.

It cannot be denied, I believe, that this Court has been in the practice of calling up cases before they have been actually disposed of. We have the authority of a learned Judge of the Presidency Court that there "the Court has, since the date when the new Criminal Procedure Code came into force, been almost daily, I may say, acting upon the general power of revision, which hitherto has been supposed to be conveyed by this first clause. And if it has power by this clause, as it seems to me clear that it has, to call up to itself proceedings while they are in the condition of the preliminary stage of investigation, for the purpose of correction and of giving proper directions for the conduct of the investigation, it must be incidental to that power that the Court should be able to suspend proceedings, for it would be a manifest absurdity to my mind that the Court should be empowered by the legislature to call up the record and the proceedings in a case for the purpose of looking at them, revising them, correcting material errors, and putting them upon a proper footing of investigation, but yet that the Court should have no power to stay the proceedings of the subordinate Court which required to be set right."

In the matter of Moonshee Syud Abdool Kadir Khan (1).

So far then I am not alone in thinking that the "order" need not necessarily be the final order disposing of the case. I have already pointed out that when the Court itself calls for any case under S. 294, it is, in my opinion, the record of any case that has been actually *tried* and disposed of. But when the Session Court or the Magistrate, when exercising the power conferred by S. 295, has been satisfied either that some order in any case, either final or in some sense final as to its effects on a party under trial, is illegal, or that some material error has occurred in the proceedings, the Court of Session or Magistrate may report the proceedings. The words, to be sure, used in the section refer to the "judgment or order as being contrary to law," to the punishment as being "too severe or inadequate;" but the course to [12] be followed is that the proceedings may be reported for the orders of the High Court. The order may have been illegal, the judgment may have been based upon no evidence or in defiance of all evidence, and the proceedings may have been irregular from beginning to end, or materially so in fact. Though the section does not expressly say that, if the Court of Session is satisfied that the proceedings have been irregular, it is to report them, it may be inferred from the fact that, under S. 295, it is part of the duty of a Court of Session to satisfy itself of the regularity of proceedings in the Courts below, and from the fact that, in a case reported for orders to the High Court under S. 297, a material error is to be noticed, the Court of Session may bring any irregularity before this Court by reporting the proceedings for orders.

(1) 11 B. L. R. Ap. 8.

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The case now before us has come up to to this Court on the report of the Court of Session, and, under the first clause of S. 297, "if it *appears* to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it *shall* pass such judgment, sentence or order thereon as it thinks fit."

It has been argued that the order to be passed must be one of the nature referred to in the clauses succeeding the first clause of S. 297. These clauses are certainly directed to cases where there is a record, or a final order has been passed. But I am not prepared to admit that they limit the construction to be put upon the first clause. We have to deal with the legality or propriety of the sentence or the order, and with the regularity of the proceedings. The subsequent clauses provide for what is to be done in particular cases, and where the accused person has been improperly discharged. When this has been the case, the order is certainly not a final order in a case *tried*. There has been no trial, and the Court can order a person so discharged to be tried, or to be committed for trial, not, it will be observed, to be *re-tried*. So where the facts show that the prisoner ought to be convicted of an offence other than that of which he was convicted, the Court shall pass sentence for the offence of which he ought to have been convicted. Again, a material error in the charge that has misled and prejudiced the person accused *shall* lead to the annulment of the conviction, [13] and a remand to the subordinate Court on an amended charge. I need not repeat all the clauses. It is enough for my purpose to say that they provide particular remedies for particular cases and circumstances. In some it is optional to adopt the course laid down, as in the case where a person has been convicted of an offence not triable by the Magistrate who has convicted the accused person. In other cases the course to be followed is imperative. These clauses providing a special course to be followed in special cases cannot, I think, be said to control cl. 1, which gives the High Court a general power of revision, and makes it obligatory on the Court to notice any material error in any judicial proceeding by passing such judgment, sentence or order relative to that judicial proceeding, as it shall think fit. It is not, it will be seen, bound to pass any particular judgment, sentence or order, but it must notice the material error, though it may do so as it thinks fit.

We now come to a more difficult part of the case. Was or was not the material error reported to this Court by the Court of Session an error in any judicial proceeding? I have already given the definition of the words a "judicial proceeding," namely, any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence.

The prisoners released by order of the Sessions Judge were recaptured, as far as I am to judge from the record, for there is one, by order of the district superintendent of police. The officer who arrested them reports his having done so, and forwards the men to the Magistrate, whereupon the Magistrate, acting judicially, as appears from the heading to his proceeding, commits them to jail as persons implicated in a charge of murder, whose case was pending in appeal before the High Court, and he orders that they shall be detained in jail until the appeal has been disposed of. There was a formal warrant of commitment to jail drawn up in the form C, sch. ii of Act X of 1872, and signed by the Magistrate, such as prescribed by S. 303. The warrant used is that which is used when a Magistrate acts under S. 196 of the Code, when the evidence given before a Magistrate justifies his sending the accused person to take his trial for an offence

triable exclu-[14]sively by the Court of Session or High Court, or which he thinks ought to be tried by such Court. The Magistrate has subsequently explained that he acted under S. 92 of the Act, and also with a view to secure the attendance of the prisoners, when the High Court should have disposed of, and passed orders on, the appeal. The order passed by the Magistrate was after he had received notice of the appeal to be served on the accused. I am aware that there is great doubt whether the appeal to this Court can be said to have been actually admitted. But the Magistrate, when he received notice that the appeal had been admitted and would be heard on a certain day, had every reason to assume that the appeal had been properly admitted, and therefore the consideration whether it had or had not been actually admitted does not affect the question now before us.

With regard to S. 92, under which the Magistrate acted, it may be at once admitted that the section refers to those cases in which a police officer may, without orders from a Magistrate and without a warrant, arrest any person. It may be conceded that the Magistrate could not have been acting under that section, which relates to primary arrest and not to a commitment to prison to await trial, or pending investigation and trial. But we have the Magistrate's assurance that he was acting under the Code, and this is apparent from his proceeding and commitment of the parties to the jail, that he believed himself to be acting judicially. It is not in my opinion a matter of any consequence, whether he followed this or that course under the Code, or how absurd or extravagant the course he adopted may have been. If it has been an illegal one, and if his order has been illegal, we are bound, assuming that it was made in a judicial proceeding, to annul it or to pass such order on his material error as we may deem fit.

There is certainly no evidence of witnesses recorded in the proceeding which followed the capture of the men released by the Sessions Judge. There is however the report of the police officer, and the proceeding of the district superintendent of police, and the Magistrate notifies his own knowledge of the fact that they were implicated in a charge of murder, in which, as he believed, there was ample evidence on record to justify their conviction, [15] and he appears to have regarded this evidence as guaranteeing the order of detention. He probably regarded the men as still in the position of accused persons committed for trial, for he had received notice of appeal, and therefore may have thought that the case was still open and that the Judge's order would not beregarded as a final order in the case, which had still to be heard and determined on the merits by the Court of appeal. With those considerations before him, and having regard to what was before him, I am not prepared to say this order may not be viewed as one coming within the definition of a judicial proceeding. It is true of course that the case of murder was no longer before him, and that in that case he could have passed no orders. But, in my opinion, his taking up the charge against the men sent to him in custody by the district superintendent of police should be looked upon as the initiation of a new case against them, and as being the commencement of a judicial proceeding (for a judicial proceeding need not necessarily be a criminal trial), and one too in which evidence might have been taken: as, for instance, one or more of the arrested persons might have denied that he was the person released by the Sessions Judge, and the Magistrate might have, under those circumstances, examined witnesses to prove that he or they were the same men as those who had been committed and released. I

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admit that the Magistrate's proceedings do not disclose any intention of calling any witnesses. But if he admits that he was acting judicially, and as is the case, it would only have been when he was acting judicially as a Court of enquiry that he could commit the accused to jail, to await the result of pending proceedings, and it appears that he considered that there was some evidence before him that the accused were guilty of murder, I am of opinion that we must regard his proceeding as a judicial proceeding, however inapplicable that evidence may be, or however wrong his course may have been. The error he committed in recommitting to jail one who had been released by the Sessions Judge was a material error. He had no power to make the order, which was final as far as they were concerned, as regards the matter before him, as to whether they should or should not be detained in custody pending the determination of the appeal. But having made it, on some show of evidence, on the report of the district superintendent and from matters within his **[16]** own knowledge, and under the supposition that he was acting judicially, I think that we have jurisdiction to deal with the order under cl. 1, S. 297 of Act X of 1872, and I would annul it.

OLDFIELD, J.--This case has been referred under S. 296, Act X of 1872, by the Sessions Judge for the orders of this Court. It appears the petitioners were committed by the Magistrate to the Sessions on charges of murder, were tried and acquitted, and an application of appeal was then presented to this Court, under S. 272, which now awaits disposal. After this application had been presented and before the appeal had been allowed, the Magistrate, upon the petitioners being brought up before him by the police, issued his warrant to the jailor that they be kept in custody until decision of the case in appeal.

The Magistrate's order is no doubt illegal. It is argued that this Court cannot interfere under its powers of revision under S. 297, Act X of 1872, on the ground that they do not extend to revise interlocutory orders, and that they are confined to errors in judicial proceedings, which is not the nature of the proceedings of the Magistrate in this case.

In my view the argument fails, and this is a case which falls within the scope of the Court's revising powers under S. 267.

There is nothing in S. 297 which excludes interference in interlocutory orders, assuming the order in this case to be one. The words of the section are plain:—"If, in any case, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit."

These terms are wide, and to construe them, as it is argued they should be construed, is to import restrictions which I think we have no right to do; moreover the present reference comes from the Judge, who acts under S. 295, which in its terms does not restrict revision to orders in cases finally tried and disposed of.

I think also the Magistrate's proceedings must be held to be judicial. A judicial proceeding is defined to be "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence."

[17] The Magistrate's explanation shows that in the present case he looked on the petitioners as persons still suspected of offences whom the police might arrest under S. 92, Act X of 1872, and on their being arrested he treated them as still charged with murder, and committed them to prison on that charge, on a warrant in regular form. He seems to me to

have considered himself acting judicially, under his powers as Magistrate, and though the circumstances do not justify his so doing, the fact will nevertheless remain, and I think it cannot be said that a proceeding, in which a Magistrate commits to prison charged with an offence a person brought up by the police, is not one which constitutes a judicial proceeding, for it will at least be one in which evidence may be taken. I would cancel the Magistrate's order.

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1 A. 1.

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PRESENT:

Mr. Justice Turner, Offg. Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

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1 A. 17.

Miscellaneous Application, No. 23-B of 1875.

BARKAT-ULLAH KHAN (*Petitioner*) v. RENNIE (*opposite party*)

[3rd July 1875.]

1 A. 17.

Crim. Pro. Code, 1872, Ss. 468, 469—Sanction to prosecute—Jurisdiction of superior Courts.

A sanction, given by any one of the Courts empowered under the Code, cannot be disturbed by a superior Court. But where the sanction is refused by one of these Courts, the refusal does not deprive the other Courts of the discretion given to them.

[*F.*, 2 A.W.N. 84 ; Rat. Unrep. Crim. Cases, 683 ; *D.*, 6 C. 440 (442) = 7 C.L.R. 330 ; *Diss.*, 26 B. 785 (786).]

REFERENCE TO THE FULL BENCH.

SPANKIE, J.—Referred the following questions to the Full Bench :—

"Whether, when the Court in which the evidence has been given, which is to form the basis of a criminal prosecution, has [19] exercised its discretion, either by withholding its sanction from, or giving sanction to, a criminal prosecution, the Court to which it is subordinate has any authority to interfere with the order, and if it has authority, to what extent can it interfere? Can it, where the first Court has refused to grant sanction, reverse its order and itself sanction a prosecution ; can it reverse that order and forbid the prosecution; and where the first Court and the Court superior to it defer, can the High Court exercise any interference, and to what extent?"

The reference was accompanied with these remarks:

SPANKIE, J.—Mr. Ross *cited several decisions of the Calcutta High Court and of this Court in support of his contention. In the first case the Sadar Amin refused to give the sanction asked for, because he saw no reason to impugn the *prima facie* authenticity of the document and for putting the petitioner on his trial for forgery. The Judge was then applied to and he sanctioned the prosecution. An application was then made to the Presidency High Court to set aside the Judge's order. It was contended that the sanction contemplated by section 170 of Act XXV of 1861, the former Criminal

Dinobandhoo Chuckerbutty Bayley and Phear, JJ. (1).

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* Counsel for opposite parties.

(1) 5 W. R. (*Mis.*) *Ap.*, 6.

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Procedure Code, can only be given by that Court in which the evidence is actually (for the first time) given in the suit, or by some superior Court before which the suit has come in regular course and which has thus before it all the materials of the case at the time when the application for its sanction is made. Mr. Justice Phear was of opinion that any Civil Court which has the power of calling before it the proceedings and evidence of the suit, after satisfying itself (by preliminary enquiry if necessary) that the charge is proper for investigation, can give sanction to a criminal prosecution, and that when one such Court has once given its sanction, a Magistrate is bound to proceed with the prosecution. It was a matter of indifference in Mr. Justice Phear's opinion that other subordinate Courts including, it may be, the Court of first instance, should have previously refused their sanction to the prosecution. Mr. Justice Bayley concurred, and the Court refused to interfere with the Judge's order. **[20]**

Ram Pershad Hazaree v. *Soomuthra Dubee*(1).

A Full Bench of five Judges had subsequently the following case before it. The petitioner produced a copy of an order of a Division(?) Bench of the Court in a previous case, staying the proceedings of the Court below in regard to the committal of a party till the result of a special appeal then pending was known, and as it appeared questionable whether the High Court has authority to interfere with the proceedings directing the commitment of a party for perjury or forgery, the referring Judges thought that the question should be submitted for the decision of a Full Bench. It was held that the High Court cannot, in the event of a regular or special appeal being lodged against the decision of the lower Court, interfere to stay criminal proceedings until the appeal shall have been heard and determined. The order, if treated as an order in a Civil case, is not, in Sir Barnes Peacock's opinion, appealable under Act VIII of 1859. No appeal is given either by the Civil or Criminal Procedure Code against orders which are left to the discretion of the Civil Court, either granting or withholding sanction to a criminal prosecution under S. 169 or 170 (Act XXV of 1861), or against an order sending a case for investigation before a Magistrate under S. 171. But the learned Chief Justice goes beyond this, and lays down that as a Court of Revision the High Court could not interfere and reverse such sanction or order upon the ground that it was not warranted by the facts; for, as a Court of Revision, it could not reverse an order except for error in law. In the case before the Full Bench the application was not by way of appeal, but merely by way of motion to postpone the committal. But if the Court, as one of Appeal or as one of Revision, cannot reverse or alter such an order, then there was no inherent authority that it had to stay proceedings. In this opinion of Sir Barnes Peacock, the other members of the Court concurred.

In the Matter of Balwant Rai. Pearson and Turner, JJ. (2).

The ruling of the Full Bench just referred to was cited by a Division Bench of this Court. In this case the petitioner obtained sanction from the Court of the Subordinate Judge to a criminal prosecution under S. 193 of the Penal Code. There was an appeal against the order to the Judge. The petitioner's counsel argued that the Judge had no jurisdiction to entertain the appeal, but the Judge held that he had, and he reversed the Subordinate Judge's order. The petitioner then applied to the High Court, urging that there was no appeal from **[21]**

(1) 5 W.R. *Mis. App.*, 24.
(2) H. C. R., N. W. P., 1874, p. 124.

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1 A. 17.

an order of a Civil Court *sanctioning* a criminal prosecution, and he therefore prayed that the Court would send for the record and pass thereon such orders as might seem fit. The Judge held that if a Judge could give sanction when a Court subordinate to him had refused it, the natural deduction was that he could withhold sanction when the lower Court had awarded it. The Division Bench remarked that it had been already ruled by a Full Bench of the Calcutta High Court, that, under the former Code of Criminal Procedure, no appeal lay to the Zilla Judge from a sanction accorded by a subordinate Court of first instance to the institution of a prosecution, in cases in which such sanction is required. There was no difference in the language of the former or present Code on the point. The Court therefore, under S. 35, Act XXIII of 1861, set aside the Judge's order. The Court further remarked :—" We are much pressed to go further and set aside also the sanction. Had it not been for the illegal assumption of jurisdiction by the Zilla Judge, we should not have been empowered to do so, for it is shown that the subordinate Court fairly exercised the discretion which the law commits to it : and where a discretion has been so exercised, whether it has been wisely exercised or not, we have no authority to interfere. On these grounds we limit our order to the setting aside of the Judge's order.

Another case came before a single Judge. In this case the Judge refused to sanction a criminal prosecution. The petitioner prayed the Court to sanction the prosecution. This Court held that the application could be entertained : but having regard to the circumstances of the case, there appeared to be no grounds for interference.

In the matter of Walid Hassain. Brodhurst, J. (1).

In another case before a single Judge the petitioners stated that they had applied to the Zilla Judge for sanction to prosecute one Kunhia Lal **[22]** criminally ; failing to get a clear order, they went to the Court of first instance. But that Court thought that it was precluded by the Judge's order from giving sanction. This Court remarked that, as it appeared from the proceeding of the Subordinate Judge that, in his opinion, ample grounds existed for sanctioning the prosecution under S. 469 of the Criminal Procedure Code, but that he considered himself to be precluded by some not very intelligible order passed by the Zilla Judge, it would be right and proper in the interests of public justice to grant the sanction applied for by the petitioners. In this case the Judge, when applied to for sanction to prosecute Kunhia Lal for forgery, is stated by the Subordinate Judge to have passed this order :— " I cannot give sanction." If so, Mr. Justice Pearson's order seems to have practically, though not in so many words, reversed the Judge's order withholding sanction.

In matter of Bujan Lal. Pearson, J. (2).

It appears to me that there is some confusion and uncertainty as to the extent of interference which the Court has a power of exercising.

The case now before me is the exact converse of that which came before the Division Bench and has been cited. That decision is based upon the Full Bench decision of the Calcutta Court also cited. But the judgment of that Full Bench appears to me to hold that neither as a Court of Appeal or Revision can the High Court reverse or alter an order granting or withholding sanction to a criminal prosecution, and further that it has no inherent authority, by which it can interfere in such cases.

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(1) Mis. Appl., No. 86 B. of 1874, dated the 30th August 1874.
(2) Mis. Appl., dated the 14th August 1874.

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1 A. 17.

Sir Barnes Peacock remarked that in some of the cases cited "the question as to reversing such sanctions was brought before the Court by motion. I asked how the case came before the Court by motion. The answer was that the motion was in the nature of a petition of appeal. But I am clearly of opinion that, in cases in which no appeal lies to this Court, relief cannot be given indirectly by motion in the nature of an appeal." According, therefore, to the Full Bench decision, there does not appear to be any power of interference. But the Division Bench of this Court, whilst acting on the judgment of the Full Bench, adds :—"We are much pressed to go further and set aside also the sanction. Had it not been for the illegal assumption of jurisdiction by the Zilla Judge, **[23]** we should not have been empowered to do so, for it is shown that the subordinate Court fairly exercised the discretion which the law commits to it; and where a discretion has been so exercised, whether it has been wisely exercised or not, we have no authority to interfere." But though the Court was doubtless right to set aside a jurisdiction illegally assumed by the Zilla Judge, it does not follow that it had itself authority to question the order passed by the first Court. The record was sent for by this Court to see whether the Judge had or had not exercised illegal jurisdiction. If the Calcutta judgment be correct, there is no authority to interfere at all. If the Division Court's judgment here be correct, the Court can interfere (though it has the record before it for one special object), but will only do so where discretion has not been fairly exercised.

Mr. Justice Brodhurst's order is one on a petition in the nature of an appeal from the Judge's order, and he considered that it could be entertained.

Mr. Justice Pearson's order, as I have observed, practically ignores the Judge's order refusing sanction, and grants it as the act of this Court.

I do not wish at the present stage to express any opinion as to the power of the Court to interfere. I think that it is desirable that the Full Bench should consider the subject and record an opinion that will remove all uncertainty.

Bábu *Jai Gopál Ghose*, for petitioner.

Mr. *Ross* and Mr. *Conlan*, for opposite parties.

JUDGMENT OF THE FULL BENCH.

TURNER, OFFG. C.J., and PEARSON and OLDFIELD, JJ. concurred in the following opinion :—

S. 469 of the Criminal Procedure Code, in declaring that the Magistrate shall not entertain a prosecution of any of the offences therein specified without the sanction of the Court before which the offence was committed, or of some Court to which it is subordinate by implication gives the Court before which the alleged offence has been committed, and to the Courts to which that Court is subordinate, a discretionary power to sanction the prosecution. If this discretionary power is exercised and sanction accorded, the **[24]** law gives no appeal from such an order. This was ruled by this Court in the case of *Balwant Rai*, decided on the 4th April 1874 (1) : and there being no appeal, the Court cannot interfere on motion in the nature of an appeal; this was ruled by the High Court of Calcutta in the case of *Ram Pershad Hazaree* (2). But the refusal of one Court to exercise its

(1) H. C. R., N. W. P., 1874, p. 124.
(2) 5 W. R. *Mis. Ap.*, 24.

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power does not deprive the other Courts of the right to exercise the same power. If the Court before which the alleged offence is committed refuses to exercise its power, the application to the superior Court is in the nature of an original application and not of an appeal. It is an application to one of two or more Courts which are vested with independent powers of sanction. If the law declares that a person may act with the consent of A. *or* B. *or* C, although A. and B. may refuse to give consent, the consent of C. will be sufficient. In placing a restriction on the right of prosecution in respect of certain offences, the legislature has not confined the power of sanction to the Court before which the offence is committed, but has conferred it on that Court and on any other Court to which that Court is subordinate, and the sanction accorded by any one of those Courts satisfies the restriction. This view of the law is supported by the rulings of the High Court, Calcutta, (*Dinobundhoo Chuckerbutty*), (1), and of this Court, and we are aware of no ruling to the contrary. But it is contended that sanction can only be given by a superior Court when the case in which the offence was committed comes before it in appeal. To accede to this contention would be to import into the Act a condition which we do not find there, and which we cannot find anything in the Act itself to warrant us in introducing. Again, it has been objected that in the view here taken of the existence of independent powers of sanction in two or more Courts, it may happen that a subordinate Court may grant sanction after it has been refused by a superior Court. Doubtless this is so, but to obviate the unseemliness of such procedure, it has been the practice of this Court, and we think it should be the practice of all superior Courts, to refuse to entertain the application until it is shown that an application has been made to the subordinate Court and that by that Court sanction has been refused. In reply to the **[25]** reference made to us, we answer that, in our judgment, a sanction given by any one of the Courts empowered under the Act cannot be disturbed by a superior Court, and that where sanction is refused by one of those Courts the refusal does not deprive the other Court of the discretion given to them.

SPANKIE, J.—I cannot agree with the entire draft of the proposed judgment. I think that there is force, and great force too, in the objection that, in the view taken of the existence of independent powers of sanction with two or more Courts, it may happen that a subordinate Court may grant sanction after it has been refused by a superior Court. The objection to such a course is on the surface, and it is met with the reply that it has been the practice of this Court, and should be the practice of all superior Courts, to refuse to entertain an application until it is shown that an application has been made to the subordinate Court and that by that Court sanction has been refused. But, in my opinion, there is no need of any such practice in order to get rid of any such objection. It appears to me that the words of S. 469, Criminal Procedure Code, do not admit of the suggestion that there are two or more Courts with independent powers, and that if one refuses, the other can grant sanction. The words are that a complaint "shall not be entertained against a party to such proceedings except with the sanction of the Court in which the document was given in evidence, or of some other Court to which that Court is subordinate." These words signify, I think, that the Court to which such Court is subordinate may, by virtue of its superiority, grant the sanction withheld by the lower Court. At the same time, I

(1) 5 W. R. *Mis. Ap.*, 6.

1875 JULY 3. FULL BENCH.

hold that sanction, once given by the Court to which the first Court is immediately subordinate, cannot be withheld by any Court superior to that Court. When no sanction has ever been applied for in the two Courts below, it may, I think, be given by this Court as the superior of both, and so, where no sanction has been granted by the first, it may be given by the second Court.

There is no appeal from one Court to the other. But an application may, I apprehend, be made on what is known as the miscellaneous side of the superior Court, and sanction, if not already given, may be granted.

1 A. 17.

[26] With these remarks, I may say that I agree in substance with the proposed reply to the reference made: that is to say, sanction given by any one Court cannot be disturbed by a superior Court, and that when sanction is refused by one of those Courts, the refusal does not deprive the superior Courts of the discretion given to them.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1875 JULY 20. APPELLATE CIVIL.

FATIMA BEGAM (*Plaintiff*) *v.* SAKINA BEGAM (*Defendant*)*

[20th July 1875.]

1 A. 51.

"Dwelling place," meaning of—Act VIII of 1859, S. 5 and XXIII of 1861, S. 4.

A man's family residence, the fixed and permanent home of his wife and family, and to which he has always the intention of returning, will constitute his dwelling place within the meaning of Act VIII of 1859, S. 5 and Act XXIII of 1861, S. 4, for the purposes of jurisdiction.

[*N.F.* A.W.N. (1892), 115.]

FACTS OF THE CASE:—The plaintiff, the daughter of Yasin Khan, deceased, brought a suit against the widow of Yasin Khan and his nephew Azim Khan who had married the widow, in the Court of the Subordinate Judge of Farukhabad, for recovering her share of the estate (moveable and immoveable property) left by her father in Farukhabad. At the time of suit Azim Khan, being a sawar in the Sind Horse, was with his regiment and the widow of Yasin Khan (now, wife of Azim Khan) resided in his family residence in Farukhabad. The first Court decreed the claim in part. But it was reversed and the suit dismissed by the Lower Appellate Court on the ground that Azim Khan was not residing within the Court's jurisdiction. The plaintiff made a special appeal to the High Court.

Mr. *Mahmood* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Appellant.

Pandit *Ajudhia Nath* and Pandit *Bishambhar Nath*, for the Respondents.

JUDGMENT.

[52] The judgment of the Court was as follows:—

In our view the lower appellate Court is in error, and Azim Khan's residence or dwelling within the meaning of those terms in S. 5, Act VIII of 1859, and S. 4, Act XXIII of 1861, is in the jurisdiction of the Farukhabad Civil Court.

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* Special Appeal, No. 573 of 1875, from a decree of the Judge of Farukhabad, dated the 11th May, 1875, reversing a decree of the Subordinate Judge, dated the 27th January 1875.

1875 JULY 20. — APPELLATE CIVIL. — 1A. 51.

The words dwelling or residence are synonymous with domicile or home, and mean that place where a person has his fixed permanent home, to which whenever he is absent he has the intention of returning. In *Lord* v. *Colvin* (1) it was held "that place is properly the domicile of the person in which he has voluntarily fixed the habitation of himself and family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." And in a case cited in Broughton's Civil Procedure Code, *R.* v. *Murray* (2), it was held that a man may have two dwelling-places, living sometimes at one and sometimes at another, and during his temporary absence each house though empty, if there be an *animus revertendi*, will still be his dwelling house.

[53] In the present case, Azim Khan, being a sawar in the Scinde Horse, his duties no doubt oblige his presence with his regiment for the greater part of his service, but the quarters of a regiment, always liable to be changed, are the temporary and not the permanent residence of the soldier; Azim Khan's family residence, admittedly within the jurisdiction of the Court, and the fixed and permanent home of his wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of the law.

We reverse the decree of the lower appellate Court and remand the case under S. 351, Act VIII of 1859, for trial of the appeal. Costs to follow the result.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

1875 AUG. 5. — FULL BENCH. — 1 A. 97.

JIWAN SINGH (*Judgment-debtor*) *v.* SARNAM SINGH (*Decree-holder*).

[5th August, 1875.]

Limitation—Act IX of 1871, S. 15—Suits and applications.

S. 15 of Act IX of 1871 must be held to apply to suits, as distinguished from applications, and that the word 'suit' therein used does not include an application for the execution of decree. Act IX of 1871 clears up what was obscure in Act XIV of 1859, under which the word "suit" has been used in a wide sense, so as to include an application to enforce execution of a decree.

[F. 2 M. 1.]

REFERENCE TO THE FULL BENCH.

PEARSON AND OLDFIELD, JJ. referred to the Full Bench, the question which of the two rulings of the N.W.P. High Court [The Ruling of the High Court, dated the 1st May, 1874 or that dated the 17th June, 1872], was the right one.

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(1) 4 Drew. 366; 28 L. J., Chanc. 361.
(2) 2 East P.C. 496.

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Mr. *Leach* and Babu *Dwarka Nath Mukarji* for the appellant.

Mr. *Conlan*, Pandit *Ajudhia Nath*, and Munshi *Hanuman Parshad* for the respondent.

FULL BENCH.

OPINIONS OF THE FULL BENCH.

The following opinions were delivered by the Full Bench :—

1 A. 97.

[98] STUART, C. J.—I was a party to the decision of 1st May 1874 and to the opinion I then expressed I advisedly adhere. With regard to the present reference, I cannot say that an application for the execution of a decree is not a suit within the meaning of S. 15, Act IX of 1871. I think it is. It has been repeatedly held in England that the word "suit" does include any proceeding instituted for the purpose of obtaining any beneficial order or relief, and that a petition presented for this purpose was a suit; and I observe it has been used in that sense in the practice of the American Courts. In Kent's Commentaries on the American Law, Vol. I, **[99]** p. 314, note (*d*), 11th ed. published in 1867, two cases are referred to in which it was decided that a *mandamus* is a "suit, for it is a litigation in a court of justice seeking a decision," and in the Calcutta case referred to by the Officiating Judge of Ghazipur (1), the following passage occurs in the judgment of Sir Barnes Peacock, Chief Justice :—"The word 'suit' does not necessarily mean an action, nor do the words 'cause of action' and 'defendant' necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action. "The meaning of this, I think, is that the word "suit," as used in S. 15 of the Limitation Act, does not mean a suit or action in an exclusively technical sense, but simply and generally any proceeding intended and adapted to the recovery or vindication of any right or demand or material advantage. Such was undoubtedly the meaning put upon the word "suit" by lawyers before Act IX of 1871 was passed; and the question therefore is whether there is anything in that Act to change the construction which up to that time had been put upon the term. I do not see that there is, nor do I understand that the mere mention of applications in the Act distinct from suits can have the effect of limiting the general relief of benefit that by S. 15 is intended. I would, therefore, answer this reference by saying that the above ruling is right, and that an application for the execution of a decree is a suit within the meaning of S. 15, Act IX of 1871.

PEARSON, J.—I was myself a party to the decision of the 17th June 1872, and on re-consideration adhere without hesitation or doubt to the opinion therein expressed. Throughout the Act, IX of 1871, the distinction between suits and applications is never forgotten; they are never confounded together. The particular section (15) which we have to consider enacts that, "in computing the period of limitation prescribed for any *suit*, the time during **[100]** which the plaintiff has been prosecuting with due diligence another *suit*, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded on the same right to sue, and is

(1) *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia*, 9 W. R. 402.

instituted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to try it." The cases in which a plaintiff may honestly make a mistake as to the Court in which his suit should be brought are not unfrequent; and therefore the provision contained in S. 15 is quite suitable to a suit. But the case in which a decree-holder could *bona fide* attempt to execute his decree in a wrong Court must be very peculiar and exceptional; and a general provision of law is therefore not required to meet a case which can hardly ever occur. It is remarkable that Ss. 16, 17, 18, 19, and 20 are only applicable to original suits; and it may reasonably be assumed that, if S. 15 had been intended to apply to applications for execution of decree as well as to suits, the intention would have been expressed and made known in an explanation like *explanation* 2, which intimates that "a plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section." In the absence of any such explanation, regard being also had to the distinction which is observed throughout the Act between suits and applications, I conceive that S. 15 must be held to apply to suits as distinguished from applications, and that the word suit therein used does not include an application for the execution of a decree.

TURNER, J.—I concur in the opinion delivered by Mr. Justice Pearson, and place the same construction on the 15th section of Act IX of 1871 as I have heretofore placed on the similar section Act XIV of 1859.

SPANKIE, J.—I accept Mr. Justice Pearson's opinion as conclusive on the point referred to us.

OLDFIELD, J.—Looking to the terms of S. 15, Act IX of 1871, I do not think the provisions of that section were intended to apply to applications for execution of decrees, but only to suits in their strict sense.

[101] It will be observed that throughout Act IX of 1871, a distinction is made between suits, appeals and applications. It is to be found in the preamble of the Act, and again notably in S. 4, and in the second schedule, which prescribes the period of limitation applicable to three divisions of subjects, suits, appeals and applications, amongst the last of which are found enumerated applications for executions of decrees.

I think Act IX of 1871 clears up what was obscure in Act XIV of 1859, under which the word suit may have been used in a wide sense, so as to include an application to enforce execution of a decree.

The title of Act XIV of 1859 is an "Act to provide for the limitation of suits," and the preamble is "whereas it is expedient to amend and consolidate the laws relating to limitation of suits, it is enacted as follows:" but the title and preamble of Act IX of 1871 differ materially Act IX of 1871 being "an Act for the limitation of suits and for other purposes," and it recites, "whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts, &c." Whereas in Act IX of 1871, suits and applications are separately treated, the word suit cannot, I apprehend, be held to mean and include an application.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

1875
AUG. 10.

FULL BENCH.

TEJ RAM AND OTHERS (*Auction-purchasers*) *v.* HARSUKH (*Judgment-debtor*). [10th August 1875.]

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1 A. 101.

1 A. 101.

1. *High Court's powers of Superintendence—Stat. 24 and 25 Vic. C. 104, S. 15.*

The powers of Superintendence, conferred on the High Court by the Stat. 24, and 25 Vic. C. 104, S. 15, relate to administrative authority and not judicial powers. This administrative authority may be thus summarised. The High Court has power, under S. 15 of the High Courts Act—

(1) to direct the exercise of a power or jurisdiction disclaimed by the lower Court.

(2) to set aside the order made by the lower Court without jurisdiction.

[R. 9 A. 104 (F.B.)=6 A.W.N. 309 ; 22 M. 68.]

2. *High Court's jurisdiction to revise judicial proceedings.*

The High Court has no power, where no appeal lies and when no power of interference is given by the C.P.C. to interfere, by way of revision, with the proceedings of subordinate Courts on the strength of these powers of superintendence.

[R. 9 A. 104 (F.B.)=6 A.W.N. 309, 9 B. 432, 12 B. 617, 1 C.W.N. 617 (620), 26 C. 74, 8 M.L.J. 231, 28 M. 28=14 M.L.J. 329, 31 A. 59, 13 C.W.N. 1221, 36 C. 994, 6 A.L.J. 22, 33 C. 68, 9 C.W.N. 1046 (F.B.)=2 C.L J. 241.]

Mr. *Ross*, *the Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Pandit *Ajudhia Nath*, and Babu *Oprokash Chandar* for the auction-purchasers.

Mr. *Conlan* and Pandit *Bishambar Nath* for the judgment-debtor.

OPINION OF THE FULL BENCH.

[103] It is not contended that an appeal lies to this Court from the order of the Judge, or that under the Code of Civil Procedure this Court has any power of interference. It is argued that the Court is authorized to exercise jurisdiction in the matter in virtue of the provisions of 24 and 25 Vic., c. 104, S. 15. These provisions have frequently been urged as justifying the interference of this Court with orders of a Subordinate Court, on the grounds that the orders of the Subordinate Court has proceeded on an error of fact or law, and that no further appeal is given by the Code, and so far as we are aware the Court has uniformly declined jurisdiction.

The provisions of S. 9 of the Statute above-mentioned declare that High Courts established under the Act shall have and exercise all such civil, &c., jurisdiction, &c., and all such powers and authority for, and in relation to, the administration of justice, &c., as Her Majesty may by Letters Patent grant and direct, and that save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same

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1 A. 101.

Presidency abolished under the Act at the time of the abolition of such last-mentioned Court.

By the Letters Patent of this Court Her Majesty was pleased to confer on it extraordinary original civil jurisdiction and appellate civil jurisdiction, but she conferred on it no powers of revision in civil suits or matters arising there-out. In these matters the Court has no other power or authority than that enjoyed by the Sudder Dewany Adawlut of these Provinces at the time of its abolition unless such power is derived from the 15th section of the Statute. The Sudder Dewany Adawlut certainly had no power to exercise judicial functions in any case in which its rights of interference was not declared by the law of India, and no provision of any Indian Act is cited as conferring on the Sudder Dewany Adawlut authority to interfere on an application of the nature of that which is now preferred to the Court.

The petitioners then can rely only on the provisions of 24 and 25 Vic., c. 105, S. 15, which declare that the High Courts established under the Act shall have "superintendence" over all Courts **[104]** which may be subject to its appellate jurisdiction, and consequently it is contended that the term superintendence confers jurisdiction to revise proceedings of the Subordinate Civil Courts.

We cannot allow this contention. Whether we consider the ordinary significance of the term or construe it in connection with the context, it appears to us to confer on the High Court no revisional power, no power to interfere with or set aside the judicial proceedings of a Subordinate Court, but that it confers on the High Court administrative authority and not judicial powers; as we construe the term, it would be competent to the High Court in the exercise of its power of superintendence to direct a Subordinate Court to do its duty or to abstain from taking action in **[105]** matters of which it has not cognizance, but the High Court is not competent in the exercise of this authority to interfere and set right the orders of a subordinate Court on the ground that the order of the Subordinate Court had proceeded on an error of law or an error of fact. It is true that some cases may be found in the reported decisions of other High Courts, in which it appears that Judges have claimed in virtue of the right of superintendence given them by the Statute to exercise larger powers than we believe are conferred by the provisions of that law, but the practice of this Court has accorded with the views expressed by us, and on the construction we put on the Statute we are not at liberty to disturb it.

The record will be returned to the Bench with this expression of our opinion.

FULL BENCH.

PRESENT :

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

1875
AUG. 17.

FULL BENCH.

RAM DIAL (*Defendant*) *v.* GULAB SINGH (*Plaintiff*).

[17th August, 1875.]

1 A. 26.

1 A. 26.

Suit for contribution—Pattidar—Jurisdiction—Civil Court.

A suit for contribution, by a Pattidar, to recover from his co-pattidars the excess revenue paid by him on account of their shares, is a claim cognizable by a Civil Court.

[R. 3 A. 66 (F.B.); D. A.W.N. (1907), 156.]

REFERENCE TO THE FULL BENCH.

TURNER, OFFG. C. J., AND SPANKIE, J., referred to a Full Bench the question whether the plaintiff, a pattidar who had paid a sum on account of a demand for Government revenue, not merely in respect of his own share but also in respect of the shares of the defendants, his co-pattidars, should have sued to recover the sum paid in excess of his own quota, in the Civil or in the Revenue Court.

The *Senior Government Pleader* (Lala *Juala Pershad*) and Munshi *Hanuman Pershad* for appellants.

Pandit *Ajudhia Nath* and Pandit *Bishambar Nath* for respondents.

OPINION OF THE FULL BENCH.

[27] TURNER, OFFG. C. J., and PEARSON and OLDFIELD, JJ. concurred in the following opinion :—

We are of opinion that the Civil Courts are competent to entertain claims of this nature, and that the Munsif is in error in regarding it as a claim connected with or arising out of the collection of revenue within the meaning of that term in S. 241, Act XIX of 1873. Looking to the context, it appears to us that provision of the law may have been intended to apply to wrongs arising out of or connected with the collection of land revenue, such as suits against the revenue officers for the illegal exaction of revenue or for the illegal issue of process. In such cases, the claim arises out of a wrong done in the collection or connected with the collection. In the case before us the plaintiff seeks no remedy for a wrong done to him in the collection of revenue or arising thereout, because assuming the revenue to have been due, he suffered no wrong in its collection, and certainly no wrong at the hands of the defendants; he sues because he has been compelled to pay a debt for which they were all jointly liable, a payment which gives him the right to call on them for contribution.

It strengthens the view we have taken that, as pointed out by the Judge, neither in the sections of this Act nor in those of Act XVIII which declare what powers may be exercised by the several revenue authorities do we find any mention made of suits of this nature.

SPANKIE, J. Until the passing of Act XIX of 1873, I am willing to admit that a suit of the nature of a claim for contribution, as this is, would

be heard in the Civil Courts. But it appears to me that Act XIX which is one to consolidate and amend the law relating to land revenue and the jurisdiction of [28] the revenue officers, aims at keeping in the hands of those officers the settlement of every dispute connected with the collection of revenue, whether such disputes arise between the revenue-payers themselves, or between the Government officers and the revenue payers.

The question that we have to determine is whether or not the suit involves a dispute regarding one of those matters included in S. 241 of the Act, over which the section declares, in so many words, the Civil Courts shall exercise no jurisdiction.

Now cl. (*i*) of the section provides for claims connected with or arising out of the collection of revenue (other than claims under S. 189) or of any process enforced on account of an arrear of revenue. The exception relates to proceedings taken under Ch. V. of the Act to enforce the recovery of any arrears of revenue against a person. He may pay the amount under protest to the officer taking the proceedings, and upon such payment the proceedings shall be stayed, and the persons against whom such proceedings were taken may sue the Government for the amount so paid in any Civil Court in the district where such proceedings were taken. Here, possibly, the party who brings the suit may contest altogether any liabilities to pay revenue to Government, or that only a portion of what was taken was due from him, because the latter part of the section allows him to give evidence of the account which he alleges to be due from him, notwithstanding the provisions of S. 149. This section declares that a statement of account certified by the tahsildar shall be conclusive evidence of the existence of the arrear, of its amount, and of the person who is the defaulter.

Cl. (*i*) appears to provide generally for any dispute being a claim connected with or arising out of the collection of revenue or any process enforced on account of an arrear of revenue as in this case, in which the tahsildar enforced the joint and several responsibility of the proprietors declared by S. 146, by calling upon the plaintiff to pay Rs. 1,293, which sum was not the proportionate share due by himself, but included also the quota due by 38 other persons.

[29] This is not a case of a lambardar suing under Act XVIII of 1873 for arrears of revenue payable through him due by the co-sharers, whom he represents. It is the case of a pattidar who is known or supposed to be solvent, who is made to pay what other pattidars owe or refuse to pay contumaciously or from design, or by the reason of some dispute in the patti. The revenue officer has done no wrong to the plaintiff in getting the arrears out of him. It is not pretended that he has made the plaintiff pay more on his own account than he is bound to pay. He has simply enforced against him the common liability of the pattidars, for which he also made himself responsible.

It is contended that the plaintiff does not seek a remedy for wrong done to him in the collection of revenue, because, assuming the revenue to be due, he suffered no wrong in the collection and none at the hands of the defendants. But it is, I think, apparent that whatever he has suffered is owing to the conduct of the defendants, and the enforced payment by him of revenue due by them has given to him the right of forcing them in return by suit to reimburse him. In the course of such a suit it would not be sufficient for the plaintiff to produce the revenue officer's receipt for Rs. 1,293. He would have to show what was the amount due by each of the pattidars, and they would have to account for not having paid their

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quota. It may surely be assumed that existing disputes connected with or arising out of the collection of the revenue (very large and wide words) would be disclosed in the suit disputed, which, in my opinion, the legislature intended should be heard and determined by the revenue authorities.

Such a claim as the one before us seems to me to arise out of the collection of the revenue and the enforcement of the plaintiff's liability to pay the arrear due by his co-sharers, and it is, I think included in cl. (*i*) of the section. If this be so, then, in the last words of the section, "in all the above cases, jurisdiction shall rest with the revenue authorities only."

Thus the first words of the section bar the jurisdiction of the Civil Courts in any of the matters included in the section, and its last words declare that the revenue authorities only shall have [30] jurisdiction. If the claim is one that will come under cl. (*i*) of the section. the Civil Courts can take no cognizance of it.

But the Judge finds that there is no special provision for the hearing of this particular class of suit by the revenue authorities, and that the prohibition entered in the last clause of S. 241 applies only to those cases for which there is a special provision. I do not understand whether the Judge means that a suit of this nature is not mentioned in S. 241, or whether he means expressly that no power is given to revenue officers elsewhere in the Act to hear suits of this nature.

As to the first point. some confusion is caused by regarding this case as a suit. It is sufficient that the dispute between plaintiff and defendants should be one connected with or arising out of the collection of the revenue. Being one of that description, it would be one of "the matters" over which Civil Court could not, and the revenue authorities alone could, exercise jurisdiction. As to the second point, the jurisdiction being with the revenue authorities, those authorities must be one or more of the officers named in S. 207, the Commissioner, Collector, Assistant Collector, Officer in charge of a settlement or Assistant Settlement Officer, or a tahsildar. Any one of those officers can summon persons before him, if he considers their attendance necessary for the purpose of any investigation, suit, or other business before him (S. 208), so it is not only suits that may be tried under the Act. The Act recites the powers of Collectors and Assistant Collectors generally and also particularly, and Collectors, in addition to their own powers, may exercise the powers of Assistant Collectors, and Assistant Collectors in charge of a sub-division exercise the same powers that a Collector could if there was no sub-division, subject to the control of the Collector. It is true that there is no particular mention of claims under cl. (*i*), S. 241, outside that section. But S. 241 is a portion of Ch. VII, which, amongst other matters, treats of the powers of Collectors and others. S. 241 expressly gives to those officers as revenue authorities alone the power of dealing with the matters contained in it. And where this is the case, it seems to me to be idle, in this particular reference, to raise any difficulty regarding the revenue officer who is to [31] determine any one of the matters contained in the section. If this is one of those matters referred to in cl. (*i*), S. 241, no want of clearer specification of the powers of the different revenue authorities, no omission of the class of case outside the section, and no ambiguity or defect in the Act, can give the Civil Courts the jurisdiction which the opening words of the section expressly bar.

I would answer that this case should be heard by the revenue authorities.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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GHASI RAM (*Decree-holder*) *v.* MUSAMMAT NURAJ BEGAM (*Judgment-debtor*). [17th August 1875.]

1 A. 31.

Letters Patent, cl. 10—Appeal—Division Bench.

An appeal lies under Letters Patent, cl. 10, to the High Court only when there is such a judgment of a Division Bench as disposes of the suit on appeal before it.

The subordinate Judge of Cawnpore rejected an application made by Nuraj Begum, on behalf of her minor daughters, for setting aside the sale in execution of a decree of their rights and interests in certain villages on the plea that there had been an irregularity in the publishing of the sale (resulting in the villages fetching a price inadequate to their value). On appeal by the judgment-debtors to the High Court, the Division Court consisting of STUART, C.J., AND SPANKIE, J., differed in opinion.

JUDGMENT OF THE DIVISION BENCH.

[32] STUART, C. J. This appeal was not satisfactorily maintained at the hearing, but it appears to me to be at least doubtful whether a fair price was obtained for the property sold, and it being the property of minors, it is our duty to see that no substantial injustice has been done, and to remand the case, in order to obtain more reliable data. Inadequacy of price is not only pleaded before us, but it appears from the record that a petition was presented in the execution department in behalf of the minors; that this objection was distinctly taken below; and there is evidence, although apparently not of much value, yet something like evidence, going to show that the price obtained at the sale was very much less than, according to one witness, about one-fourth of its true value.

Under these circumstances, I think it would be proper to remand the case under S. 354 for further and more distinct evidence on the point whether the property was sold for a price grossly inadequate, and also whether there was anything in the manner of the sale, with respect to the formalities, or otherwise, which could have conduced to such a result. On receipt of the record with this new matter, a week to be allowed for objections.

SPANKIE, J.—It was sufficiently established before the Subordinate Judge that the sale was properly notified in all respects, and indeed the petition of the judgment-debtor praying that the sale might be set aside does not dispute this fact. There has been no informality in the sale, and I agree with the Subordinate Judge in his finding on this point.

There is no evidence worth consideration in support of the plea that the property was sold for an inadequate price. I should be sorry to injure the minors if the property sold be theirs. But we have nothing to do with

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inadequacy of price in the case before us. Under S. 256, Act VIII of 1859, a sale becomes absolute when confirmed by the Court directing it to take place. But it may be set aside, if application should be made within thirty days to set it aside, on the score of any material irregularity in publishing or conducting the sale, and no sale shall be set aside on the ground of such irregularity unless the applicant shows to the satisfaction of the Court that he has sustained substantial injury by [33] reason of such irregularity. We cannot therefore go into the question whether the sale price was inadequate or not. I would dismiss the appeal and affirm the judgment with costs.

On appeal by the decree-holder to the Full Court against the order of the Chief Justice under S. 10 of the Letters Patent, on the grounds that the order of remand under S. 354, Act VIII of 1859 was invalid, as there was nothing to shew that there was any irregularity in conducting or publishing the sale, or injury to the judgment-debtors caused thereby, and that the mere allegation of inadequacy of price, without any reliable evidence to support it, did not justify a remand for further evidence into that question, as a sale, otherwise valid, could not be set aside on that ground only.

Pandit *Bishambar Nath* appeared for appellant and
Pandit *Ajudhia Nath* for respondents.

JUDGMENT OF THE FULL BENCH.

The following judgment was delivered :—

It has been argued it is doubtful from the language of the honourable the Chief Justice whether, under S. 353, Civil Procedure Code, he intended to frame and remit issues for trial, or under S. 355 merely to direct the Court below to take further evidence. We think it unnecessary to determine this point, because we are of opinion that in either view this appeal cannot be entertained.

There has been no judgment in the sense in which we construe that term in cl. 10 of the Letters Patent. There must be such a judgment on the part of all the learned and honourable Judges who may constitute a Bench as disposes of the suit on appeal before it. The learned Chief Justice has as yet recorded no such judgment, and to enable the Bench to do so, he has considered it necessary to obtain further materials.

Under the circumstances, we reject the appeal, and as the respondents have appeared, with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Spankie.

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APPELLATE CIVIL.

1 A. 75.

BALDEO SAHAI (*Plaintiff*) *v.* BATESHAR SINGH (*Defendant*).

[20th August 1875.]

1 A. 75.

C.P.C. (Act VIII of 1859), S. 2—Res Judicata.

1. When a plaintiff claims an estate, and the defendant, being in possession, resists it, he is bound to resist it upon all the grounds that it is possible to him, according to his knowledge, then, to bring forward; if he fails to do so, he is estopped from asserting any of them thereafter.

2. Where, therefore, in a former suit for possession brought by the defendants against the plaintiff, the latter unsuccessfully pleaded his title as auction-purchaser, but did not set up the right of pre-emption with respect to the property, which had already accrued to him, *held* that the subsequent suit, based on such right of pre-emption, was *res-judicata*.

[Overruled, 26 A. 61 = A.W.N. (1903), 106; F., 1 A. 316, 3 A. 189, 20 A. 516; R., 11 B. 708.]

Munshi *Hanuman Parshad*, Munshi *Sukh Ram* and Lala *Lalta Parshad* for the appellant.

The *Senior Government Pleader* (Lala *Juala Parshad*) and Pandit *Bishambar Nath* for the respondents.

JUDGMENT.

[76] In 1873 the respondents purchased the share of which the appellant claims pre-emption. The appellant denied the title of the vendor, but the respondents instituted a suit against the appellant, and having succeeded in establishing their vendor's title, they obtained a decree for possession. The appellant then instituted the present suit to have the sale to the respondents set aside, and a sale concluded in his favour as pre-emptor. It is contended that the respondents having succeeded in obtaining a decree for possession in a suit to which the appellant was a party, he is now debarred from suing to enforce a claim which he might have asserted in reply to the claim formerly made by the respondents, and decreed in their favour. We admit the validity of the plea. It would have been a good answer to the claim then advanced that the sale on which it was founded was invalid, in that the defendant was entitled to a prior right of purchase and ready to exercise it. In *Srimut Rajah Mootoo Vijaya* v. *Katama Natchiar* (1), it was declared by the Privy Council that, "when a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible to him, according to his knowledge, then to bring forward," and that, if he fails to do so, he is estopped from **[77]** asserting any of them thereafter. This dictum was cited and re-affirmed in *Woomatara Debia* v. *Unnopoorna Dassee* (2), decided by the Privy Council on May 13th 1873. We must, then, allow the plea urged by the respondents and dismiss this appeal with costs.

(1) 11 Moore's Ind. App., at p. 73.
(2) 11 B. L. R. P. C., at p. 169.

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

FULL BENCH.

DUBEY SAHAI (*Plaintiff*) *v.* GANESHI LAL (*Defendant*).

[21st August 1875.]

1 A. 34.

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Limitation Act, IX of 1871, Ss. 4 and 5—Admission of appeal after time—Single Judge and Division Bench.

When an appeal is admitted, after time, by a single Judge sitting as an Admission Court, his order is liable to be questioned and set aside, at the hearing, by the Division Bench, on the ground that the reasons assigned for admitting it are erroneous or inadequate.

[App., 12 A. 79; R. 6 B. 304, 9 M. 450, 9 A. 11, 10 A. 524, 34 C. 216, 5 C.L.J. 280.]

REFERENCE TO THE FULL BENCH.

The Division Bench (PEARSON and OLDFIELD, JJ.), referred the following question to the Full Bench, viz.:—

[35] "Whether the order of a single Judge admitting an appeal after time is liable to be impugned and set aside at the hearing of the appeal by the Bench before whom it is brought on for hearing on the ground that the reasons assigned for admitting it are erroneous or inadequate?

Mr. *Howard* and Munshi *Hanuman Parshad* for appellant.

The *Senior Government Pleader* (Lala *Juala Parshad*) and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for respondent.

OPINIONS OF THE FULL BENCH.

[36] STUART, C. J.—The question submitted in this reference is, whether, as a preliminary objection taken in behalf of the respondent, the order of a single Judge admitting an appeal after time is liable to be impugned and set aside by the Bench before whom it is brought for hearing, and my answer is in the affirmative. But I confess I have not derived much assistance from Act IX of 1871. The sections of that Act which bear on the subject are Ss. 4 and 5, and appended to S. 4 are two illustrations, the latter of which (*b*) is in the following term:—"An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed." This appears to meet the present case, showing clearly, as it does, that, in the opinion of the person who prepared it, such a preliminary objection as the present might be entertained. But it is a mere illustration and not binding as law, and I can find no direct authority for it in either of the sections referred to. No doubt under S. 5 (*b*) it is provided that "any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefore, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period," and the words "appellant" and "the Court"

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appear to support the illustration. So far as they go, however, these quotations from the Limitation Act seem to me to favor the objection, or, in other words, the opinion that the order in the present [37] case by a single Judge may be impugned in the form stated before the Bench of the Court hearing the appeal.

To my mind, however, the right of a respondent to take such an objection may be allowed to rest on the very intelligible principle that the application to, and order by, the single Judge, is in the nature of an *ex parte* proceeding and behind the back of the respondent, who, until the appeal comes on for hearing before the Division Bench, has no opportunity of resisting the admission of the appeal, which it must be admitted he has every interest to do. Nor without express legal enactment to the contrary can a respondent be deprived of the right to plead any matter, whether preliminary or otherwise, which is relevant and germane to not only the merits of the appeal but to the hearing of it. Other preliminary objections, which may be competently considered on the application for admission and not in my opinion more entertainable than that in the present case, are constantly heard and disposed of on appeal; such as, for instance, on the ground of insufficiency of stamps, want of jurisdiction, and the like, and there seems to be no reason, on principle or by analogy, why a respondent should be less favorably situated as regards an objection of the nature in question.

My answer therefore is that, in my opinion, my order of the 4th December last may be impugned and set aside at the hearing of the appeal by the Bench before whom it is brought for hearing, on the grounds that the reasons assigned for admitting it are erroneous or inadequate.

PEARSON, J.—In answering the question referred to the Full Bench, it seems to me that a distinction must be made between an order admitting an appeal after time, after the other party to the case has had an opportunity of urging any objections he may have to make to its admission, and an order admitting an appeal after time merely on the strength of the explanation given or evidence adduced by the appellant himself of the cause of his delay in preferring the appeal.

In my opinion an order of the first kind passed by a single Judge cannot be impugned or set aside at the hearing of the appeal by the Bench before whom it comes to be heard. For although [38] under the rule of practice of the High Court, an appeal may be admitted by a single Judge and afterwards be heard by a Bench of which that Judge may or may not be a member, the Court which admits the appeal is not one Court, and the Court which hears the appeal another distinct Court, but both Courts are one and the same High Court; and the Bench cannot be held to have any power to review or interfere with the single Judge's decision between the parties on the point, whether sufficient cause was shown by the appellant for not presenting the appeal within the prescribed period.

On the other hand, an order of the second kind passed by a single Judge, inasmuch as it cannot bind the party who was not invited or allowed to show cause why it should not be passed, is, I conceive, on the ground of equity, liable to be impugned and set aside when the appeal is heard by the Bench before which it is brought, under illustrations (*b*), S. 4, Act IX of 1871.

TURNER, J.—It is the practice of the Court to delegate to a Division Bench composed of a single Judge its functions of admitting appeals. The Bench so constituted enjoys the full powers of the Court, and can

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determine when an appeal shall be admitted or rejected. It is incumbent on the Bench so appointed to consider (*inter alia*) whether the application is presented within due time, or if presented after time whether sufficient cause is shown for the delay. On these points the Bench composed of a single Judge ordinarily decides *ex parte*. At the presentation of a plaint, it is incumbent on the Court to see that the suit is within time and to pass an *ex parte* decision on this point before bringing it on the register, yet it, nevertheless, permits the defendant when he appears to answer the suit to plead limitation. In like manner, I am of opinion that the Bench which hears an appeal ought to entertain and dispose of the respondent's objection that the appeal has been admitted after the time allowed by law, and that no sufficient cause was shown for the delay in presenting the application, notwithstanding the Court admitting the appeal may have held *ex parte* that sufficient cause for the delay has been shown.

That the Court may, nay must (except in the cases excepted), notwithstanding the admission of the appeal, dismiss it if it be shown to have been presented beyond time, is shown by the language of **[39]** the Limitation Act. The Court has therefore the power of dismissing an appeal at the hearing for a reason which would have justified it in refusing to admit the appeal, and I cannot see anything in the Procedure Code nor in the Limitation Act which prohibits us from adopting the same practice in respect of the plea of limitation when pleaded to the admission of the appeal, as we have followed without objection in respect of the plea of limitation in bar of suit. We are bound to afford to a respondent the same opportunity of urging the one plea as to a defendant of urging the other; and we should take the ruling of the Bench admitting the appeal in the absence of the respondent as a decision subject to re-consideration on the appearance of the respondent, in the same manner as we in practice hold the admission of a suit on the register to be a decision subject to re-consideration on the appearance of the defendant. The term "if the Court be satisfied, &c.," in S. 5, paragraph *b*., applies in my judgment not only to the Ccurt exercising its function in admitting the appeal but to the Court exercising its function in deciding the appeal. I would therefore reply that the Court hearing the appeal can and should dispose of the plea urged by the respondent.

SPANKIE, J.—During the argument several decisions of the Calcutta Court were cited, and amongst them, the ruling of a majority of the Court as delivered by Sir Barnes Peacock (1), to the effect that an appellate Court, after admitting and registering an appeal and serving notice on the opposite party, has no power, at the hearing, to reject the appeal, upon the ground that it was not preferred within the prescribed period.

When the Bill for the limitation of suits was introduced into the Legislative Council on the 2nd December 1870, it was stated by Mr. Fitz-James Stephen that S. 5 "provides for the case where a period of limitation expires when the Court is closed, empowers the Court in proper cases to admit an appeal or an application for review after the period applicable thereto, **[40]** and declares, in accordance with a decision of Sir B. Peacock, that an appeal once admitted shall not be dismissed as late." The Bill as passed, Act IX of 1871, contains no such provision as that contained in cl. (*c*), S. 5 of the proposed Bill. S. 4 and S. 5 and cls. (*a*) and (*b*) remain as they were in the proposed Bill. It appears therefore that the Legislature in passing the Bill, as amended, no longer intended to declare that an appeal once admitted shall not be dismissed on the ground that it was not presented within the prescribed period.

(1) 8 W. R., C. R. 141.

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S. 4 of the law as it is (Act IX of 1871) provides that—"subject to the provisions contained in Ss. 5 to 26 (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." The provisions of S. 5, in so far as they affect the question before us, are as follows:—Clause (*b*)—" Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period." It is the appellant who is to satisfy the Court. No procedure is laid down for calling upon the party, who would become respondent if the appeal was admitted, to show cause why it should not be admitted. It is enough if the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within the prescribed period. This is the only point upon which satisfaction is required. The Court admitting the appeal has to satisfy itself whether there is sufficient ground for admitting and registering the appeal, in order that it may be heard and determined. Until this has been done, no notice can issue under the law to respondent.

Under authority conferred by S. 13 of the High Courts Act of Parliament, this Court has made a rule by which a single Judge may receive and admit appeals. But any rule made by the Court is subject to the Laws and Regulations which may be made by the Governor-General in Council. By S. 23, Act XXIII of 1861, a regular appeal shall be *heard* and *determined* by a Court [41] of two or more Judges. This section amends S. 332 of Act VIII of 1859, and it clearly refers to the number of Judges who are to *hear* and *determine* the appeal. It does not touch the question of admission; another section provides for the presentation of the memorandum of appeal. Appeals are to be preferred to the appellate Court and may be admitted or rejected, and if admitted they must be registered either by the Court or one of its officers; after which follows the procedure by which they may be eventually heard and determined. A single Judge of the Court, so far, under the rules of the Court, appears to be competent to admit an appeal, though after time, if the person who presents it satisfies him that he had sufficient cause for not presenting the appeal within the prescribed period. But when the respondent, in obedience to notice, after registration, appears to answer the appeal (the case being then before the two Judges who must, by law, hear or determine it), and finds for the first time that the memorandum of appeal should have been presented at an earlier date and that it is barred by S. 4 of Act IX of 1871, he of course takes a preliminary objection to this effect, not so much against the admission as against the hearing and determination of the appeal. When he finds that the appeal should not have been admitted at all, an objection of this nature is the best answer that he can make to it, and one that he is entitled to make, for he was no party to the admission. The order admitting the appeal was not passed in his presence or by the Bench before which he is to answer the appeal. There is nothing in the law which connects him with the appeal until he is called upon to answer it, and the Court which is to try the appeal is bound to dispose of his objections to its being heard at all.

It has been said that the Court cannot reject the appeal at the hearing, because, according to S. 350 of Act VIII of 1859, the judgment must be for confirming or reversing or modifying the decree of the lower Court, and therefore there is no authority for rejection. This was the

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view taken by Sir Barnes Peacock in the case referred to above, which led to the enactment of S. 4, Act IX of 1871. S. 4, subject to the provisions of S. 5, provides that an appeal presented after time shall be dismissed, although limitation has not been set up as a defence. The illustrations of this section are as follows:—"(*a*)—A suit is instituted after the prescribed [42] period of limitation. Limitation is not set up as a defence and judgment is given for the plaintiff. The defendant appeals. The appellate Court must dismiss the suit (*b*).—An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed."

In the first illustration, though the defendant does not plead limitation and a decree is passed against him, yet if he appeals, the moment the Court hearing and determining the appeal finds that the suit was barred by limitation, it must dismiss the suit. It must, as a Court, obey the provisions of S. 4, which are imperative. The appeal, though it has been admitted and registered, though on the hearing no objection as to limitation has been taken by respondent, yet if the Court finds that it was admitted too late, must be *dismissed*. The Court does not reject the appeal but dismisses it, thus practically affirming the decree of the Court below. The appellate Court then must dismiss the appeal. That is, the two Judges who sit to hear and determine the appeal must dismiss it, even though a single Judge has admitted and registered it. It is not therefore the appellate Court hearing and determining the appeal that necessarily admits it, nor is it bound by the admission and registration permitted by another Judge.

It is contended that S. 4, being subject to the provisions of S. 5, if the Court admits the appeal and has satisfied itself that the appellant had sufficient cause for not presenting the appeal within time, the admission under such circumstances cannot be questioned. But to this I would reply that the Court receiving the memorandum of appeal has only to satisfy itself on the showing of the person who presents it that the case is one that may be admitted for registry. The Judge admitting the appeal is not required to go beyond this. Cl. (*b*) does not say that when the Court has satisfied itself, it *shall* admit the appeal. Admitted it *may* be, but if when it comes on for hearing the Court sitting to hear and determine the appeal finds, either of its own motion or on the representation of the respondent, that it was admitted after time without sufficient excuse, it is bound under the provisions of S. 4 of the Act to dismiss the appeal. If, on the other hand, the excuse is found to be sufficient, the provisions of S. 5 are fully complied with.

The appeal proceeds and is heard and determined.

[43] Holding this view of the case, I would reply that the Judges at the hearing of the appeal are at liberty to question its admission by a single Judge.

OLDFIELD, J.—S. 5, Act IX of 1871, gives the Court a discretion to admit an appeal after expiration of the period of limitation prescribed for it, when the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within such period. The Judge of this Court sitting for receiving applications and admitting appeals exercises a discretion under this section, but subject to the provisions of S. 4.

Illustration (*b*) of S. 4, which applies generally to appeals after they have been admitted and registered, is to this effect:—"An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed." This is a general direction for the dismissal

of appeals under certain circumstances, notwithstanding their previous admission and without reference to the authority admitting them, and will, in my opinion, apply to appeals admitted by a Judge of the Court under the discretion given him by S. 5, and this power of subsequent dismissal, I apprehend, is intended to be exercised by the Court sitting for the hearing of the appeal, and that Court having both parties before it (which the Judge admitting the appeal had not), is bound to determine whether the appeal should not be dismissed, sufficient cause not being shown why it should be entertained after the period prescribed by limitation.

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FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

1875 AUG. 22. — FULL BENCH.

PARAMESHAR RAI (*Defendant*) *v.* BISHESWAR SINGH (*Plaintiff*).

[22nd August 1875.]

1 A. 53.

1 A. 53.

Hindu Law—Missing person—Presumption of death—Evidence Act, I of 1872, S. 108—Act VI of 1871, S. 24.

It is only when the devolution or succession to the property of a missing Hindu (or Mahomedan) is in question, that the Hindu and Mahomedan Law of presumptions as to the death of a missing person may have to be applied with reference to S. 24, Act VI of 1871. But, when a suit is by a reversioner for a declaration or for the avoidance of an alienation of property in the possession of the present heir, the provisions of S. 108 of Act I of 1872 will apply.

[F., 11 B. 433; **R.**, 8 A. 614; **D.**, 2 A. 625.]

ORDER OF REFERENCE TO THE FULL BENCH.

[54] The Court (STUART, C.J., AND SPANKIE, J.,) referred the following question to the Full Bench:—

"Is the question whether a man be alive or dead one simply of evidence, not necessarily forming a portion of the Hindu and Muhammadan law of succession and inheritance, inasmuch as the order of succession, devolution of property, are not really affected by its determination, and therefore its determination should follow the rules of evidence in Act I of 1872; or is it a question which can only be answered in accordance with the presumption allowed to be drawn by the Hindu and Muhammadan law of succession and inheritance, and therefore so much a portion of these laws, that the Courts are bound to follow the provisions of S. 24, Act VI of 1871, in dealing with it?"

The reference was accompanied with the following remarks:—

S. 107 of the Evidence Act provides that, when the question is whether a man is alive or dead and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. S. 108, as amended by S. 9, Act XVIII of 1872, is as follows:—

"Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who

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would naturally have [55] heard of him if he had been alive, the burden of proving that he is alive is shifted on the person who affirms it."

The mortgagor defendant, especially, and the other defendants, equally with plaintiffs, are those who would have naturally heard of Janki Rai had he been alive, and the defendants are the persons who affirm that he is alive. The onus therefore has been laid on the right party. One thing is quite certain, that the question whether Janki Rai is alive or dead is the question which must be answered prior to the determination of the suit on its merits. When the question is whether a man is alive or dead, what is the effect of these two sections? Do they establish one uniform rule in all cases, or are the Courts bound to follow what has been held to be the Hindu and Muhammadan law on the point?

In the first report on the draft Bill the Committee remarks :—"We have, however, admitted one or two such presumptions to a place in the Code, as in the absence of an express rule the Judges might feel embarrassed. These are the presumptions of death from seven years' disappearance and the presumption of partnership."

The *Senior Government Pleader* (Lala *Juala Parshad*) and Munshi *Hanuman Parshad* for the appellants.

Lala *Lalta Parshad* for the respondents.

OPINIONS OF THE FULL BENCH.

The following opinions were delivered :—

TURNER, OFFG. C. J., and PEARSON, J.—The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance. Were they claiming it, inasmuch as Janki Rai has been missing for only 8 or 9 years, their claim might be inadmissible under Hindu law. But they are claiming nothing belonging to him. He is the next heir or reversioner to one Salig Rai, deceased, whose estate is retained during her lifetime by his widow Musammat Ablaki; and this suit is brought by the plaintiffs, as next reversioners after the aforesaid Janki Rai, in consequence of his absence, for the avoidance of a deed of mortgage executed by Mussammat Ablaki to the detriment of their reversionary rights. Under the circumstances, there seems to be no reason why the provisions of S. 108 of the Evidence Act should not be applicable. The death of Janki Rai may be [56] presumed for the purposes of this suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the law of succession prescribed when a person is missing and not dead.

SPANKIE, J.—It appears to me that the question whether a man be alive or dead is one simply of evidence, and has no immediate connection with the devolution of property under the Hindu or Muhammadan law, and its determination should follow the rules of evidence in Act I of 1872. When a person is claiming the estate of a missing person, he could not do so, if a Hindu, until after the expiration of 12 years from the date of that person's forsaking his family, and being lost sight of, or if a Muhammadan, until 90 years had passed from the date of the missing person's birth. The period at which the estate of a missing person may be claimed under the Hindu or Muhammadan law seems to be unaffected by the sections of the new Act referred to.

OLDFIELD, J.—Under Hindu law the property of a missing person will not vest in the next heir until the expiry of at least 12 years from the date that the missing person forsook the family, supposing that during

the interval no intelligence of him has been received: and if the present case were one in which the plaintiff sues to succeed to the property of a missing person, it may be that we should apply the Hindu law as to the presumption of death, with reference to S. 24, Act VI of 1871.

But the case before us is not of this character, and there is no question in respect of the devolution of property of a missing person. The plaintiff sues to protect property in the hands of a widow from alleged illegal alienations made by her, and ordinarily the next heir should sue, but in this case the missing person is the next heir, and plaintiff asks to be allowed to sue, and on the ground that the next heir is missing and presumably dead. The decision will determine no right of inheritance or succession, so as to make Hindu law necessarily applicable, and in such a case, the general rules of evidence under the Evidence Act as to the presumption of death and consequent burden and proof may, in my opinion, properly apply to this case.

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PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield.

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QUEEN v. NAIADA. [23rd August 1875.]

1 A. 43.

1 A. 43.

Penal Code, Ss. 59, 377—Transportation in lieu of imprisonment, term of.

When an offence is punishable, either with transportation for life or imprisonment which may extend to ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment.

The accused was convicted of an offence under S. 377, I.P.C. In consideration of the offender's youth the Sessions Judge passed a sentence on him of 14 years' imprisonment in transportation, instead of transportation for life. OLDFIELD, J., doubting the legality of the sentence referred the question to the Full Bench with the following remarks:—

ORDER OF REFERENCE.

[44] OLDFIELD, J.—There is some doubt whether a sentence of ten years' transportation is not the maximum which can be passed for the offence. The punishment for the offence is transportation for life or imprisonment of either description for a term which may extend to ten years. The Code does not specifically provide transportation for any term shorter than life. S. 59, however, provides that "in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment." It may be said that this section refers to offences where imprisonment is the sole punishment, and that the words "transportation for life," where

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they occur as denoting a punishment, will include transportation for a term of years. But, on the other hand, the terms of S. 59 seem to refer to all cases, whether transportation for life be an alternative punishment or not, for the words of the section are "in *every* case in which an offender is *punishable* with imprisonment, *etc.*," and the words "transportation for life," as used in S 377, seem not to allow the option of transporting for a shorter term, for had that been the intention, the words would have run "shall be punished with transportation for a term which may extend for life," just as in the latter part of the section the words are "or with imprisonment of either description for a term which may extend to ten years."

I would draw attention to the note to S. 59 in Mayne's Commentary on the Penal Code, and the remarks at page 34 in Morgan and Macpherson's Penal Code.

[45] The question is of some importance, now that the Government of India, by its resolution dated the 17th of November 1874, has rescinded the orders by which only life convicts were to be transported to the Andamans, and the Courts are likely to exercise more frequently their powers of sentencing to transportation for a term of years.

OPINION OF THE FULL BENCH.

When the Indian Penal Code was originally drawn, it was in the contemplation of the framers of the measure that no sentence of transportation should be passed for a less period than life, and the Bill was so prepared. When the Bill was before the Council, S. 59 was introduced, which enacts that in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, the Court may, in lieu of awarding a sentence of imprisonment, sentence the offender to transportation, for a term no less than seven years, and not exceeding the term for which by the Code such offender is liable to imprisonment. No alteration appears to have been made in the language of the several sections which prescribed transportation as a punishment. Thus, in the majority of instances, the words used are as follows:—"shall be punished "with transportation for life or with imprisonment which *may* extend, &c." While the Court has an option in determining the duration of the term of imprisonment, it has no option in determining the duration of the term of transportation. By S. 302 an offender convicted of murder shall be punished with death or transportation for life. By S. 307 an offender convicted of an attempt to murder shall, if hurt be caused, be *liable* to transportation for life, or to imprisonment for a term which may extend to ten years. By S. 389 an offender convicted of extortion under certain circumstances *may* be punished with transportation for life. By S. 75, on a second conviction of certain offences, an offender "shall be subject to transportation for life or to double the amount of punishment for which he would otherwise be liable." In no section of the Code which prescribes transportation as a punishment, with the exception of S. 59, is the language used such as to leave the Court any option regarding the duration of the term. It follows that a sentence of transportation for a period less **[46]** than life can only be passed under the provisions of S. 59, and consequently that when an offence is punishable, either with transportation for life or imprisonment which may extend to ten years, if a sentence of transportation for a term not less than life is awarded the term cannot exceed ten years.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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MUSSAMMAT GANGA JATI *(Defendant)* *v.* GHASITA *(Plaintiff).*

[23rd August 1875.]

1 A. 46.

Hindu Law—Inheritance—Woman's property—Unchastity.

A woman is not debarred by unchastity from inheriting *Stridhan.*

[F. 4 N.L.R. 31, 30 C. 521, 31 M. 100=18 M.L.J. 70=2 M.L.T. 533; **R.** 4 B. 104, 4 C.W.N. 743, 29 A. 4=A.W.N. (1906), 243=3 A.L.J. 537; **D.**, 4 C. 550, 22 C. 347.**]**

REFERENCE TO THE FULL BENCH.

SPANKIE AND OLDFIELD, JJ., referred to a Full Bench the question whether a woman was incapacitated by reason of unchastity from inheriting *Stridhana.*

Pandit *Nand Lal* and Pandit *Ajudhia Nath* for appellant.

Lala *Lalta Parshad* for respondent.

OPINION OF THE FULL BENCH.

[47] TURNER, OFFG. C. J.—It appears to me immaterial whether the property in suit was or was not the *stridhan* of the grandmother. In either case, I am of opinion that the daughter is not deprived, by her unchastity, of her right of succession under the law administered by our Courts.

The objection to her succession is only based on the general rule embodied in the text of Narada cited in the Mitakshara (Ch. II, S. 10), and again in the Dayakrama Sangraha (Ch. III), and in Dayabhaga (Ch. V., S. 13), that a person addicted to vice does not **[48]** inherit. No doubt this rule is cited and treated as well established by the author of the Mitakshara, but for many years it has not been enforced in our Courts.

I was myself a party to a decision in which it was held that want of chastity in a mother does not defeat her right of inheritance, and the same rule which, it is contended, deprives a daughter of a right of succession, would also operate to deprive the mother of succession.

PEARSON, J.—The question which arises in this case is whether Mussammat Ganga Jati is precluded, on account of her unchastity, from keeping possession, by right of inheritance, of the estate left by her maternal grandmother. If we are to understand that she is leading a vicious life, she might appear to be so precluded by a strict and literal application of the Hindu law. Among those described as excluded from inheritance is "one who is addicted to vice." Mr. Colebrooke, however, says, in regard to the causes of disinheritance mentioned in the tenth section, Ch. II, of the Mitakshara, that, while he is not aware that any have been abrogated or become obsolete, he does not think that any of our Courts would go into proof of one of the brethren being addicted to vice, or profusion, or being guilty of neglect of obsequies and duty towards ancestors. Since this remark was recorded by Mr. Colebrooke more than half a century has elapsed, and it may perhaps be doubted whether such causes of disinheritance as those indicated by him have not become obsolete in practice.

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It is less probable now than it was then that our Courts would recognize any one of those causes as a sufficient ground for declaring any man incapable of inheriting property; and if this be so, one would hardly be justified in depriving the (defendant) respondent in this case of her maternal grandmother's estate.

As to the text which says that "a woman, who acts maliciously and is shameless, and a destroyer of property, and addicted to immorality, is unworthy of wealth," I have had occasion in another case to observe that it cannot, without violence, be construed to mean that she is to be deprived of property which has come into her possession: and there is reason to believe that the text refers only to property received by her from her husband.

[49] I am therefore disposed to answer in the negative the question which has been put to us as it arises in the case in appeal.

SPANKIE, J.—I agree entirely with this opinion.

OLDFIELD, J.—There is no passage to be found in the Mitakshara or other authority followed in the Benares school, debarring a woman living in unchastity from inheriting *stridhana*.

It is not expressed among the causes of exclusion from inheritance in Ch. II, S. 10, Mitakshara, and whether it would become so when accompanied by deprivation of caste is not the question before us.

There is a text of Narada cited in Mitakshara, Ch. II, S. 10, V. 3, to the effect that one who is addicted to vice takes no share of the inheritance, but the Courts would not give effect to a text of this nature, vague in itself and obsolete in practice.

The only other passages to be found in authorities recognized in the Benares school, from which such exclusion from inheritance can in any way be inferred, are certain passages in the Viramitrodaya of Mitra-Misra in the chapter treating of *stridhana* in West and Buhler's Digest of Hindu Law Cases, Bk. II, Appendix, S. 1, para 17. The author, after stating that, on a wife's supersession by her husband taking a second wife, he must restore to her the property she may have given him, and that she may exact maintenance, confines the operation of this rule to the case in which she is blameless, and remarks:—"A wicked wife receives no separate property whatever," and goes on to cite the text of Catyayana:—"A wife who acts unkindly towards her husband, who is shameless, who destroys his effects, and who takes delight in being faithless to his bed, is unworthy of separate property." But this passage refers to a particular kind of property, that which the wife has given to her husband for his use, or which she is entitled to receive from him on his taking another wife. The same passage from Catyayana is cited in the Smriti Chandrika, Ch. IX, S. 11, para 24, referring to the same description of *stridhana*. It cannot be inferred from such passages that a woman is excluded from inheriting *stridhana* from her female relations.

It was argued before us that the right of succession to *stridhana*, equally with the succession to other property, is inseparable from **[50]** the capacity to confer benefits on the ancestors, and that this capacity is lost by reason of unchastity. It may be that the right of succession to *stridhana* is intimately connected with such a principle by the law current in Bengal, as would appear from the Dayabhaga, Dayakrama Sangraha, Vyavastha Darpana, but it is also certain that, even by that law, the right of succession to this kind of property does not rest exclusively on such principle. This appears from the permitted succession of barren and widowed daughters, notwithstanding they confer no direct benefits through

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the medium of sons; and the note to ccccxcviii, Colebrooke's Digest, Vol. 2, page 612, gives the general opinion that the advantages afforded are not principally considered in treating of separate property held by women. Under the law of the Mitakshara this is still more the case, and throughout that work, and the commentators, no allusion is made to the principle of succession to *stridhana* resting on a capacity to benefit the ancestors by offering funeral oblations. In Macnaghten's Hindu Law it is stated that "this description of property is not governed by the ordinary rules of inheritance: it is peculiar and distinct, and the succession to it varies according to circumstances." In fact, a woman succeeds to *stridhana* rather by reason of consanguinity and in order to afford her some provision. This is shown to be so from the fact that those persons who are worst provided for, or least capable of providing for themselves, are the first in the order of heirs. The argument must, therefore, I think, be dismissed which rests the exclusion from inheritance on the incapacity to confer benefits on the deceased. Nor does the fact that the unchaste widow is excluded from inheriting her husband's separate estate afford any argument in the case before us, as the widow's exclusion rests on express texts and with reference to grounds inapplicable to the case of a woman's succession to the *stridhana* of her female relations; and the same may be said of the rule which imposes chastity as a condition on the claim of dependent female members of a family to be supported from the estate in the hands of the male members.

No decided cases on the point have been brought to our notice. There is only the case in Vol. 2, Macnaghten's Hindu Law, p. 132, where, in answer to the question,—Can a daughter who lives in a **[51]** state of prostitution take her parent's property by right of inheritance, the reply is given,—"a daughter who has given herself up to prostitution, or one who is unchaste, is wholly incompetent to inherit the property left by her parents." But it is not clear if this refers to *stridhana*, or if the exclusion is by reason of unchastity entailing loss of caste.

In the absence of any express law, or of any custom handed down or supported by a course of decisions of the Courts, the answer to the reference should, I apprehend, be that unchastity will not disqualify a woman from inheriting the *stridhana* of her female relations.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield.

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BALDEO DAS (*Plaintiff*) *v.* SHAM LAL (*Defendant*).

[26th August 1875.]

1 A. 77.

APPELLATE CIVIL.

A. 77.

Hindu Law—Undivided family—Rights of father and son.

In an undivided Hindu family, the sons acquire by birth an interest in the paternal as well as in the ancestral estate, and are entitled, in certain events, to interfere to prevent waste, or to enforce partition, in the lifetime and without the consent of the father; but while their interest is proprietary, they have no dominion over the property.

[R. 4 C. 723, A.W.N. (1892) 35, 23 P.R. 1902, 135 P.L.R. 1902, 33 C. 1119=10 C.W.N. 765=3 C.L.J. 616.]

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APPELLATE CIVIL.

1 A. 77.

In a suit by a Hindu father to eject his son from a portion of a house taken possession of by him on its being vacated by a tenant, the first Court found that a portion was ancestral property, and a portion acquired by purchase by the father from his brother, and decreed the claim. The suit was dismissed by the Lower Appellate Court. The plaintiff appealed to the High Court.

Munshi *Hanuman Parshad*, Babu *Oprokash Chunder*, and Mir *Zahur Hosain* for the appellant.

Pandit *Ajudhia Nath* and Pundit *Bishambhar Nath* for the respondent.

JUDGMENT.

[78] OLDFIELD, J :—

The decree of the Court of first instance should, in my opinion, be restored.

A son, no doubt, takes by birth a vested interest in immoveable ancestral property, and there is authority for considering that his interest in the father's lifetime, and before partition, is a present interest of a proprietary and co-parcenary nature—(Mitakshara, Ch. I, S. 1 and S. 5) ; and the power to enforce partition of the ancestral estate implies such an interest, looking to the definition of partition given in Mitakshara, Ch. I, S. 1, para. 4, and Ch. I, S. 1, para. 23. But even assuming such ownership on the part of the son, yet until partition takes place, or until the death of the father, natural or civil, the father, by reason of his paternal relation, and his position as head of the family, and its manager, is entitled to make lawful disposition of the property in the interest of the family. This is shown by Ch. I, S. 5, paras. 9 and 10, Mitakshara, which, by marking the extent of the son's power of interference in the father's disposition of the property, shows that the power of disposition within certain limits is centred in the father. The son's enjoyment of the property is subject to the dispositions lawfully made by the father, and, if dissatisfied, the son's remedy will lie in any right he may possess to enforce partition of the estate.

In this case there has been no illegal disposition of the property on the part of the father. It appears that the defendant objects to live with his mother-in-law, and insists on occupying part of a house [79] which used to be rented, and which his father desires to dispose of in the way he considers most advisable.

I would decree the appeal and decree the claim, but, looking to the relationship subsisting between the parties, they should bear their own costs in all Courts.

TURNER, OFFG. C. J.—I concur in decreeing the appeal. Sons who are members of an undivided Hindu family acquire by birth an interest in the paternal as well as the ancestral estate, and are entitled in certain events to interfere to prevent waste or to enforce partition in the lifetime and without the consent of their father ; but, while their interest is proprietary, it lacks the incident of dominion. "They have not independent dominion, although they have a proprietary right."—Colebrooke's Digest of Hindu Law, Bk. V. Ch. VII, 433, Vol. II, p. 552, 3d ed.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield.

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APPELLATE CIVIL.

1 A. 79.

SHUGAN CHAND (*Defendant*) *v.* THE GOVERNMENT, NORTH-WESTERN PROVINCES (*Plaintiff*). [26th August 1875.]

1 A. 79.

Person to whom money is paid by mistake, liability of—S. 72, Contract Act (IX of 1872).

1. Money paid under a mistake induced by the fraud, though of a third party, may be recovered, provided there has been no laches and no neglect of the usual precautions on the part of the plaintiff.

2. In such a case, neither the payment over to the fraudulent third party, nor the circumstance that the third party was also a servant of the plaintiff and obtained facilities for the commission of the fraud, in his course of his employment, affords a valid defence.

FACTS OF THE CASE.

Suit on behalf of the Government N.W.P. to recover a certain amount paid by the plaintiff to the defendant by mistake on his presenting to the officer in charge of the Civil treasury in Dehra Dun, by the hand of his agent Manohar Misr, a forged certificate of requisition for an advance to the 1st. division Bhawalpur Revenue Survey which certificate was duly authenticated by the signature of the defendant. The letter which accompanied the requisition purported to be addressed by Mr. Johnson, an officer of the survey, to the Treasury Officer, and requested him to pay the amount entered in the requisition to the bearer.

The author of the forged certificate and letter was one Kana Ram, clerk under the said Mr. Johnson. The Court of First Instance, finding that the money was paid under a mistake of fact decreed the claim. The defendant on appeal contended :

(i) that S. 72, Act IX of 1872 was not applicable to the circumstances of the case ;

(ii) that the finding of the first Court that the Treasury Officer supposed that the defendant's servant was the bearer of the letter from Mr. Johnson was unsupported by evidence ;

(iii) that the Treasury Officer and his subordinates did not exercise due care in the payment of the money to defendant's servant and it was quite inequitable to make the defendant liable for their carelessness ;

(iv) that the defendant having paid over the money, in the ordinary course of business, to the persons for whom it was realised from the Treasury, was not liable in equity for its payment to the plaintiff ; and

(v) that as the defendant paid the money to Kana Ram, a public servant, in good faith, it was not equitable to hold him responsible tor the misappropriation of a public servant.

Mr. *Conlan*, Pandit *Bishambhar Nath*, and Munshi *Hanuman Parshad* for the appellant.

The *Senior Government Pleader* (Lala *Juala Parshad*) for the respondent.

JUDGMENT.

[81] It appears to us that the pleas taken in appeal fail. The money was paid under a mistake, and, therefore, the provisions of the 72nd section apply. The Treasury Officer would certainly not have paid the money

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unless he had believed the requisition was duly signed and countersigned, and the signatures which he believed to be genuine are admitted to be false. He, therefore, paid the money under a mistake of fact. It is immaterial whether he believed the bearer of the requisition to be the messenger sent by Mr. Johnson or by the appellant; and, indeed, the circumstance that the messenger was the servant of a respectable native banker would have been calculated to disarm rather than excite suspicion. Looking to the course of business, we cannot find any ground for the contention that the Treasury Officer neglected any precaution he could reasonably have been expected to take, nor that he was in any way guilty of carelessness. The Officer was imposed on by a gross fraud, and paid the money to the appellant, who was the innocent agent of the [82] person who contrived the fraud. The appellant is, under the circumstances, bound to repay the moneys received by him, and he cannot defend himself by the plea that he has paid the money to his principal.—*Tugman* v. *Hopkins* (1); nor can we allow that the circumstance that the principal was himself a servant of the respondent, and in the course of his employment obtained facilities for committing the fraud, relieves the appellant from his liability. If the form of the requisition was purloined, it was taken without the consent of the respondent, and it is not shown that the Officers of the department in any way facilitated the theft by the omission of any reasonable precautions. The appeal fails, and is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield.

1875 AUG. 26. APPELLATE CIVIL. 1 A. 82.

UDA BEGAM (*Plaintiff*) *v.* INAM-UD-DIN (*Defendant*).

[26th August 1875.]

1. *Estoppels* in pais *or equitable estoppels.*

The equitable doctrine of laches and acquiescence is applicable to suits, for which a period of limitation is prescribed by the Limitation Act. (2 M.H.C.R. 114 *Disapp.*, 2 M.H.C.R. 270 *App.* with *qualifications.*)

2. *Acquiescence—What constitutes.*

Mere delay does not constitute acquiescence. There must be, on the one side, conduct or language inducing a reasonable belief that a right is foregone, and on the other, good faith and ignorance of facts.

[1 & 2—**R.**—27 B. 515 (532), 33 C. 1119=10 C.W.N. 765=3 C.L.J. 616; A.W.N. (1908), 282, 6 A.L.J. 57; **2 F.** 9 A. 661 (663). **R.** 6 A.W.N. 123, 4 C.L.J. 198 (206); 9 A. 434 (438), 14 A. 362 (364). **D.** 16 A. 328 (332).]

FACTS OF THE CASE.

The plaintiff in this suit was the Zemindar and a pardanashin, residing at a place two miles distant from the site in question. She had her affairs managed by her son. The defendants took possession of, and erected buildings on, that site, which they knew belonged to the plaintiff and they had no claim to, without applying to the plaintiff for consent. The plaintiff abstained from suing to eject them for one or two years,

(1) 4 M. & G. 389; 5 Scott, N.R. 464.

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1 A. 82.

knowing that the defendants were building on the land in dispute. The Court of first instance *held* that the plaintiff had, by acquiescence, lost her right to the relief she claimed, and must fall back on an action for damages, and consequently dismissed the claim. The lower appellate Court affirmed the decree of the first Court, relying on the rulings of the late Sudder Court in *Powell* v. *Guffoor Khan* (1) and *Ram Jewan* v. *Sah Koondun Lall* (2). The plaintiff appealed to the High Court.

The *Senior Government Pleader* (Lala *Juala Parshad*) and Munshi *Hanuman Parshad* for the appellant.

Pandit *Bishambar Nath* and Mir *Zahur Husain* for the respondents.

JUDGMENT.

[84] In special appeal it has not been objected that the circumstances from which the appellant's knowledge is inferred were insufficient to warrant that inference, and, therefore, we need not consider this point; the case has been argued on the hypothesis that the erection of the building commenced with the appellant's knowledge a year or two before the institution of this suit. The pleas recorded in the memorandum of special appeal are inaccurately drawn, but the contention of the appellant at the hearing was that her consent ought not to be inferred merely from her inaction, and that, inasmuch as she has brought her claim into Court within the term allowed by law for the institution of such claims, she is entitled to a decree. The rulings of the Sudder Court as to the effect of delay in the assertion of a right have been considerably modified or explained by more recent decisions of this Court, which have, however, we believe, escaped the observation of the reporter. We propose, therefore, in disposing of this case, to examine at somewhat greater length than **[85]** we should have otherwise thought it necessary to do, the principle on which the rule of estoppel *in pais* appears to rest, and the circumstances to which it should be applied. This rule has been stated generally in the following terms:—"If a man by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induced others to do that from which they might otherwise have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given credit to his words, or to the fair inference to be drawn from his conduct." And again:—"if a party has an interest to prevent an act being done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous license."—*Cairncross* v. *Lorimer* (3).

Mr. Justice Story points out the principle on which the rule rests, and it is most important that the principle should be borne in mind in applying the rule:—

"This doctrine of estoppels *in pais*, or equitable estoppels, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. As if both parties were equally conusant of the facts and the declaration, or silence, of the one party produced no change in the conduct of the other, he acting solely on his own judgment. There must be deception, and change of conduct

(1) S.D.A.R.N.W.P., 2nd July, 1864.
(2) S.D.A.R.N.W.P., 29th Jan. 1864.
(3) 3 Macq. H. L. Cas. 829; 7 Jur. N. S. 149.

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in consequence, to estop the party from showing the truth."—(Story's Equity Jurisprudence, Vol. II, S. 1543). Of course by fraud the author must be understood to mean whatever amounts in law to fraud.

In *Ramsden* v. *Dyson* (1) Lord Chancellor Cranworth and Lord Wensleydale declared that if a stranger builds on the land of another supposing it to be his own, and the owner does not interfere, but leaves him to go on, equity considers it dishonest in the owner to remain passive and afterwards to interfere and take the profit. But [86] if a stranger builds on the land of another knowingly, there is no principle of equity which prevents the owner from insisting on having back his land, with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that, if a tenant does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

These dicta of the highest authority illustrate the application of the general rule. There must be something more than a mere delay in instituting proceedings to deprive a man of his legal remedies. We are not, indeed, prepared to adopt without qualification an opinion thrown out by the High Court of Madras, "that the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil for which a period of limitation is provided by the Limitation Act."—*Rama Rau* v. *Raja Rau* (2).

The rule as expounded by the authorities we have quoted is obviously founded on a highly equitable principle, and we see no reason why on fitting occasions it should not be applied in this country. No doubt a distinction must be made between those cases in which a suitor seeks some relief which, if he proves his case, the Court is bound to grant him, and the cases in which he seeks relief which the Court has discretion to grant or refuse. When a suitor has a right to demand relief, no doubt a stronger case must be made out against him than such mere tardiness in seeking a remedy which might justify a Court in refusing relief when it has a discretion to grant or refuse it. With this qualification we assent to the dictum of the Madras High Court in a case decided subsequently to *Rama Rau* v. *Raja Rau* (2) to the effect that "on the whole, it may be taken as the law both of Courts of law and equity that mere laches, short of the period prescribed by the statute of limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiffs at the period of suit."—*Peddamuthulaty* v. *N. Timma Reddy* (3); but where there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead acquiescence, and the plea if sufficiently proved ought to be held a good answer to [87] an action, although the plaintiff may have brought suit within the period prescribed by the law of limitation. In the case before us it has been found that the appellant, knowing that the respondent was building on her land, abstained from commencing proceedings for one or two years. The respondents have set up a title to the land which has been held to be manifestly false. They must have known they had no claim to it, and they could hardly have doubted it belonged to the zamindar. Had they thought it probable the zamindar would consent to their usurpation, they might have assured themselves on the point by applying to her before they expended a rupee on the land. Under the circumstances,

(1) L. R. 1 H. L. 129; 21 Jur. N. S. 506; 14 W. R. 926.
(2) 2 Mad. H.C.R. at p. 116.
(3) 2 Mad. H.C.R. at p. 273.

we cannot hold that the delay in the institution of the suit is sufficient to deprive the appellant of her right to relief.

The appeal is decreed with costs, and so much of the decree of the Courts below as dismissed the claim to the plot in question in this appeal are reversed, and the claim is decreed.

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1 A. 82.

FULL BENCH.

PRESENT :

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

HAMIR SINGH (*Defendant*) *v.* MUSAMMAT ZAKIA (*Plaintiff*).

[27th August 1875.]

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1 A. 57.

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Mahomedan Law—Minor—Guardianship—Duty to discharge debts.

When decrees were obtained by the creditors of a deceased Mahomedan against his two widows, and a sale deed of the deceased's properties was executed by the two widows, for themselves and for a minor daughter of their co-widow, in the assumed character of her guardians, *held*, in a suit by the minor for her share of the inheritance, that if she was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, that it would seem she cannot be bound by the decrees nor by the sale subsequently effected, that she was entitled to recover her share, but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected.

[**F.** A.W.N. (1881) 16; **Ap.** 7 A. 822 (**F.B.**) = A.W.N. (1885) 248 and 11 C. 421. **R.** 1 A. 533, 4 A. 361, 9 A. 340, 20 B. 199 and 26 M. 734. **D.** 5 O.C. 201, 26 A. 22 and 9 O.C. 97.]

FACTS OF THE CASE.

Suit to obtain possession, by right of inheritance, of a share in certain property forming portion of the real estate of the plaintiff's deceased father. Two of his widows sold it to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of themselves, and as guardian of the plaintiff, who was then a minor. The deceased left considerable personal property as well as real. The plaintiff was not the daughter of either of the said widows, but of a third widow of the deceased. At the time of sale, she lived with her mother, but was supported by one of the two widows who executed the sale-deed. At that time she had no legal guardian, nor was she a party to the suits brought by the creditors; nor was she properly represented in those suits. The Court of first instance held that the sale was invalid. The lower appellate Court concurred. The vendees appealed to the High Court.

REFERENCE TO THE FULL BENCH.

TURNER and OLDFIELD, JJ., in reference to the doctrines of Muhammadan law expounded in Bk. XX., Ch. 4 of the Hedaya, referred to the Full Bench the following question :—

"Whether, under the circumstances found by the Courts below, the sale by the widows in possession, against whom decrees had passed as

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Babu *Oprokash Chandar*, for the appellants.

Munshi *Hanuman Parshad* for the respondent.

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OPINION OF THE FULL BENCH.

1 A. 57. [58] TURNER, OFFG. C.J., and SPANKIE and OLDFIELD, JJ., concurred in the following opinion:—

Under the Muhammadan law, the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. The discharge of debts is a matter of necessity, the right of the heirs is connected with the [59] estate on the sole condition of its being free from incumbrance, whence it is that the discharge of the funeral expenses precedes the right of the heirs, as that is also a matter of necessity—Hedaya, Bk. XXV. Nevertheless, the circumstance of a small debt attaching to the estate of a deceased person does not prevent the heirs from inheriting, whereas if the estate were completely involved in debt they would be prevented—Hedaya, Bk. XXVI. While then the heirs might lawfully take possession of an estate not completely involved in debt, the creditors have the right to sue such of the heirs as have taken the estate: "but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir;" and the reason given is—"that although any one of them (the heirs) may act as plaintiff in a cause on behalf of the others, yet he cannot act as defendant on their behalf unless *the whole of the effects are in his possession.*"

There is, however, still another provision of the Muhammadan law, that if the creditor desires to realize his debt out of the *akar*, or immoveable property, of the deceased, he cannot obtain a decree to the prejudice of heirs who are not parties to the suit on the mere confession of some of the heirs, but he must establish his claim by proof—Hedaya, Bk. XXXIX., Ch. 1.

In the case now before the Court it appears from the sale-deed that the plaintiff was in possession, and that the deed was executed on her behalf by a person who had no legal right to represent her. It does not appear whether she was or was not a party to the suits brought by the creditors and properly represented in those suits: nor whether the decrees obtained in those suits passed on confession of the defendants or after proof was given of the debts.

If the minor was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, then it would seem she cannot be bound by the decrees nor by the sale subsequently effected, and she is entitled to recover her share, but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected.

PEARSON, J.—The doctrine that a sale made by one or more of the heirs of a deceased Muhammadan, in lawful and exclusive [60] possession of his estate, in discharge of a debt which has been adjudged to be due from it, is valid, though it appears reasonable and equitable, may not be altogether free from doubt. But, in the case in which this reference has been made, it is not clear that the two widows, who took upon themselves

to sell the plaintiff's share, were lawfully in possession of it to her exclusion, and they were certainly not legally competent to act on her behalf as her guardians. Under the circumstances, it would seem, therefore, that she is entitled to recover her share, on payment of her share of her father's debt which was discharged by the sale.

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PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Spankie.

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1 A. 105.

DEBI PARSHAD AND OTHRS (*Defendants*) *v.* THAKUR DIAL AND OTHERS (*Plaintiffs*). [27th August 1875.]

1 A. 105.

Hindu Law—Undivided family—Survivorship.

In an undivided Hindu family, governed by the Mitakshara law, when a brother dies, leaving brothers and nephews (the sons of a pre-deceased brother), his interest in the joint property does not pass to his surviving brothers alone; on partition, the whole estate is divisible, *per capita* among the brothers and *per stirpes* among the sons and grandsons of a deceased brother, the share of the latter two classes being the share, which the deceased would have taken, if alive at the time of partition. (H. C. R., N. W. P. 1868, p. 101—*over-ruled*).

[F. 2 C. 379, 4 C. 425. R. 17 C. 33 and 9 C.L.J. 485.]

Of the four brothers, Durga, Bisheshar, Bhairo and Ram Pargar, constituting an undivided Hindu family, Ram Pargar died first, leaving sons; then Durga and Bhairo died without issue; and lastly Bisheshar died leaving sons. The sons of Ram Pargar were the plaintiffs in this suit and the sons of Bisheshar the defendants.

ORDER OF REFERENCE TO THE FULL BENCH.

[106] PEARSON AND SPANKIE, JJ., referred to the Full Bench the following question, *viz.*:—

"Whether, in a joint family property, two of four brothers dying without issue, their interest passed on their death to their surviving brother exclusively, or whether the sons of a brother who predeceased them are entitled to participate in it?"

The order of reference was accompanied with these remarks:—

Had Bhairo and Durga left separate estates, there can be no doubt that their surviving brother would have succeeded to them in preference to, and to the exclusion of, their nephews; and it is contended that the succession would not be different in a joint undivided family. The contention is supported by the decision of a Bench of this Court, dated the 25th February 1868, in special appeal No. 1779 of 1867, at page 101 of the High Court Reports for 1868. The ruling of the lower Court in this case is opposed to that decision, but is supported by the answers to the

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questions 3 and 4 given in page 33, Bk. II, West and Bühler's Digest, and by the opinions of the Benares pandits examined by the Subordinate Judge. Under the circumstances we think it expedient to refer the point in question for the consideration of a Full Bench.

Pandit *Ajudhia Nath* (with him Munshi *Shuk Ram*), for the appellants.

Mr. *Mahmood* (with him Munshi *Hanuman Parshad*) for the respondents.—

OPINION OF THE FULL BENCH.

[108] To answer the question proposed to us it is necessary to consider the condition of a Hindu family in these Provinces while it remains undivided, and to inquire whether the same rules of succession apply while the members continue joint in estate, when they have separated and effected partition, and when they have re-united. **[109]** Sir Thomas Strange in the ninth chapter (1) of his work on Hindu Law declares that "wherever a plurality of sons exists, the inheritance descends to them as co-parceners making together but one heir" * * * "the deceased may have left, not only more sons than one, but brothers, as well as a widow or widows, and daughters, together with other dependants; and such sons and brothers may have their wives and children respectively; the whole having constituted in his lifetime, not so many co-parceners indeed in the proper sense of the term, but an undivided family. Or supposing him to have been a single man, with collateral relations only, their descendants and connections, all living together in co-parcenary, his death makes no difference in this respect among the survivors." If undivided at his death, they still continue so in point of law, however appearances may indicate a different state. So long as they remain joint, they offer one common sacrifice. "The religious duty of unseparated brethren is single,"—Narada, quoted in Mitakshara, Ch. II, S. 12. V. 3,—until partition takes place.

In respect of property, whatever is acquired by the several members, with certain exceptions, falls into and becomes part of the common fund, and the expenses of all members are met from this common fund, no account being taken of excess in the expenditure of some over the expenditure of other members. This community of worship and property being the ordinary condition of a Hindu family, it is to be presumed that a Hindu family is undivided until the contrary is shown, and that the acquisitions of the several members form part of the common stock unless the acquirer, or those claiming under him, prove that it was acquired in such a manner as would, by the special provisions of the law, constitute it the sole property of the acquirer.

Moreover, "according to the true constitution of an undivided Hindu family, no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property that he has a certain share."—*Appovier* v. *Rama Subba Aiyan* (2); while a Full Bench of the High Court of Calcutta has gone so far as to hold, in *Sadabart Prashad Sahu* v. *Foolbash Koer* (3), that under the **[110]** Mitakshara law one of the several members of a joint Hindu family cannot, without any legal necessity, alienate any portion of the undivided ancestral property without the consent of the whole of the co-sharers, and that such an

(1) On Partition, 4th ed., p. 198.
(2) 11 M. I. A. 75.
(3) 12 W. R. (F. B.) 1=3 B. L. R. (F. B.) 31.

alienation is not valid, even for the share to which the alienor would have been entitled on partition.

The condition of an undivided family being such as has been described, it is not unintelligible that rules may govern the distribution of the joint inheritance different from those which would regulate the devolution of separate property: and it has been ruled that in one and the same family different rules may govern the succession to the estate of a deceased member according to the nature of the different properties comprising it, whether it be joint or separate.—*Katama Natchiar* v. *The Rajah of Shivagunga* (1).

The peculiar incidents of the joint property of an undivided family are survivorship and the right of representation. In the Shivagunga case above cited, the Lords of the Privy Council declared that, "according to the principles of Hindu law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession"(2). It has been argued that this is a mere statement of the general rule, and that it does not necessarily follow from it that the benefit of survivorship extends to all, and not only to some of the surviving members of the family. When once the principle of survivorship is admitted, it is difficult in the absence of express law to limit its operation. The principle of survivorship taking effect on the common fund, in which no one of the members of the family has any distinct share, operates not to augment the rights of any particular class of the co-parceners, but to enlarge the shares which upon partition would fall to the lot of every one of the members. In effect, by the operation of this rule, the share to which a co-parcener dying without issue would have been entitled does not pass by descent but lapses. The right of representation operates at the time of partition to secure an equal parti-[111]tion of the inheritance between the several sons of the common ancestor and the issue to the third generation of sons who have died leaving issue surviving the period of distribution, such issue taking *per stirpes* the share of their father or forefather—"Should a younger brother die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his uncle's son, and the same proportionate share shall be allotted to all the brothers according to law. Or if that grandson be also dead his son takes the share; beyond him the succession stops."—Katyayana—cited in Vyavahara Mayukha, Ch. IV, S. 4, V. 21. "Although grandsons have by birth a right in the grandfather's estate equally with sons, still the distribution of the grandfather's property must be adjusted through their father, and not with reference to themselves. The meaning here expressed is this: if unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments,

(1) 9 M. I. A. 539 (at p. 610).
(2) 9 M. I. A. at p. 611.

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and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text"—Mitakshara, Ch. I, S. 5, V. 2. "A grandson (D) whose father (B) is dead, and a great-grandson (F) whose father (E) and grandfather (C) are dead, participate equally in the inheritance with the son (A), for they without distinction confer equal benefits on the deceased owner of the property by the presentation to him of funeral offerings at solemn obsequies.—Daya-Krama Sangraha, Ch. I, S. 1, V. 3. Unless authority be shown to the contrary, these incidents of the joint estate of an unseparated Hindu family survivorship and the right of representation govern the case before us and determine the answer to be given to the question put to us. The fathers and uncles of the parties lived as an unseparated Hindu family in possession of an undivided estate. Assuming partition to be made now, there are living representatives of two sons only of the common ancestor, and equal partition being made **[112]** between the stocks, each stock is entitled to one moiety, but it is argued that, inasmuch as the father of the one line died before any of his three brothers, and the father of the other line died after two other brothers, who died without male issue, the shares of the brethren dying without male issue descended to the sole surviving brother and passed from him to his issue—to the exclusion of the line of the brother who died first—in other words, it is contended that the case is not to be governed by the law of survivorship, except so far as to exclude females, but that the shares of the deceased brothers passed to the surviving brother in virtue of the rule that, "in case of competition between brothers and nephews, the nephews have no title to succession, for their right of inheritance is declared to be on failure of brothers."—Mitakshara, Ch. II, S. 4, V. 8. No doubt, if this rule was intended not only to apply to the descent of the separate property of a brother but to operate on the share which he would have taken in the common property of the family had he survived the period of partition, the contention is correct; but if we carefully examine the system on which the Mitakshara is compiled and bear in mind the principles of Hindu law, as to which there can be no dispute, it will appear that the rule on which the contention is based cannot apply to the undivided ancestral estate, nor to any thing which has accrued to and become part of that estate. The author of the treatise commences with a definition of heritage, "daya", and distinguishes between the wealth of a father or grandfather which *becomes the property* of his sons or grandsons *by right of their being his sons and grandsons*, and which the author consequently terms unobstructed, and property which *devolves* on parents, brothers and the rest, *on the demise* of the owner without male issue, and which he terms liable to obstruction, because existence of issue or the survival of the owner impede its devolution. After investigating the nature of property and reviewing the methods by which it may be acquired, he declares the fundamental principle of the Hindu law obtaining in these Provinces that property in the paternal or ancestral estate is by birth. He next describes the limitation to which the power of the father over ancestral and acquired wealth is subject, and having previously defined partition to be "the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate," **[113]** he proceeds to declare in what manner and subject to what rules the common property of the family is to be distributed by partition in the father's lifetime or after his decease. The consequence of the doctrine that a right in the paternal ancestral estate

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is acquired by birth is that there is in fact no devolution of the property from one owner to another, but that as each son comes into being he forthwith acquires a right which would, on partition, reduce the shares of the other sons, and which, should he not survive partition and have issue, his son or grandson would take by substitution, and which, if he dies before that period, will simply lapse. There being no devolution of the property, the laws of descent are inapplicable. An ascertainment of the rights of the several members of the family is effected by partition, and consequently the rules regulating partition in every Hindu work on inheritance take the place of rules regulating the descent of property from an owner leaving issue. Unless there is a plain direction to the contrary, rules of partition from their very nature operate at the time when the partition is made. Unless it is expressly declared that the ascertainment of shares is to be made at an earlier period, it must be assumed they are to be ascertained at the time partition is made. Seeing that a son in the undivided family is a co-owner, having acquired his right by birth, there is no more reason for fixing the date of the death of the father as the period at which shares should be ascertained than in fixing the date of a son's death as that period: and if shares are not ascertained until the period of distribution; if, until that time, no one can declare he has any share in the common property, it accounts for the circumstances that in none of the treatises on Hindu law which have been brought to our notice is there any rule declaring what is to be done with the interest (it can hardly be called a share) in the common property which has been acquired by a member of the family who has not survived the period of distribution. On the other hand, there are express rules declaring that the partition is to be an equal partition, subject to the qualification that those who take by representation take only the share which he whom they respectively represent would have taken had he survived partition.

Having in Ch. I dealt with the distribution of the estate of a Hindu who dies leaving issue, and having declared the rules which provide for the distribution of the paternal and ancestral pro-[114]perty of the undivided family, the author next proceeds in Ch. II to treat of the descent of the estate of a man who dies without issue. The first section clearly relates only to separate property. It presumes the case of a man who, leaving no male issue, could not be the founder of an undivided family. —"The sons, principal and secondary, take the heritage, has been shown. The order of succession among all tribes and classes, on failure of them, is next declared." Here then we pass from a law of partition to a law of devolution of inheritance, the persons entitled no longer acquire an interest by birth. It accrues on the death of the owner, and to be entitled to claim they must survive the owner, and first in the line of descent the author places the widow, and after explaining that, if the proprietor died in union with his brethren, the widow has merely a right of maintenance, he concludes the discussion of her claims with the declaration that a wedded wife being chaste, takes the whole estate of a man who, being *separated from his co-heirs*, and not subsequently re-united with them, dies leaving no male issue.

In the second section the right of succession of daughters and daughter's sons are declared. Now in this section there is no distinct allusion to separate property, yet it has never been doubted that it deals only with separate property, and the intention is evident from the commencement of the section :—"On failure of her (the widow), the daughters

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inherit." The widow could only take separate property and the daughters succeed to what, if she had survived the *propositus*, the widow would have taken. Similarly, the following section, which treats of the rights of parents, commences with the declaration: —"On failure of those heirs, the two parents, meaning the mother and father, are successors," preference being given to the mother. In this section again there is no mention of separate property, but it manifestly deals only with that property, for it is declared that the parents take, in default of widow, daughters, and daughter's sons.

We now arrive at the fourth section, which treats of the rights of brothers, and which it is argued governs the case before us. That section commences like the preceding by premising the failure of the heir whose right had been last declared; and from this circumstance it must again be inferred that the property to which it regulates the **[115]** succession is such property as would have been taken by the heirs entitled to priority of succession, had they survived the *propositus*. If it be held that the interest which a co-parcener acquires by birth does not lapse on his death without male issue, but passes under the law of succession to heirs other than direct issue, who presumably do not exist, and other than his widow, whose title is expressly denied, it follows that the right would devolve not on brothers only, but on those heirs also who are entitled to succeed in priority to brothers. Thus, a daughter, a daughter's son, a mother, or a father, might, on partition, claim the share of a deceased co-parcener. No instance is cited in which such a claim has been allowed. The conclusion seems clear that S. 4, like the preceding sections of the chapter, provides only for the devolution of the separate estate of the *propositus*.

But in support of the contention that the interest of a member of an undivided family in the common fund is a share, and that the rules respecting the succession of brothers operate, notwithstanding the *propositus* may have died in union with his brethren, and regulate the inheritance of that share, reference has been made to the provisions of S. 9, which treat of the succession to re-united kinsmen.

It is argued that brethren who have re-united are in the same position as those who have never separated; that the whole of the property is again brought into a common fund, each brother saying to the other "what is mine is thine and thine is mine," yet nevertheless the interest of each is described as his *share*:—"A re-united brother shall keep his *share* of his re-united co-heir who is deceased"—Yajnavalkya, cited in Mitakshara, Ch. II. S. 9, V. 1—and inasmuch as on the death of a re-united brother without male-issue his share devolves on re-united brethren of the whole blood to the exclusion of re-united brethren of the half blood, or if there be no brethren of the whole blood in re-union, the re-united brethren of the half blood and the unassociated uterine brothers divide the share equally, it is contended that the principle of survivorship does not operate to overrule the rules regulating the succession of brothers, but that so far as is possible effect is given to both.

[116] To these arguments it may be replied that a distinction is recognized by Hindu writers between undivided and re-united brethren (Colebrook's Digest, ccccxxx). Moreover, a re-union implies a previous partition, in virtue of which each of the re-united brethren has acquired separate ownership of a share. He brings to the re-united fund something which is specially his, while in an undivided family he acquired his right by birth in the estate of his father or grandfather. Again, when a partition is made of the property of an undivided family, no distinction

is made between the half blood and the whole blood :—" If any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in co-parcenary, the half-brothers shall have equal shares with the rest, but uterine brother has the sole right to the divided property, moveable or immoveable"—(Colebrook's Digest, ccccxxxi); and on partition of the common property of re-united brethren the eldest never enjoyed the privilege, now in all cases obsolete, of receiving a larger or better portion than his brethren, to which Hindu writers declared him entitled, on a partition of the property of the undivided family. It is dangerous then to draw an analogy from the special rules which apply to the devolution of the shares of re-united brethren. Indeed, the circumstance that rules have been specially prescribed to regulate the devolution of the common property of re-united brethren affords ground for arguing that they were exceptions to the ordinary rules regulating the partition of the common property of an undivided family.

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If then the provisions of Ch. II, S. 4, are not applicable to the interest of an undivided co-parcener in the common property, but that interest lapses on his death without issue, it follows that, in the case before the Court, the interests of the brothers who died without issue do not devolve on the last surviving brother, and that the sons of the last surviving brother are only entitled to one moiety of the estate. This conclusion is supported by the opinions of the three pandits examined by the Subordinate Judge of Benares, although the reasons given by one of those gentlemen for the conclusion at which he has arrived are not satisfactory. It is also supported by the decision of the Sudder Court of Calcutta in *Duljeet Singh* v. *Sheomunook Singh* (1), to which Mr. Colebrooke was a [117] party, and by the decision of the Bombay Court in *Bhugwan Golab Chund* v. *Kriparam Anundram* (2). The decision of this Court in *Madho Singh* v. *Bindessery Roy* (3), it is true, is opposed to these authorities, but in our judgment that ruling cannot be supported.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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DAIA CHAND AND OTHERS (*Defendants*) *v.* SARFRAZ AND OTHERS (*Plaintiffs*).

[27th August 1875].

1 A. 117.

Redemption suit—Limitation—Act IX of 1871, Art. 148—Acknowledgment of the mortgagor's title and of his right of redemption.

The signature of the mortgagees in a record of rights, in which they are described as mortgagees of the estate, is a sufficient acknowledgment of the mortgagor's right to redeem, within the meaning of Act IX of 1871, Art. 148.

[R. 1 A. 425, U. B. R. (Civil) (1892—1896), 462, 10 Bom. L.R. 385, A. W. N. (1908), 226, 9 C. 616, 12 C. 267, 16 M. 220, 17 B. 173, 5 Ind. Cas. 77.]

JUDGMENT OF THE DIVISION BENCH.

The learned Judges of the Division Court (PEARSON and SPANKIE, JJ.), before which the appeal came on for hearing, differed in opinion.

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(1) I. S. D. Rep. 59.
(2) 2 Borr 29. (3) H.C. R. N. W. P. p. 101.

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The following judgments were delivered :—

[119] PEARSON, J.—This is a suit for the redemption of a mortgage said to have been made in favour of the defendants' ancestors by the ancestors of the plaintiffs in 1811, and was dismissed by the Court of first instance improperly on the ground of insufficient valuation. The lower appellate Court has rightly held the valuation to be correct, and, disallowing a plea set up by the defendants to the effect that the suit was barred by the law of limitation, has remanded the case to the first Court under S. 351, Act VIII of 1859, for trial and disposal on the merits. The plea of limitation has been disallowed with reference to an acknowledgment of their mortgage tenure recorded in the settlement record of 1841, which is signed by the defendants or their forefathers. In that record they described themselves, or allowed themselves to be described, as mortgagees of the estate in question ; and by so doing admitted by implication the title of the mortgagors, whoever they may be, and their right to redeem the property. Whether the plaintiffs' ancestors were the mortgagors and whether the mortgage was made by them in 1811, for a consideration of Rs. 241, are questions which must be determined before it can be decided whether the suit can be maintained. Even if it be established that the plaintiffs' ancestors were the mortgagors, unless it be shown that the mortgage was not made before 1811, it may be found that the suit is barred by limitation. But although the Subordinate Judge's decision is open to this objection, that he has somewhat precipitately declared the suit not to be barred by limitation, while not quite consistently remarking that, "if the plaintiffs can prove the mortgage to have been effected by their ancestors in favour of those of the defendants in 1811 they will obtain a decree, if not, their claim must be re-[120]jected," there is nothing objectionable in his remand order on the assumption that the materials on the record were not sufficient to enable him to decide satisfactorily himself. There is no force in the grounds of appeal. Nothing is shown to be a bar of the suit in the proceedings of 1864, which referred to a claim of certain manorial rights only. The admission of the mortgage tenure in the settlement record of 1841, if it can be referred to the plaintiffs' ancestors, and the mortgage be found to have been made by them in 1811, is sufficient to give a new period of limitation from the date of the admission. With these remarks, the appeal is dismissed with costs.

SPANKIE, J.—Article 148, Sch. II, Act IX of 1871, provides that time shall run from the date of the mortgage, unless when an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee or some person claiming under him and, in such case, the date of the acknowledgment.

It is argued in this case that some of the ancestors of the defendants, appellants, attested as correct the *khewat* and *khatauni shara asamiwar* prepared at the settlement under Regulation IX of 1833 in 1841, in which they are described as mortgagees. Their signatures, it was contended, are an acknowledgment of the mortgage tenure, and take the case out of the operation of the limitation law. * * * * * * * * * * * *

It will be seen from what I have stated that the parties who signed have not acknowledged any particular fact, but their signatures must be taken as an admission of the general accuracy of the *khewat* and *khatauni*, the one containing a variety of matter, the other having the special object of showing the rent payable to the landlords by their tenants.

I may also mention that there did not appear to be any recognised owners in 1841, the entire 20 biswas being in the possession of persons described as mortgagees. I attribute this description to be due to some report regarding an earlier settlement and the state of the village then, obtained from the office when the settlement under Regulation IX of 1833 was made.

[121] I do not regard the signatures of the ancestors of the defendants under the circumstances described as amounting to an acknowledgment of the title of the mortgagor or of his right of redemption within the meaning of Art. 148, Sch. II, Act IX of 1871. The record shows that the appellants did not acknowledge any right of redemption anywhere. They contested in 1863 an attempt of the heirs of the mortgagors to establish their right of redemption, and ultimately in 1872 they succeeded in obtaining an order from the revenue authorities for the erasure of the word mortgagees.

If we look at the effect of an acknowledgment in writing in respect of a debt or legacy (S. 20, Act IX of 1871), we find that no promise or undertaking would take the case out of the operation of the Act, unless the promise or acknowledgment amounts to an express undertaking to pay or deliver the debt or legacy, or to an unqualified admission of the liability as subsisting. So, I think that any one who desires to take his claim out of the operation of Art. 148, Sch. II, must show a clear and express acknowledgment in writing of the title of the mortgagor or of his right to redeem, that this acknowledgment must be unqualified and made touching the mortgage. It cannot be implied from a general admission of the accuracy of certain settlement records dealing with a great variety of matters.

I, therefore, would decree the appeal, reverse the judgment of the lower appellate Court, and restore that of the first Court, with costs.

The defendants appealed to the Full Court, under the provisions of cl. 10 of the Letters Patent, against the judgment of Pearson, J.

Munshi *Hanuman Parshad* (with him Babu *Jogindro Nath Chaudhari*), for the appellants.

Pandit *Bishambar Nath* for the respondents.

JUDGMENT OF THE FULL BENCH.

TURNER, OFFG. C. J., and OLDFIELD, J., concurred in the following opinion:—

[122] The question which arises in this appeal is whether or not there has been a sufficient acknowledgment of the mortgagor's title or his right to redeem to prevent the operation of the law of limitation, or rather to give the representatives of the mortgagors a new period from which limitation should be computed.

The terms of the law, an acknowledgment of the mortgagor's title or an acknowledgment of his right to redeem, were not, it may be presumed, intended to be mere tautology. An acknowledgment that a certain person, or his representative, is the proprietor of the estate is an acknowledgment of his title. An acknowledgment that the mortgage is a subsisting mortgage would be an acknowledgment of his right to redeem, if he established his title.

The provisions of the English Statute 3 & 4 Will. 4, c. 27, S. 28, require, in order to enlarge the statutory period of limitation, that an acknowledgment of the title of the mortgagor or of his right to redemption shall be given to the mortgagor or some person claiming his estate,

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or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming. It appears to be the law that any acknowledgment, which before the passing of the English Statute would have been sufficient, will satisfy the requirements of the Statute if it be given in writing to the mortgagor or to a person claiming his estate, or to the agent of such mortgagor or person.—Fisher on Mortgages 2nd ed., Vol. I, 502, page 288. Before the Statute was enacted it was held that an acknowledgment of the mortgage as a subsisting mortgage was an acknowledgment of the mortgagor's right to redeem: and in a case [123] quoted by Lord Hardwicke it was held by Sir J. Jekyll that, where a testator described an estate in his will as my "mortgaged estate," it was a sufficient acknowledgment of the mortgagor's right to redeem (1). This ruling appears never to have been overruled; it is quoted in Tudor's Leading Cases, Vol. II, 4th ed., 1065. We are not, indeed, bound by English cases, but we may usefully consult them.

With the exception that it requires the acknowledgment to be in writing, the law of limitation in this country, so far as it applies to the question before us, appears to be analogous to the English law as it was established by the practice of the Courts of Equity before the Statute above referred to was enacted. The law of British India does not require that the acknowledgment should be given to the mortgagor, but, in other respects, it follows the language of the English Statute and the practice of the Courts of Equity before that Statute was enacted. The acknowledgment must be in writing, signed by the mortgagee or a person claiming under him, and it must acknowledge the title of the mortgagor or his right to redeem. In the case before us the settlement officer had prepared the record-of-rights, a record which by law he was bound to prepare, showing the interests in the village of which he found persons in possession. From the records of preceding settlements he ascertained that the appellants, or rather their predecessors in title, had obtained possession in virtue of a mortgage, and he entered them accordingly in his record as mortgagees. To this record, for the purpose of certifying to its correctness, he obtained the signature of those whom he found in possession, and, amongst others, of the appellants. This appears to be a stronger case than that decided by Sir J. Jekyll. Here there is not a mere description of the estate as a mortgaged estate, but a subscription to a record purporting to show the extent of the rights which the persons in possession enjoyed. For this reason we hold the acknowledgment sufficient, and would dismiss the appeal with costs.

PEARSON, J.—There can be no doubt that the settlement record of 1841 does not contain an express acknowledgment of the title of any particular persons as owners of the estate in question in this [124] suit of their right of redemption, for the mortgagors or their representatives are not named. If, therefore, such an express acknowledgment be required by the terms of Art. 148, Sch. II, Act IX of 1871, the present suit, instituted in 1874 for the redemption of a mortgage alleged to have been made in 1811, is liable to be dismissed as barred by the law of limitation. I still adhere to the opinion intimated in my judgment of the 8th April last, that such an express acknowledgment is not required, and the acknowledgment of a subsisting mortgage tenure is by implication an acknowledgment of the title of an owner and of his right to redeem and sufficient for all practical purposes complies with the terms of the law. It is not reasonable to suppose that any one would allow himself to be described as the

(1) 3 Atkyn's Rep. at p. 114.

mortgagee of a property of which the mortgage had ceased to be redeemable at law, and the names of the owners thereof had been lost to knowledge by lapse of time, without any mention of those circumstances. In the present case there are no grounds of supposing that in 1841 there was any doubt or dispute as to who were the owners, or whether they were entitled to redeem the property in suit. The addition of their names, though it would have completed the statement of the facts, was hardly necessary, and the omission of their names was presumably accidental. An acknowledgment of a mortgage tenure, not including the title of a mortgagor and of a right to redeem, appears to be meaningless, useless, and absurd. The main point is whether the tenure is that of a mortgagee; it can make no difference to the mortgagee whether the owner is A or B. If it be held that an entry describing C as mortgagee of a share acknowledged by C, would be an acknowledgment that would satisfy the requirements of the law, it cannot plausibly be contended that an entry describing C. as a mortgagee does not describe a subsisting mortgage tenure. But if there were any real doubt as to whether the acknowledgment implied in a man's description of himself as a mortgagee referred to a subsisting mortgage, or one which had ceased to be redeemable, the doubt might easily be removed by an enquiry as to whether the mortgage had or had not ceased to be redeemable at law at the date of the acknowledgment.

The view which I have taken as to what constitutes a sufficient acknowledgment is apparently not at variance with English law. [125] In page 288, Vol. I, Fisher's Law of Mortgage, it is stated that "any expression referring to the estate as mortgaged will be a sufficient acknowledgment." The description by a man of himself as the mortgagee of an estate is surely a reference to the estate as mortgaged to him. In the case of *Stanfield* v. *Hobson* (1), cited in support of the doctrine, the reference to the estate, as one of which the mortgage was redeemable, did not express the name of the party entitled to redeem, which was ascertained by external evidence. This case establishes both the points for which I contend; first, that an acknowledgment of a mortgage tenure is by implication an acknowledgment of the title of an owner; and secondly, that other evidence may be admitted to show who is the person possessing that title to whom the acknowledgment referred. In that case the evidence indicating the owner may have been nearer at hand than in the present case; but that difference does not effect the principle that an acknowledgment of a redeemable mortgage may be connected by evidence with the person entitled to redeem it. On the other hand, it is observable that the acknowledgment in that case not only did not specify any particular person as the owner, but that it did not specify any particular property as the subject of the mortgage; and further, that it was apparently made after the lapse of the period of the limitation, when the right of redemption, if it had not been extinguished, could not be enforced at law. The acknowledgment, indeed, which was deemed sufficient to take the case out of the ordinary operation of the law of limitation, was no more than an answer by the mortgagee to a proposal on behalf of the mortgagor for a meeting for the purpose of considering the matter of the debt, to the effect that, unless some one was prepared to pay the debt, a meeting would be useless. It was held that, by that answer, a right of redemption had been admitted; and the admission was supplemented by evidence which pointed out the mortgagor and the mortgaged property. In the present case the acknowledgment takes the form of a description

(1) 3 DeG. Mac. & G. 620=16 Beav. 236=22 L. I. Chanc. 657.

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by the defendants' ancestors of themselves as mortgagees of the property in question on the public and solemn occasion of a settlement, the [126] mortgage not being known to have been irredeemable at law at the time, and a clue to the names of the owners being found in the settlement records.

At page 314 of Atkyn's Reports mention is made of a case in which Sir J. Jekyll decreed a redemption upon the circumstance of the person who was in possession of an estate originally in mortgage, calling it by the name of the mortgaged estate in his will. This case supports my judgment not less than that of *Stansfield* v. *Hobson* (1) above quoted.

SPANKIE, J.—I am under the impression that my honourable colleagues take a different view of this case than I do. I therefore would simply say that I adhere to my former judgment. Nothing was stated at the hearing which shows me that my opinion was wrong, and I can add nothing to what I have already put on record.

[For a further stage of this case, see the Judgment, dated April, 19, 1877, of PEARSON and SPANKIE, JJ., reported *infra*.]

ORIGINAL CIVIL.

PRESENT:

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Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

CROSTHWAITE (*Plaintiff*) *v.* HAMILTON (*Defendant*).

[31st August 1875].

1 A. 87.

1. *Investiture of Small Cause Court Judges with Subordinate Judges' powers—Legality—Act XI of 1865, Ss. 45 and 51.*

Although the occasional investiture of Small Cause Court Judges, by name and from time to time, with the powers of Subordinate Judges, may have been the mode of procedure contemplated by the Legislature as the one likely to be ordinarily adopted, Government cannot be said to have exceeded its power or contravened the law by permanently investing them with such powers. (H.C. N.W.P., p. 55, *impugned*.)

2. *Liability of surety.*

In a suit against the surety, who had undertaken to secure the due performance by the principal, of his duties as clerk of the Small Cause Court, for the recovery of moneys misappropriated by the said clerk out of the proceeds of sales of moveable properties held in execution of decrees, passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, *held* that the surety was liable for the moneys so misappropriated, as the grant and exercise of Subordinate Judge's powers was an incident attached by law to the office of Small Cause Court Judge, and the clerk of the Court is as much bound to perform the incidental, as the ordinary, duties of his appointment; and that it would have made no difference that, at the time of the execution of the bond, the Small Cause Court Judge was not invested with the powers of a Subordinate Judge.

Suit on a security bond executed on the 29th March 1871 by the defendant and one J. W. Church, then clerk of the Small Cause Court at Allahabad, to recover from the defendant a certain sum, being a portion of certain moneys alleged to have been received by the said Church in his official capacity and to have been fraudulently misappropriated by him. This suit instituted in the Court of the Subordinate Judge of Allahabad,

(1) 3 DeG. Mac. & G. 620=16 Beav. 236=22 L. J. Chanc. 657.

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was transferred to the High Court for trial by an order of Turner, O. C. J., secured at the instance of the defendant.

The plaint, as originally filed, was on behalf of the Secretary of State for India in Council. The material portion of the bond was as follows:—"Know all men by these presents that we, John Montgomery Hamilton, of Allahabad, Land and house-holder, and John William Church, Clerk of the Court of Small Causes at Allahabad aforesaid, are hereby jointly held, and each of us severally firmly bound unto William Tyrrell, Esquire, of the Bengal Civil Service, and Judge of the Court of Small Causes aforesaid, as well as to his successors in office, during the continuance of these presents, in the sum of two thousand rupees lawful current money as security for the true and faithful performance by the said John William Church of his duties as clerk of the said Court, and for his well and truly accounting for all moneys entrusted to his keeping as such clerk of the Court. Now the conditions of this bond are that, if owing to misappropriation or misapplication, but not owing to fire, robbery with force, or any cause beyond the control of the said John William Church, any deficiency shall arise in the moneys so to the John William Church entrusted, then we the said John Montgomery Hamilton and John William Church, and each of us separately, our respective heirs, executors, administrators, and assigns, are bound to make good the same to the extent of the misappropriation, or misapplication, provided the same does not exceed the amount herein stipulated, in which case no claim shall lie as under this instrument further than for the sum of two thousand rupees against each of us separately."

The defendant objected to the filing of the plaint on behalf of the Secretary of State. On this, the plaint was ordered to be amended. The issues were:—

(i) The first issue referred to the institution of the suit by the Secretary of State in Council.

(ii) At the time the bond in suit was executed by the defendant was the Judge of the Small Cause Court invested with the powers of a Subordinate Judge?

(iii) Was it a part of the duties of J. W. Church, as clerk of the Small Cause Court to receive moneys arising from sales of moveable property held in execution of decrees, passed by the Judge of the Court of Small Causes in the exercise of his powers of Subordinate Judge?

(iv) If, at the date the bond was executed, the Small Cause Court Judge was not invested with the powers of a Subordinate Judge, does this circumstance affect the liability of the defendant in respect of sums received by the said J. W. Church as the proceeds of sales made in execution of decrees passed by the Judge in the exercise of his powers as a Subordinate Judge?

JUDGMENT.

[93] The first issue had reference to the institution of the suit on behalf of the Secretary of State for India in Council. That personage, it was argued, was not a party to the bond or interested therein. The Government Advocate admitted the force of the argument, and was allowed to amend the plaint by substituting the present Judge of the Small Cause Court, Mr. Crosthwaite, as plaintiff. By this amendment of the plaint, the objection taken to the competency of the plaintiff to maintain the suit has been removed.

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The Government Notification of the 6th June 1866 (1), *prima facie* determines the second issue in the affirmative. It is argued that the *permanent* investiture of the Judges of the Small Cause Courts of Agra, Benares, and Allahabad, *ex officio*, with the powers of a Principal Sudder Amin by a single order was not within the scope or in accordance with the spirit and intention of S. 51, Act XI of 1865, which provides that "*whenever* the state of business in any Court of Small Causes, the Judge of which shall be the Judge of such Court only, is not sufficient to occupy his time fully, the Local Government may invest him within such limits as it shall from time to time appoint, in addition to his powers as such Judge, with the powers of a Principal Sudder Amin." But we cannot hold that, because the order is open to some criticism on the ground urged, the Judges thereby invested with the powers of a Principal Sudder Amin had no legal jurisdiction to exercise the powers so conferred upon them, and that all acts done by them in that capacity are null for want of such jurisdiction. Without **[94]** meaning any disrespect to the learned Judges who passed the decision dated the 27th February 1873, in the regular appeal case No. 135 of 1872, *Musammat Bijee Kooer*, appellant, v. *Rai Damodar Dass*, respondent, (2), to which our attention has been drawn, we are unable to concur in the conclusion at which they arrived on this point. The Government, it may be presumed, had reason to believe that the Judges of the three Small Cause Courts mentioned in the order had generally leisure to dispose of more business than was supplied by the small causes instituted in their Courts; and on the strength of this belief, in the exercise of the discretion which the law has given to it, passed the order of the 6th June 1866. If this belief was well founded, or if it was entertained *bona fide*, we should not be justified in declaring the Government to have exceeded its power, or to have contravened the law although the occasional investiture of Small Cause Court Judges by name from time to time with the powers of a Principal Sudder Amin may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted. We are, therefore, of opinion that, by the Government order of the 6th June 1866, the powers of a Principal Sudder Amin were legally conferred on Mr. Tyrrell, who was officiating as Small Cause Court Judge on the 20th March 1871, the date of the execution of the bond in suit.

We proceed to the third issue. The evidence of Mr. Tyrrel proves that, as a matter of fact, "it was a part of Mr. Church's duties, as Clerk of the Small Cause Court, to receive moneys realised under decrees or processes issued by the Judge in the exercise of his powers as Subordinate Judge." It could not well be otherwise; for "there was no separate establishment to carry out the orders of the Judge exercising those powers." Under this head we may notice the fallacy of the second plea set out in the defendant's written statement, to the effect that, "by the terms of the bond on which the suit is based, he is not liable for any money received by the Clerk of the Court of Small Causes, J. W. Church, except in his capacity as such Clerk and within the scope of such office; and the

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(1) The Notification is as follows:—"Under S. 51 of Act XI of 1865, His Honor the Lieutenant-Governor has been pleased to permanently invest the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares, with the powers of a Principal Sudder Ameen, to be exercised within the limits of their respective jurisdictions, subject to the orders of the Court of Sudder Dewanny Adawlat, Northern Western Provinces, in respect to the reception of original regular suits and regular appeals."

(2) H.C.R., N.W.P., 1873, p. 55.

plaintiff has misconceived the extent of defendant's liability in suing him for sums received by the said Clerk acting as nazir, or bailiff, of [95] the Subordinate Judge." That fallacy consists in supposing that the grant of the powers of a Principal Sudder Amin, or Subordinate Judge, to the Judge of the Small Cause Court, constituted him a Subordinate Judge, and created a Court distinct from that of the Small Cause Court. This supposition is altogether erroneous. The Judge of the Small Cause Court when exercising the powers of a Subordinate Judge is still the Judge of the Small Cause Court; decrees passed by him in the exercise of those powers are decrees of the Small Cause Court; moneys paid into Court under such decrees are paid into the Small Cause Court, and under S. 45, Act XI of 1865, it is the duty of the Clerk of the Court to take charge and keep an account of them. If it was Mr. Church's duty, as Clerk of the Small Cause Court, to receive moneys paid or realized under decrees by the Judge of that Court in the exercise of the powers of a Subordinate Judge, it follows that the defendant, as Mr. Church's security, is liable for the misappropriation by his client of any of those moneys. A Munsiff is sometimes invested with the powers of a Small Cause Court within certain territorial and pecuniary limits. The decrees passed by him in the exercise of such powers are decrees of the Munsiff's Court not less than decrees passed by him in the exercise of his ordinary jurisdiction. It is equally the duty of the nazir of his Court to receive moneys paid or realized under all decrees whether passed by the Munsiff in the exercise of the one or the other jurisdiction; and the surety of the Nazir is just as much responsible for his client's misappropriation of moneys paid or realized under decrees passed in the exercise of the Small Cause Court jurisdiction as of moneys paid or realized in the exercise of the ordinary jurisdiction. This was not disputed by the defendant's advocate, but he contended that the case of a Munsiff invested with Small Cause Court powers was essentially different from the case of a Small Cause Court Judge invested with the powers of a Subordinate Judge. The only difference is that the grant of the powers of a Subordinate Judge to a Small Cause Court Judge gives him a larger jurisdiction than he possessed as Small Cause Court Judge; whereas the investiture of a Munsiff with Small Cause Court powers only gives him a peculiar kind of jurisdiction in some classes of causes which he had before jurisdiction to try. The difference does not in the least degree [96] affect what is the matter in question, *viz.*, the extent of the duty of the Clerk of the Court, and of the nazir, and of the liability of their sureties.

The third issue is, therefore, decided in the plaintiff's favour.

Our decision on the second issue relieves us from the obligation of deciding the fourth; but we have no hesitation in expressing our opinion that, had the Small Cause Court Judge, at the date of the execution of the bond in suit, not been invested with the powers of a Subordinate Judge, the Clerk of his Court would, nevertheless, have been bound to receive, take charge and keep account of any moneys paid or realized under decrees passed by any of his successors in office invested with such powers, and that the Clerk's surety would have been liable for his client's misappropriation of any of those moneys. This, indeed, follows from what we have already said in disposing of the third issue. The Clerk's duty is to take charge of all moneys paid into the Small Cause Court, and this duty remains the same whether the Judge of the Small Cause Court only exercise his ordinary jurisdiction, or be invested with additional powers. The grant and exercise of such powers is an accident

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attached by the law to the office of a Small Cause Court Judge; and the Clerk of his Court is as much bound to perform the accidental as the ordinary duties of his appointment, and the surety's pecuniary liability is co-ordinate with that of the Clerk. The defendant would not, therefore, have been able to repudiate his liability in respect of moneys paid to, or realized by, the Clerk in respect of decrees passed by the recent Judges of the Small Cause Court at Allahabad in the exercise of the powers vested in them of a Subordinate Judge, even had it appeared that, at the time when he executed the bond, Mr. Tyrrell had not been invested, or not legally invested, with those powers. The circumstance that, at that time, and for some years before, the Judge of the Small Cause Court has exercised those powers, and the Clerk of his Court had, as a part of his duty, received all moneys paid or realized under decrees passed in the exercise thereof, precludes the defendant from pleading with plausibility, and us from believing, that he executed the bond in ignorance of the Clerk's duty and liability, and under the impression that he was only undertaking a risk in respect of moneys paid or realized under decrees passed by the Small Cause Court Judge **[97]** in the exercise of his ordinary jurisdiction. The description of Mr. Church in the bond as the Clerk of the Small Cause Court and of Mr. Tyrrell as the Judge of that Court is strictly accurate, and not at all incomplete by reason of the absence of any mention of the powers of a Subordinate Judge vested in the Judge of the Small Cause Court. The plea that in reference to that description, the defendant's liability was limited to moneys paid to, or realized by, Mr. Church under decrees passed by the Judge in the exercise of his ordinary jurisdiction is not sustainable.

Decree for plaintiff with costs.

PRIVY COUNCIL.

PRESENT:

Sir Barness Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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On Appeal from the Court of the Judicial Commissioner at Oudh.

PRIVY COUNCIL.

RAJAH KISHEN DUTT RAM PANDAY *v.* NARENDAR BAHADOOR SINGH

[3rd December 1875.]

3 I.A. 85=3 Saraswati's P.C.J. 570.

3 I.A. 85=3 Saraswati's P.C.J. 570.

1. *Mortgage--Redemption—Limitation in Oudh—Act I of 1869.*

According to Act I of 1869, a suit for redemption is not barred where the mortgage-deed fixed a term within which the mortgage might be redeemed, and such terms not expiring before the 13th of Feb., 1856.

2. *Ibid—Mortgage-deed lost*—Onus probandi.

With regard to the amount of evidence required, a Court will generally take into consideration the facilities which, in particular cases, each party may naturally be supposed to have of giving evidence.

The plaintiff sued to redeem a mortgage made in the year 1840. The mortgage-deed was lost and the plaintiff-mortgagor alleged that it was a deed of mortgage for 20 years whereas the defendant-mortgagee maintained that it was a deed of conditional sale for 10 years and that the period had expired in 1856. *Held* the *onus* was on the mortgagor, *prima facie* to show when the term of the deed expired; but if the mortgagor gives evidence shifting the *onus*, then it lies on the mortgagee.

[F., 7 A. 738 ; **Appl.**, 5 A. 184 ; **R.**, 8 A. 295, 11 A. 438, 27 B. 271.]

JUDGMENT.

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3 I.A. 85 = 3 Saraswati's P.C.J. 570.

Sir. Robert P. Collier :—

[86] This was a suit for redemption of a mortgage made in the year 1840. The sole question between the Plaintiff and Defendant was whether or not the term for the redemption of this mortgage had expired in the year 1856. The statutes bearing on the question are the following ;—first, the *Oudh*—Limitation of Suits Act (No. XIII of 1866). Sects. 2 and 3 are to this effect,—" When a mortgagee shall under or by virtue of a mortgage executed before the said day," that is 13th February, 1844, " have obtained possession of any land comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit in any Civil Court or any Revenue Court in the said province to redeem the mortgage of such land," and so on—" provided that any suit for the redemption of land which may have been rejected or dismissed upon the ground that the suit was barred under some rule of limitation in force or supposed to be in force in the said province may be revived," and so on —and thirdly, " nothing herein contained shall be taken to bar a suit for redemption in any case where by the instrument of mortgage a term was fixed within which the property comprised therein might be redeemed, and such term had **[87]** not expired before 13th, February, 1856, provided that, if any such term had expired before that day, the suit therein be barred, whatever may have been the date on which the instrument was executed." Then in 1869 another act was passed, the object of which was to define the rights of talookdars and others to certain lands in *Oudh*. The second part of that confirms to the talookdars certain rights. It says,—" Every talookdar on whom a summary settlement of the Government revenue was made between the 1st day of April, 1858, and the 30th October, 1859, or to whom before the passing of this Act, and subsequently to the 1st day of April, 1858, the talukdary sannad has been granted, shall be deemed to have thereby acquired a permanent, heritable, and transferable right in the estate" and so on. Then Sect. 6 is to this effect :—" Nothing in Sects. 3, 4, and 5, or in the said orders, or in any sannad, shall be deemed to bar a suit for redemption where the instrument of mortgage was executed on or after 13th February, 1844, and fixed no term within which the property comprised therein might be redeemed ;" which manifiestly does not apply to this case,—" and (*b*) When the instrument of mortgage fixed a term within which the property comprised therein might be redeemed, and such term did not expire before the 13th February, 1856." Such was the issue between the parties, and such are the statutes bearing upon that issue.

The case was first tried before the Extra Assistant Commissioner, who believed the case of the plaintiff, who called several witnesses for the purpose of proving that the term of redemption in the mortgage was the term of twenty years, which would not have expired at the date in question. Several witnesses were called for the Defendant, who deposed that the term expired in ten years. The Extra Assistant Commissioner, who had the advantage of hearing and seeing the witnesses, believed the witnesses for the Plaintiff and disbelieved those for the Defendant, and gave judgment for the Plaintiff. The case was brought on appeal before the Commissioner, who reversed that decision, taking a somewhat opposite view of the case ; on the whole, being more disposed to believe the case of the Defendant, though he did not believe the whole of it, than the case of the Plaintiff. There was a subsequent appeal to the Officiating Judicial

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Commissioner. [88] Whether or not it was because Commissioner him as a general appeal does not very distinctly appear, but he appears to have decided mainly, if not entirely, upon the ground that according to his view there was a presumption of law in favour of the Plaintiff, and that the burden of proof lay, not upon the Plaintiff to prove that the term did not expire before the 13th February, 1856, but upon the Defendant to prove that it did; and upon this assumption he overruled the judgment of the second Court, and affirmed that of the first.

Their Lordships are not prepared to concur with the Judicial Commissioner in the view that he expressed, that the presumption of law is such as he has described it. It appears to their Lordships that in such a case as the present it lies upon the Plaintiff to substantiate his case by some evidence, by some *prima facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *prima facie* in this case in their Lordship's view is upon the Plaintiffs, still they think the consideration should not be omitted, that the Defendant would naturally have the mortgage, and that it would be *prima facie*, at all events, more in his power to give accurate evidence as to its contents, than in that of the Plaintiff. It is not a case in which two deeds, such as a lease and a counterpart, are executed, the Plaintiff keeping one and the Defendant the other, but it is a case in which it would appear that there is only one document, and that that would be, and moneys in this case, in the custody of the Defendant. The Plaintiff, by the hypothesis, would not have seen the document or probably have had access to it from the time of its execution, which in this case was the year 1840, whereas the Defendant woud be assumed to have it and to be able to produce it, or if he could not produce it, to show why he could not, and to give some evidence of its contents if it were lost.

Now, applying this view of the law to the present case, their Lordships have to see whether the Plaintiff, in their view, did give such *prima facie* evidence as shifted the burden of proof on the Defendant. Although it may be that the evidence of neither side [89] is altogether satisfactory, nevertheless their Lordships, after giving their best consideration to the case, are of opinion that the Plaintiff did give some such *prima facie* evidence. He was himself examined. He called seven or eight witnesses, who deposed to the contents of the instrument, to its containing the term which he contended for, and further, to the admission of the Defendant or of his predecessors of the existence of some such term, and the Extra Assistant Commissioner believed those witnesses, having, as was before observed, the opportunity of seeing them and observing their demeanour.

Again, it appears to their Lordships that there was some confirmation of the case of the Plaintiff by that of the Defendant. The Defendant did not produce this document: he indeed gave evidence that it had been filed in some proceedings in the Settlement Court just before the outbreak of the mutiny, and had been lost in the mutiny, but he neither gave any evidence himself, nor did he give any other legitimate evidence of its contents. It is true that a copy was put in by the Defendant, which purported to be a copy of the document in question. That is to be found in the record, and that describes the instrument as a deed of conditional sale. It contains these terms: "But should I fail to repay the mortgage-money at the time entered in this bond it will become a deed of sale, and the Panday will be entitled

to hold permanent possession like me, without fear or annoyance," and so on. But this document put in was not proved in any way. No person was called who made a copy or who made the document; no person was called into whose hands this document was put, and who was able to say, "This, according to the best of my recollection, represents the contents of the lost mortgage deed." The case was wholly bare of proof, although that proof might have been given. At the same time it is not immaterial, as against the Defendant, to observe that the case which he set up was that of a mortgage by conditional sale, which would have become absolute in the year 1850.

It appears, further, that on the part of the Defendant, there was an attempt to shew that he had sent in a return to the Government in pursuance of a requisition from them with respect to certain talooks, and that he described the villages in question in **[90]** this suit as having been mortgaged for a term of years to expire in 1850, that is, that they were mortgaged by a mortgage redeemable at the end of ten years. But the paper containing this return was said to have been abstracted from the records of the Government office, and some attempt was made to give secondary evidence of it. But, again, their Lordships have to observe that what was put in with this purpose is described as an "unattested statement," and in this unattested statement, wholly unproved, no doubt there is what purports to be a copy of a copy of a document wherein the talook was described as having been mortgaged, and by a mortgage redeemable at the end of ten years. It is to be observed, however, that in another return which the Defendant gives about the same time no mention is made of these villages. And there is a statement in the Government record somewhere about this time to the effect that the Defendant had not given the particulars of the mortgage, or described the terms or conditions of redemption.

Their Lordships observe that the Commissioner, in giving his judgment reversing the judgment of the Extra Assistant Commissioner, makes this observation :—" Prior to the grant of the sunnuds a general inquiry was ordered with respect to villages mortgaged to taluqdars, and in accordance with the Deputy Commissioner's order, two lists of Defendant's mortgaged villages were filed, one by Defendant's agent, and the other attested by himself; the original of the former has been abstracted from the file, but in an attested copy "—these are the words of the judgment—" filed by Defendant, the term of the mortgage is entered as ten years." Their Lordships fail to perceive any evidence whatever of this copy having been attested, and they cannot help thinking that if the Judge's view was founded, as it would appear partly to have been, on the impression that this supposed copy was an attested one, so far that judgment was wrong, and cannot be supported. But this appears, that in the settlement proceedings of 1857 the Defendant did describe himself as a mortgagee, and their Lordships have come to the conclusion that he did not then assert—at all events it is not shewn that he asserted—that the mortgage was subject to redemption in ten years or any particular time.

That being so, their Lordships are of opinion that there is some **[91]** force in the remarks of the Extra Assistant Commissioner, which are to this effect. Referring to certain settlement proceedings in 1857, he says :—" The proceeding recorded in appeal dated 4th April, 1857, filed by the Defendant, shews that in appeal the Defendant countermanded his statement of the purchase of the estate, and simply called himself a mortgagee ;"—it appears he had put forward some statement with respect to

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3 I.A. 85=3 Saraswati's P.C.J. 570.

the purchase of the estate—"and there is an order conveyed in the proceeding that this fact should be inquired into. He now says that the transaction was a conditional sale, the term of which expired towards the close of 1257 Fuslee. Had the latter's statement been correct, he would, under the terms of the deed, have ranked as a purchaser and proprietor in 1258 Fuslee, and would not have called himself a mortgagee in 1857." Their Lordships therefore think that the evidence of the Plaintiff is to some extent corroborated by an admission of the Defendant, to the effect that there was in existence a mortgage in 1857. They therefore think that the Plaintiff gave some evidence calling upon the Defendant for an answer. It may be that the evidence was not very strong, and that it would have been rebutted by evidence of any force on the other side. But their Lordships are of opinion that the evidence of the Defendant, the main portions of which appear to have been disbelieved by all three Courts, and some documents connected with which have been treated by all three Courts as spurious, contains no answer to the case of the Plaintiff, which must therefore prevail.

For these reasons their Lordships will humbly advise Her Majesty to confirm the two judgments which have been given in favour of the Plaintiff.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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APPELLATE CIVIL.

1 A. 126.

CHUNNI (*Defendant*) *v.* THAKUR DAS (*Plaintiff*).

[15th December 1875.]

1 A. 126.

Condition in mortgage-deed not to alienate—Equities in favour of the mortgagees.

An alienation of mortgaged property in violation of a condition in the mortgage not to alienate, is not absolutely void, but voidable in so far as it is against the mortgagee's rights.

In such a case, the mortgagee will have obtained all that in equity he is entitled to, if it is declared that the alienation against the terms of the mortgage shall not bind the auction purchaser, unless he desires its continuance.

[F., 1 A. 610; **Expl.**. 4 A. 518; **R.**, 5 M. 184, A.W.N. (1890) 59.**]**

Plaintiffs got a mortgage-deed executed in their favour on the 24th November, 1870 with respect to certain property and it contained a condition against alienation. On the 9th October, 1874, the mortgagor granted the defendant a lease of the same for 11 years. The plaintiffs got a decree on the 5th December, 1874 for the sale of the mortgaged property in satisfaction of the mortgage-debt. The present suit was instituted by them for the invalidation of the lease. The suit was dismissed by the first Court. The lower appellate Court held that the lease was invalid. The defendant made a special appeal to the High Court.

JUDGMENT.

[128] The lease is not a lease merely for agricultural purposes, but a transfer of the interest of the proprietor for a term of years. Is it a violation of the condition against alienation? It has been held **[129]** that such conditions are introduced to protect the lien created by the mortgage,

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1 A. 126.

and that a transfer made in contravention of the condition is not absolutely void, but voidable so far as it is in defeasance of the mortgagee's rights. In the present case the mortgagees have obtained a decree for the sale of the estate in satisfaction of the loan. The existence of the lease may induce purchasers to offer less price for the property than they would offer if they could obtain immediate possession. On the other hand, the lease may be an arrangement highly beneficial to the owner of the estate and thus a substantial increment to its value. The mortgagees will have obtained all that in equity they are entitled to, if the Court gives them a declaration that the lease will not be binding on a purchaser in execution of the decree, unless he desires its continuance. The decrees of the Courts below will be modified accordingly, but as the appeal substantially fails, we must order the appellant to bear the respondents' costs.

PRIVY COUNCIL.

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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JAN. 11.

PRIVY COUNCIL.

3 Suth. P.C. 235=25 W.R. Civil, 121.

On Appeal from the High Court of Judicature, North-Western Provinces, Allahabad.

MAHOMED ALTAF ALI KHAN *v.* AHMED BUKSH AND OTHERS.

[11th January 1876.]

3 Suth. P. C. 235=25 W. R., Civil, 121.

Mahomedan Law—Testamentary disposition—Wazib-ul-arz—Condition recorded valid.

By the Muhammadan Law, no writing is required to make a will valid, and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained.

Where a testatrix devises a certain disposition of her whole property in *wajib-ul-arz* relating to a portion of it, and independent evidence of her intention to make this disposition was produced, held that the disposition was valid against a claim for possession set up by rival claimants.

JUDGMENT.

[121] The point in this case is a very short one. The plaintiffs claimed under a will of Mussumat Bunnoo Jan, who is admitted on both sides to have been the owner of the property in question, and to have had power to dispose of it by will. The defendant's claim was simply that of possession.

It is admitted that by the Mahomedan law no writing is required to make a will valid, and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained. In the first place, the plaintiffs put in a certain power of attorney executed by the testatrix to one Kishoon Lall, to make what is called a *wajib-ul-urz*, and this document is to this effect: that a new settlement having been made of the property this lady made her appearance in respect of one Mouzah Ismaeelpore, and she directed a *wajib-ul-urz* to be made in respect of that Mouzah. But then she goes on to say, the *wajib-ul-urz* is to contain an alienatory clause to the effect: "After my demise Ahmed Buksh shall be the proprietor of one moiety of my property, and Mussumat Nujmoonnissa, my adopted daughter, the proprietress of the other moiety."

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3 Suth. P.C. 235 = 25 W.R. Civil, 121.

Now it was contended that although these words of demise in themselves extended to the whole of the property of the testatrix, still the scope of this document must be limited to Mouzah Ismaeelpore, to which, in the beginning, it particularly refers, and if this document stood alone there might possibly have been some question on this subject. But there was also verbal evidence to the effect that the testatrix did express an intention that the whole of her property should be devised by will to the plaintiffs, and as far as their Lordships understand the judgment of the Judge of the Subordinate Court, that Judge appears to have believed the evidence, because he came to the conclusion that it was the intention of the lady to give the whole of her property, though he thinks she has not carried that intention into effect. Accordingly his judgment was, that her testamentary disposition only took effect with respect to Mouzah Ismaeelpore. That decision was reversed by the High Court, on the ground that it appeared from the evidence in the case generally, consisting partly of this document and partly of verbal evidence which seems to have been credible, that the lady intended to devise the whole of her property to the plaintiffs.

Their Lordships are of opinion that the High Court was right in that conclusion, and they will therefore humbly advise Her Majesty to confirm the judgment of the High Court, and to dismiss the appeal with costs.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Oldfield.

1876
JAN. 14.

QUEEN *v.* KULTARAN SINGH. [14th January 1876.]

CRIMINAL JURISDICTION.

1 A. 129.

Crim. Pro. Code, 1872, Ss. 468, 471, 472, 473—Offences against public justice—Jurisdiction.

S. 472 is not intended to include offences, which, under the Penal Code, are classed as offences against public justice, in contradistinction to offences in contempt of the Court's authority. But a Magistrate, before whom an offence under S. 196, I.P.C., has been committed, may not, under S. 271, himself try the accused person for that offence.

[Overruled, 1 A. 625 (F.B.). Diss., 1 B. 311 (312), 1 B. 339.]

In a suit before the Assistant Collcetor against Kultaran Singh, for the recovery of arrears of rent, one Bikam Singh gave evidence as to the payment of rent by Kultaran Singh. This evidence led the Assistant Collector to enquire into a charge against the former under S. 196, I.P.C., and against the latter under S. 193, I.P.C. It resulted in a conviction of both. Kultaran Singh petitioned to the High Court.

JUDGMENT.

[130] OLDFIELD, J.—It has been objected on the part of Kultaran Singh that the Assistant Magistrate was not competent to try and convict the petitioner, being the Court before which the said offence was committed. This objection was urged under Ss. 471 and 473, Code of Criminal Procedure.

[131] The objection is not tenable under S. 473. That section is to the effect that, except as provided in Ss. 435, 436, 472, no Court shall try any person for an offence committed in contempt of its own authority of

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JAN. 14.

CRIMINAL JURISDICTION.

1 A. 129.

a Court. It was not intended apparently to include such offences as those which are the subject of this trial, which, under the Indian Penal Code, are classed as offences against public justice, in contradistinction to offences in contempt of the Court's authority. The Indian Penal Code has separately classified those two classes of offences, and it may be presumed that S. 473, Code of Criminal Procedure, has followed this classification, and that when it refers to offences in contempt of authority of a Court, it refers only to such as are so classed under the Indian Penal Code. As a matter of fact also, the classification of the Indian Penal Code has been followed in the Code of Criminal Procedure, and notably in S. 468 in regard to offences under S. 193, and which are classed as offences against public justice. This is the view of S. 473 taken by this Court in their answer dated the 14th September 1874, to a reference in *Mumni* and others made by the Judge of Agra, and was held by the Calcutta Court in *Safatoollah* (1).

But it appears to me that, with reference to S. 471, the Assistant Magistrate was not competent to try the petitioner for an offence under S. 196, committed before him as Assistant Collector. S. 471 is as follows: —"When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiring into any charge mentioned in Ss. 467, 468, 469, such Court, after making such preliminary enquiry as may be necessary, may either commit the case itself or may send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged."

This section seems to require that the Court shall either commit the case or send it to some other Magistrate, but not charge or try the person on its own charge. It appears to have been intended that the rule in S. 471 should have general application, with the one exception provided for in S. 472. That section gives an exceptional power to a Court of Session to charge and try on its own charge a person for an offence committed before it when the offence is triable by the Court of Session exclusively; and **[132]** S. 472, by thus exceptionally exempting a Court of Session from the operation of the provisions of S. 471, shows what the general effect and aim of those provisions was intended to be.

To permit the Court in the present case to charge and try for the offence committed before it would be interpreting S. 471 as giving the Court a higher power than is allowed to a Sessions Court. A similar view of the effect of S. 471 was taken by the Calcutta High Court in *Safatoollah* (1).

The convictions and sentences passed on Bhikam Singh and Kultaran Singh are annulled, and the Court is directed either to commit them for trial or to send the case to another competent Magistrate for disposal.

(1) 22 W. R. Cr. 49.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1876
FEB. 11.

SHAIKH EWAZ (*Decree-holder*) *v.* MOKUNA BIBI (*Judgment-debtor*).

[11th February 1876.]

APPEL-LATE CIVIL.

1 A. 132.

1. *Pre-emption—Conditional decree.*

In decreeing a suit for pre-emption, the Court can fix a time, within which the purchase-money is to be deposited in Court, in default of which the plaintiff loses the benefit of the decree. (H. C. R., N. W. P. 1868, p. 254, *appr*).

1 A. 132.

2. *Final Judgment and Decree, what is—*

Where there was a direction in such a decree, that the purchase-money should be deposited in Court within 31 days from the date of its becoming final, *held* that the decree did not become final until the time for the last appeal allowed by law had expired, or, if appealed from, has been decided by the ultimate appellate Court.

[**F.**, 7 A. 107, A.W.N. (1884) 224; **R.**, 24 M. 449: **D.**, 1 A. 293; A.W.N. (1888), 4, 11 A. 346, 4 A.L.J. 360, 5 A.L.J. 136=A.W.N. (1908), 13.]

In a suit to establish a right of pre-emption *re* a share in a certain village, under and by virtue of a clause in the village administration-paper to the effect that no share in the village should be sold or transferred in any way to a stranger unless it had been previously offered to and been refused by all the co-sharers, the plaintiffs got a decree in the Court of first instance on 5—1—1875, declaring their right to the possession of the share on the payment of Rs. 300, within 31 days from the date of the decree becoming final. The vendees, defendants, appealed to the lower appellate Court and the appeal was dismissed on 18—3—1875. They preferred a special appeal to the High Court but it was dismissed on 27—8—1875. On the decree-holders paying the amount of the purchase money on 1—5—1875 and praying for possession of the property in execution of the decree, both the lower Courts refused execution of the decree, for failing to deposit the purchase money within the time specified in the 1st Court's decree, and held that the decree became final on 18—3—1875. In special appeal to the High Court, the contentions of the decree-holders were:—

(i) that the right of pre-emption decree was not lost by reason of failing to deposit the purchase-money within the time specified in the decree; and

(ii) that the decree did not become final till the date of the decision of the special appeal.

JUDGMENT.

[133] The first plea hardly arises in the shape in which it has been thrown. But it has always been the practice of our Courts in these Provinces to insist upon the payment of purchase-money in cases of the nature within the period prescribed by the Court. We are understood to follow the ruling of this Court marginally noted. There a pre-emptor obtained a decree from the first Court which provided a certain time within which the sum ascertained to be the purchase-money was to be deposited. The

Sheo Pershad Lall v. Thakoor Rai (1).

(1) H.C.R., N.W.P., 1868, p. 254.

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1 A. 132.

pre-emptor appealed against the amount fixed by [134] the Court but failed. He did not deposit the money within the fixed time, and the Judge declined to enlarge the time. It was held by this Court that the plaintiff, in appealing from the original decree, could not escape from the obligation which it imposed, and the lower appellate Court was not bound by law to insert in its decree any special direction concerning such deposit unless occasion called for it, although it was important to have done so. This ruling is not one exactly in point. But the principle laid down is the same. The Court was competent to make the direction it did as to the payment of the money, and if the decree-holder failed to comply with the obligation imposed on him by the decree, he would lose the benefit of it.

As to the second plea, the decision referred to by the lower appellate Court (1) is not one in point, for the ruling there related to the question whether a plea of limitation could be heard for the first time after a remand-order on the merits had been carried out, when it had not been made the subject-matter of appeal at a previous stage. The words in the decision —"it appears to us that the judgment and decree, from which the ninety days are intended to be reckoned, are the final judgment and decree in the suit between the parties" (2)—might perhaps be misleading as to what is to be considered the final decision of the case in the suit before us. The words of the decree of the first Court are that the plaintiffs "shall make a deposit of Rs. 300 within 31 days from the date this (the Munsif's) decision becomes final." In our opinion a decision cannot be said to become final until the time for the last appeal allowed has expired, or, if appealed, it has become final by the decree of the High Court, as the ultimate Court in the country. In the suit before us there was a special appeal allowable under certain circumstances, and the Rs. 300 were deposited before the time fixed for the presentation of a special appeal had expired. Indeed, the special appeal was subsequently admitted and ultimately dismissed on trial on the 27th August 1875.

Under this view of the case the order of both the Courts below is wrong. The appeal is decreed and the decision of the lower appellate Court reversed, and the case remanded to it under S. 351, Act VIII of 1859, for trial on the merits. Costs will abide the result.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

1876
FEB. 16.
FULL BENCH.
1 A. 151.

QUEEN v. THAKUR PARSHAD.

[16th February 1876.]

1 A. 151.

Crim. Pro. Code, 1872, S. 390—Power of Sessions Court to admit a convicted person to bail.

The Court of Sessions is not competent to make an order, under S. 390, directing the admission of a convicted person to bail, as a convicted person is not an accused person within the meaning of that section.

[Appl., 17 B. 334 (341).]

(1) *Mirza Himmut Bahadoor* v. *Gobindo Panday*, 5 W.R. 91; (2) 5 W.R. 91 (93).

1876

FEB. 16.

FULL BENCH.

1 A. 151.

ORDER OF REFERENCE TO THE FULL BENCH.

The question referred to the Full Bench was :—

Whether the Court of Session was warranted by the terms of S. 390, Act X of 1872, to make an order directing the Magistrate to admit to bail a person convicted and sentenced under S. 352, I.P.C.

STUART, C.J., referred the above question to the Full Bench with the following order of reference :—

That section (390) provides that "the Court of Session may in any case, whether there be an appeal on conviction or not, direct that the accused person shall be admitted to bail, or that the bail required by a Magistrate be reduced." This, it was argued, meant "whether there be *allowed by law* an appeal on conviction or *not allowed by law*." In connection with this view, however, it must be remembered that the Sessions Judge has no power under S. 297 of the Code of Criminal Procedure, or otherwise, to revise the proceedings of Criminal Courts subordinate to him, and that, in the case of an appeal not allowed by law, an application to him to admit to bail would be unmeaning and futile. If, on the other hand, the true meaning of the section is "whether there be an appeal *entered or taken* on conviction, or *not entered or taken*," then the power of the Judge would appear to be confined to appealable convictions, and not to extend to cases, like the present, where there is no appeal, the Judge at the same time having no power of revision.

OPINIONS OF THE FULL BENCH.

[153] PEARSON, J.—The question upon which I understand that the opinion of the Full Bench is required is whether the Court of Session at Allahabad was warranted by the terms of S. 390, Act X of 1872, in directing the Magistrate to admit to bail a person who had been convicted and sentenced to one month's imprisonment under S. 352, Indian Penal Code. My answer to that question is in the negative. S. 390 declares that "the Court of Session may in any case, whether there be an appeal on conviction or not, direct that an *accused* person shall be admitted to bail." The section occurs in a part of the Code which prescribes procedure incidental to enquiry and trial ; and it is thus evident that an accused person is one against whom an accusation is the subject of inquiry and trial and not a *convicted* person. That this is so further appears from the context, if S. 390 be read in connection with the preceding and following sections. By "any case" is meant only any case the subject of enquiry or trial before a Magistrate, whether or not, in the event of a conviction, an appeal would lie from the Magistrate's sentence or not. The section does not refer to cases in which the Court of Session is proceeding under S. 296 of the Procedure Code.

TURNER, J.—Reading the terms of S. 390 by themselves, the natural construction appears to be that in all cases, both in those which, resulting in a conviction, would not be appealable to the Sessions Judge, and in those which, resulting in a conviction, would not be so appealable, a Court of Session has power to admit to bail an accused person, that is to say, a person charged, but not as yet convicted of an offence, or to reduce the bail required by a Magistrate.

It may be dangerous to draw an inference as to the proper construction of this section from the place it occupies in the Code, because at the conclusion of the Chapter we find S. 399 applying to all cases in which bail may be taken except those therein specially excepted. The proper

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construction of S. 190 rests on the meaning to be given to the word "accused." In its ordinary sense it is most properly applied to persons against whom a charge is made, and it is opposed to the term "convicted." But the learned counsel for the petitioner contends that, in other parts of the Code, we find the [154] term "accused" applied to persons convicted—to which it appears a reasonable answer that, in those places, as for instance in Ss. 283 and 297, it is apparent from the context that the term is used in a particular sense, whereas in S. 390 there is nothing in the context to affect its ordinary meaning. It must, therefore, be held that the provisions of S. 390 do not empower the Sessions Judge to order the Magistrate to admit to bail a person who has been convicted. Of course, as an appellate Court, a Sessions Judge has power on or after the admission of the appeal to admit the convicted appellant to bail, but in the case out of which this reference has arisen no appeal lay to the Sessions Court.

SPANKIE, J.—On the question as to the legality of the order, there can be no doubt, I think, that, if made under S. 390 of the Criminal Procedure Code, it was illegal. The section is found in Part IX of the Code, which refers to procedure incidental to inquiry and trial. S. 388 directs when bail shall be taken when any person is accused before a Magistrate; S. 389 directs when it shall not be taken in non-bailable offences, and when it may be taken. Under those sections it is the Magistrate who orders bail. S. 390 empowers the Sessions Court in any case, whether appealable to itself or not so appealable, either to admit to trial or to reduce the amount of bail ordered by the Magistrate. But the power given is to be exercised before conviction is had, and it may be exercised in all cases and without exception.

OLDFIELD, J.—The Judge's order directing the Magistrate to release the prisoners on bail is, in my opinion, illegal. The case not being appealable, the Judge could not act under S. 281, Criminal Procedure Code, as an appellate Court and admit to bail, and the power given by S. 390, Criminal Procedure Code, appears to me to refer to the procedure incidental to inquiry and trial, and to allow the Judge in any case to admit an accused person to bail at any time during the trial, but not after conviction. S. 390 should be read with the preceding section.

To interpret S. 390 so as to permit the Judge to take bail without restriction, in any case after conviction, would be to allow the Judge a higher power in admitting to bail than is given to the High Court as a Court of Revision, since S. 297, Criminal Procedure [155] Code, limits that Court's power to take bail in cases coming before it as a Court of Revision to cases where the offence for which a person has been imprisoned is bailable.

STUART, C. J.—This reference has come back to me from the Full Bench with the opinions of the consulted Judges. They all consider that the Judge's order, purporting to direct the Assistant Magistrate to release the prisoners on bail, was illegal, and I am clearly of the same opinion. They very properly direct attention to the circumstance that S. 390 is to be found under Part IX of the Code, which is entitled as "Procedure incidental to inquiry and trial;" and, keeping that consideration in view in construing the section, I am of opinion that it only applies to the case of an "accused person," that is, to the case of a person accused of an offence, the conviction of which is appealable or not appealable, and that it was not intended to apply to such a case as the present, where there has been a conviction, final and complete. Such I think is the true

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meaning of the section. Any other reading of it, which would take it out of the category indicated by the heading of "Procedure incidental to inquiry and trial," would involve the necessity of holding that an "accused person" in the section was synonymous with a convicted person, and that therefore the compiler of the Code had made a mistake in placing it under the heading of "Procedure incidental to inquiry and trial." The Sessions Judge, I think, must be understood to be of this mistaken opinion, for it appears from the correspondence which accompanies his letter of reference and by his directing Mr. Pears' attention to S. 390 of the Criminal Procedure Code, that his idea was that he could admit to bail in *any case after trial*, whether there had been a conviction or not. We cannot, however, put such a construction on the terms of the section, a construction entirely repugnant to them and to the whole context. "An accused person" simply means an accused person, and nothing more, and this S. 390 was only intended for a person in that position, and who on conviction would appeal or not.

But in either view of the section the Judge's order in the present case ought not to have been made. If S. 390 does not apply, as I hold it does not, there is no other provision of the Code which **[156]** empowered the Sessions Judge to admit to bail, and the order was altogether *ultra vires*. But if, on the other hand, it could be shown that the section does apply to such a case as this, the order was equally invalid, for (as I have already pointed out in my referring order) the Judge having no revisional authority, his admitting these convicts to bail was inoperative for any judicial purpose or effect and therefore futile.

FULL BENCH.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr Justice Oldfield.

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IN THE MATTER OF HARDEO. [19th February 1876.]

Crim. Pro. Code, 1872, S. 297—Judgment of acquittal—Revisional powers of the High Court.

Per Oldfield, J.—The mere fact, that an accused person has been acquitted on trial, will not operate to take away the general powers of revision of the High Court, when there has been a material error in any judicial proceeding in the case.

Per Pearson, J.—An acquittal does not preclude revision under S. 297, Cr.P. C., 1872.

Per Turner, J.—Where there has been an acquittal on the merits, and where an accused person has been acquitted because the Court by which he has been tried holds the evidence insufficient to prove his guilt beyond reasonable doubt, the High Court cannot interfere as a Court of Revision. But where the acquittal has been brought about by such material error in the proceeding as makes the proceeding bad in law, it is competent for the High Court to interfere.

Per Spankie, J.—There is no appeal allowed by law to a private prosecutor from an order of acquittal, and there is no power given to the High Court to revise an order of acquittal on the facts found on the evidence. Unless there is something that could be considered to be a material error in law, all interference under the first paragraph of S. 297 is barred.

Per Stuart, C. J.—A private prosecutor, who can show, on the face of his petition, a proper case for revision of a judgment of acquittal, is entitled to have it entertained under S. 297, and to an order on it for a new trial.

[Appl., 2 A. 336 (339). **R.**, 2 M. 38 (39) = 2 Weir 567, 14 B. 331 (341).**]**

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ORDER OF REFERENCE TO THE FULL BENCH.

The question referred to the Full Bench was:—

Whether the High Court is precluded by a judgment of acquittal from exercising its powers of revision under S. 297, Act X of 1872?

STUART, C. J. made the following reference to the Full Bench:—

[140] The question raised in this petition has already been determined in this Court in the case of *Queen* v. *Bisheshar Pandey* (1) before Mr. Justice Turner, who was of opinion that we had no power to disturb an acquittal save on the appeal of Government, and that, therefore, I presume, a private prosecutor could not apply for *revision* of a judgment of acquittal; and there is also a ruling by Mr. Justice Markby of the Calcutta Court (2) to the same effect. I am inclined to think that these learned Judges are right, but the question is not without difficulty and doubt.

On the other hand, the powers of revision by this Court under S. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of *revision*, that the facts and evidence relied on in defence afforded no answer whatever to the charge; and it might be argued to be impolitic and scarcely intended that, while the Government cannot only *appeal*, but, according to the judgments above referred to, can also apply for *revision*—and in all cases—a private prosecutor has no remedy by resort to this Court against the ignorance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest evidence and the undoubted facts, even where these facts are found by such Magistrate or Judge himself.

In the present case the private prosecutor pleads that "the facts found by the Sessions Judge were sufficient to convict the defendant under S. 471, if not of direct forgery." This is a question that appears to be covered by the terms of S. 297, and revision is not necessarily the same thing as an appeal. The object of S. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was **[141]** perhaps simply to allow the public prosecutor in such a case a rehearing on the merits, without any desire to limit or curtail the powers of revision, whatever the extent of these may be. I refer the question to a Full Bench of the Court.

OPINIONS OF THE FULL BENCH.

[141] PEARSON, J.—The question on which our opinion is asked I understand to be whether an acquittal precludes revision under S. 297, Act X of 1872; and my answer to the question is in the negative. The terms of that section empower the High Court in any case, either called for by itself or reported for orders, or coming to its knowledge, in which it appears that there has been a material error in any judicial proceeding of any Court subordinate to it, to pass such judgment, sentence or order thereon as it thinks fit.

There is nothing in these terms restricting the High Court's action in the exercise of the powers conferred upon it to cases in which persons have been convicted of an offence. On the contrary, it seems to me that the High Court is fully warranted by these terms in ordering a new trial of a person who has been acquitted by reason of some material error in a

(1) H.C.R.,N.W.P., 1874, p. 357.
(2) *Queen* v. *Hatu Khan*, 12 B.L.R. App. 22=21 W.R. Cr. 21. See also *petition of Bakram*, 19 W.R. Cr. 52; *Okhoy Teli* v. *Modhoo Sheik*, 19 W.R. Cr. 55.

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judicial proceeding of a subordinate Court. The provisions of S. 272 of the Code are quite distinct from those of S. 297 and do not militate with them. Whether in the particular case out of which this reference to the Full Bench has arisen, there has been any such material error in the proceedings of the lower Court as to call for revision is another question which we are not asked to decide.

TURNER, J.—In *Regina* v. *Bisheshar Pandey* (1) an application was made to me to admit for revision the proceedings in a Session trial, in which the Sessions Judge had acquitted a person accused of adultery on the ground that he was not satisfied with the evidence of his guilt and inclined to accept the evidence adduced by the accused in support of a plea of *alibi*, and the petitioner contended that the application ought to be admitted because the guilt of the **[142]** accused was proved by the admission of the woman who was at the same time on trial for abetment of the offence.

In refusing that application I inadvertently used language which warrants the conclusion that in no case of acquittal can this Court interfere as a Court of Revision. I am not prepared to maintain that view. Where there has been an acquittal on the merits, where an accused person has been acquitted because the Court by which he has been tried holds the evidence insufficient to prove his guilt beyond reasonable doubt, I am still of opinion that this Court cannot interfere as a Court of Revision. But where the acquittal has been brought about by a material error in the proceeding, and by material error I understand such an error as makes the proceeding bad in law, then I hold it is competent for this Court to interfere. Now it is not only not an error on the part of the Court, but it is the duty of the Court to determine whether evidence offered is in its judgment reliable or not. Consequently, although this Court might be disposed to give credit to evidence distrusted by a subordinate Court, it could not interfere on this ground as constituting a material error in a judicial proceeding. On the other hand, if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and therefore acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision.

It has been suggested that the first clause of S. 297 is controlled by the succeeding clauses. Although some of the cases mentioned in these clauses might be held to constitute material error in a judicial proceeding and so to fall within the purview of the first clause, I have already in other cases expressed my opinion that the first clause is not controlled by the succeeding clauses.

There remains the question whether, in the case referred, a private complainant may set the Court in motion. In my judgment in this as in other cases in which the Court has a discretionary power to call for cases for revision it is competent to the Court to allow a private person to move it to exercise its powers.

[143] SPANKIE, J.—The prayer of the petition which gave rise to the reference is that the records of the case may be called for, and an order for a new trial be given—and the reason assigned for the prayer is that the facts found by the Sessions Judge were sufficient to convict the defendant under S. 471, if not of direct forgery.

(1) H.C.R. N.W.P., 1874, p. 357.

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I do not quite gather from the order of reference what we are asked to determine. If we are asked whether the Court could entertain the petition under S. 297 so far as to send for the record, I would say that it could be sent for if the petition discloses any material error in the proceedings of the Court below. But it seems to me that nothing of the kind is disclosed by the petition in the case brought to our notice. The petitioner expresses his opinion that the facts found on the evidence by the Sessions Judge were sufficient to convict the defendant—but no error or defect either in the charge or in the proceedings on or before trial, on account of the improper admission or rejection of any evidence, has been shown, whereby there has been a failure of justice affecting the due conduct of the prosecution. The proceedings of the Court have been regular, but the Judge on the evidence finds that the charge has not been established. He therefore acquits the prisoner. There is no appeal allowed by law to a private prosecutor from an order of acquittal—and in my opinion there is no power given to this Court to revise an order of acquittal on the facts found on the evidence. Any revision must proceed on the ground of a material error in some judicial proceeding. When no such errors such as those referred to above are pointed out, unless there is something that could be considered to be a material error in law, all interference under the first paragraph of S. 297 seems to be barred. It will further be observed that though where the material error is such that the Court is empowered to pass such judgment, sentence or order as it thinks fit, and though these words seem to be almost unlimited in their range, still there does appear to be some limit put to these cases in which a new trial may be ordered. When an accused person has been improperly discharged there is power to order commitment, there is power to alter a finding and sentence, and power to annul conviction, power to annul improper and to pass a proper sentence, and power in certain cases, of which this [144] before us is not one, to annul the trial and order a new trial before a competent Court. But there is no express power given to order a new trial in the case of an acquittal on the ground that the facts found might warrant conviction. From these considerations. I come to the conclusion that, as there is no appeal to a private prosecutor in the case of an acquittal, so there can be no revision by the Court merely of the finding on the evidence, and if there is a revision at all, it must be on some purely material error (in law) in the proceedings.

OLDFIELD, J.—In my opinion it was not the intention of the legislature that the power of revision given to this Court by the first paragraph in S. 297, Criminal Procedure Code, to pass such judgment, or sentence or order as it thinks fit, when a material error in any judicial proceeding of a Court in any case has come to its knowledge, should only be exercised in the particular instances of error and in the particular manner given in the succeeding paragraph of S. 297. I apprehend that those paragraphs are merely illustrative of the operation of the law in particular instances, and that this Court can, and should, revise any material error in a judicial proceeding coming to its knowledge, by passing such judgment, sentence or order as it thinks fit.

In this view of the law the fact that an accused person has been acquitted on trial will not operate to take away the general power of revision, when there has been a material error in any judicial proceeding in the case. The law, by S. 272, Criminal Procedure Code, allows the High Court to entertain an appeal from judgments of acquittal at the instance of the Local Government, and since it can interfere in cases of

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acquittal on appeal, I conclude it can *a fortiori* under its power of revision; and without such a power in this Court there would be danger of miscarriage of justice. Such too was the view of the law under the old Criminal Procedure Code taken in *Queen* v. *Gora Chand Gopee* (1) by the Calcutta Court, Peacock, C. J., Trevor and Norman, JJ.

I am not called upon to express an opinion whether there has been a material error in the case within the meaning of S. 297.

ORDER.

On receipt of the opinions of the Full Bench, the following order was passed by :—

[145] STUART, C. J.—This case has come back from the Full Bench with the opinions of the Judges, and it is now to be disposed of by me as the referring Judge.

The majority of the Court, including myself, hold generally that we have and may exercise in such a case as the present the revisional power conferred by the first general substantive enactment of S. 297 of the Criminal Procedure Code. Mr. Justice Spankie is of a different opinion, holding that, as there is no appeal to a private prosecutor in the case of an acquittal, there can be no revision as here claimed.

Some of my colleagues, however, do not appear fully to have apprehended my reference as I intended to put it, and if I could have anticipated their difficulty I would have endeavoured to have put the question referred in clearer terms than I have used. But, looking at the case in the light in which its mere statement would be at once understood by the legal profession at home, it did not occur to me to be more precise, but let me here explain myself more clearly by a brief reference to the opinions of my colleagues. Mr. Justice Turner comes nearer my own views of the case in the sense I have alluded to, when he expresses himself favourably as regards our revisional power in all cases where there is error in law, adding that, "if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and consequently acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision"—his meaning, I presume, being that, if the subordinate Court acquitted from an ignorant conception of the legal insufficiency of the facts, this Court could interfere. On the other hand, Pearson, Spankie, and Oldfield, JJ., although differing in opinion as to our powers of revision in cases of acquittal, do not appear to have considered that legal error or material error was shown in the reference, and that it had yet to be ascertained. Mr. Justice Spankie in such a case as this is against any revision on our part at all, while I suppose the meaning of the opinion of Pearson **[146]** and Oldfield, JJ., is that we may send for the record and then see what the error, if any, was.

But there was a question preliminary to such an order which I intended should be first entertained and decided, *viz.*, whether the petition before us shows, *on the face of it*, a case which we can entertain at all, in other words, assuming the statement in the petition to be true, does it on its face show legal error? This is a question that lies on the threshold of the case, and must be first determined before we even admit the application, much more before we make any order for the record. The Sessions Judge acquitted the accused, and it is alleged by the petitioner

(1) 1 Ind. Jur. N. S. 177=5 W. R. Cr. 45.

that not merely the facts, but the facts found by the Sessions Judge himself, were sufficient to convict. Now does such a statement show or does it not show, *on the face of it*, legal or material error? There is here evidently the same question that is raised, the same legal or material error that is intended by, for example, the demurrer to an indictment at home, and legally demonstrated when well taken as a plea—for I think any one acquainted with the principle of the English demurrer in criminal pleading must perceive at once that the principle here sought to be applied is analogous.

Such was the reference I intended, and the question involved appeared to me to be a very simple one, and sufficient to raise the question and enable us to come to a decision as to the powers of revision given to High Courts in all cases. It was occasioned not only by the consideration I had given to the powers of this Court under the Criminal Procedure Code, but also by the judgments alluded to in my order of reference. No prosecutor other than the Government can appeal against a judgment of acquittal. This power, however, is expressly given to the Government by S. 272 of the Criminal Procedure Code. Such an appeal, I take it, is an appeal *on the merits* of the case, that is, an appeal on the ground that the trial in the Court below has miscarried by the reason of the Judge or Magistrate not having sufficiently weighed or considered the evidence, and that there has been an acquittal, whereas there ought to have been a conviction. Such is the appeal which in the case of an acquittal the Government can make. A private prosecutor, however, has no such power.

[147] But, although a private prosecutor has no such power of appeal against a judgment of acquittal on the merits, can he apply to this Court for *revision* under S. 297 of the Criminal Procedure Code? or in other words, is insufficiency of facts to support a conviction such a legal error, on the face of the acquitting judgment, or otherwise such a revisional question, as can be entertained under S. 297?

In the Calcutta case above referred to, *Queen* v. *Hatu Khan* (1) it was stated that the Deputy Magistrate, after hearing two of the prosecutor's witnesses only, and without taking the evidence of the remaining witnesses named by the prosecutor (two of them at least were present at the trial), and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under S. 211 of the Indian Penal Code. The Magistrate, however, being of opinion that such a judgment was illegal, reported the case for orders to the High Court of Calcutta, and it came on for hearing before Markby and Birch, JJ., the judgment of the Court being delivered by Mr. Justice Markby, who said: —"We do not think that we have power to do what the Officiating Magistrate asks, namely, to set aside the acquittal of the prisoner, and to direct a retrial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged, we may order him to be tried, or to be committed for trial, under the second clause of S. 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that case." The case (2) which came before Mr. Justice Turner in this Court is scarcely in point. It was one in which the Sessions Judge had acquitted the prisoner, one

(1) 12 B.L.R., App. 22=21 W.R. Cr. 21.
(2) H.C.R., N.W.P., 1874, p. 357.

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Bisheshar Pandey, who was charged under S. 497, Indian Penal Code (adultery), and 498 (enticing, or taking away or detaining with a criminal intent, a married woman), and two other persons, Balak and Mussamut Bhagia, of abetment of the offences, and the private prosecutor presented a petition to this Court in which it was objected that "the acquittal was bad in law, the state-[148]ment of Mussamut Bhagia being sufficient to establish the offences charged against the accused." Such an objection scarcely shows an error in law. It would rather appear to have been an error or mistake on the part of the Judge in not giving due effect to the evidence, and that therefore the petition was really an appeal on the merits, which of course could not be entertained. But the petition was entitled in revision, and it suggested that the acquittal was "bad in law" for the reasons stated, and the case was argued before my learned colleague as one in revision, the counsel who appeared against the petition referring to the judgment of Mr. Justice Markby in the Calcutta case (1). In the order passed by Mr. Justice Turner it was stated that the reasons for the acquittal were not obvious, and it then proceeded:—"However, there has been an acquittal, and, as the learned counsel who appears for the accused in this Court contends, this Court has no power to disturb an acquittal save on the appeal of Government. The provisions of S. 297 only permit the Court to interfere and order a new trial when an accused person has been discharged without being put on his trial." The judgment of my Honourable and learned colleague is so reported, but from the opinion he has recorded in the present case I am glad not to be driven to the conclusion that he necessarily holds against our power to revise.

Respecting, however, the opinion I have quoted of Mr. Justice Turner and the judgment of Mr. Justice Markby in the Calcutta case (1), I stated in my order of reference that I was inclined to think that these learned Judges were right, but that the question was not without difficulty and doubt, suggesting at the same time considerations in favour of the remedy sought in the case before us. I pointed out that "the powers of revision by this Court under S. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of *revision*, that the facts and evidence relied on in defence afforded no answer whatever to the charge; and it might be argued to be impolitic and scarcely intended that, while the Government cannot only *appeal*, but, according to the judgments above referred to, can also apply for revision—and in all cases—a private pro-[149]secutor has no remedy by resort to this Court against the ignorance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest evidence and the undoubted facts, even where these facts are found by such Magistrate or Judge himself," and that the right to present such a petition "appears to be covered by the terms of S. 297 and revision is not necessarily the same thing as an appeal. The object of S. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was perhaps simply to allow the public prosecutor in such a case a re-hearing on the merits, without any desire to limit or curtail the powers of revision whatever the extent of these may be." And having now fully considered the question, I have formed the opinion very clearly, first that a private prosecutor who can show on the face of his petition a proper case for revision of a judgment of acquittal is entitled to have it entertained under S. 297 of the Criminal Procedure Code and to an order

(1) 12 B.L.R. App. 22=21 W.R. Cr. 21.

on it for a new trial, or otherwise as to this Court in such a case might seem proper, and secondly that, inasmuch as the petition in the present case states that the facts found by the Sessions Judge were sufficient to convict, the petition was a petition in revision which the private prosecutor was entitled to present, and that her prayer that the records of the case be called for in order to consider the suggestion for a new trial should be granted.

So far, therefore, I must qualify the concurrence I expressed in favour of the ruling at least of Mr. Justice Markby (1). According to the report of the procedure in the lower Court in the case before that learned Judge and Mr. Justice Birch, I think they ought to have entertained the application and to have ordered a new trial; and I am clearly of opinion that the High Court has the power which these Judges appear to repudiate. In the other case in this Court my learned colleague Mr. Justice Turner appears to have considered and, as I have already observed, correctly, that the case before him was really one of appeal on the evidence: but when he goes on to state that "the provisions of S. 297 only permit the Court to interfere and order a **[150]** new trial when an accused person has been discharged without being put on his trial," I must remark that it does not necessarily follow that there is no course open to a private prosecutor, or for that matter to any prosecutor, public or private, under S. 297, who complains of an illegal acquittal after trial.

But there is a question of considerable importance which was referred to at the hearing of this case, and as I have formed an opinion of my own on the subject, I desire to express it. The question is this, whether the first substantive portion of S. 297 is complete in itself, giving the High Court the full general powers of revision thereby appearing to be conferred, and that the paragraphs which follow this general portion of the section are to be considered merely as examples or illustrations in the way of express enactment, or whether the first part of this section is to be considered as merely introductory to the particular provisions which follow in the succeeding enactments, and that these particular provisions contain all the powers given to the High Court? Now on this subject I am clearly of opinion that the first part of S. 207 is not merely introductory to the particular enactments which follow, but that it is, on the contrary, a substantive and complete enactment in itself, without any necessary reference to the clauses which follow; and of course the powers thus given to the High Court are large and full, if not unlimited.

It occurs to me to add that, in my opinion, S. 272 giving the Government the power of appeal against a judgment of acquittal did not affect or interfere with, much less take away, any rights or remedies competent to prosecutors, public or private under S. 297—that S. 272 was simply an addition to the provisions of the Code of Criminal Procedure, and that before it was passed prosecutors could avail themselves of the revisional powers of this Court, whether in the case of acquittal or otherwise, and that they can do so still.

As regards, therefore, the question of our powers in the case before us and the sufficiency of that case in law, I am of opinion that the petition ought to be admitted and entertained, and I admit it accordingly as an application that may be entertained and disposed of under S. 297 of the Criminal Procedure Code, and I direct the records to be sent for and notice to issue to the other side.

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(1) 12 B.L.R. App. 22.

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FULL BENCH.

1 A. 135.

FULL BENCH.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

UDAI SINGH (*Plaintiff*) *v.* JAGANNATH (*Defendant*).

[25th February 1876.]

1 A. 135.

Lambardar or co-sharer—Claim to set off for revenue paid.

A lambardar, who was an agent of the co-sharers of a village to make collections in the village, and after payment of the revenue to divide the profits, paid out of the collections of subsequent years, an arrear of Government revenue. In a suit by one of the co-sharers for his portion of the profits, *held*, the lambardar was entitled to claim a set-off of the revenue paid by him. There is nothing in the Revenue law which restricts a lambardar or other co-sharer, who may make collections, to discharge arrears of revenue out of the collections of the particular year in which the arrear may accrue.

JUDGMENT OF THE DIVISION BENCH.

[135] PEARSON, J.—The first plea in appeal appears to be valid. The defendant is the lambardar of the mahal of which the plaintiff is a co-sharer. The jama of the mahal was fixed by Mr. Lowe at Rs. 1,488-12-0. Mr. Currie reduced it to Rs. 1,275, from 1272 fasli. In 1278 fasli the Government disallowed the reduction, and directed the difference to be recovered for the previous six years. The amount was made good by the defendant in 1281 fasli, and it cannot be denied that he would be entitled, if he had paid it out of his own pocket, to recover from the plaintiff a sum proportionate to his share in the mahal. In the present suit the plaintiff claims Rs. 384-14-0 as arrears of profits due to him for 1278, 1279, and 1280 fasli. The defendant answers that he has paid the amount claimed to the Government in payment of the demand above-mentioned, and that it is less than what is due from the plaintiff on that account. The lower Courts have held this defence to be insufficient. They think that he was not justified in applying in 1281 fasli profits which were due to plaintiff before that time, and without first calling on the plaintiff to pay his share of the Government demand : and that the proper course to be taken, was to have brought a suit against the **[136]** plaintiff for his share of the Government demand, in the event of his refusing to pay it on demand.

The opinion of the lower Courts is not well-founded in reason or equity. When the defendant was required to pay to the Government an amount for which the plaintiff was jointly responsible, the former had in his hands a balance remaining out of the collections of 1278, 1279, and 1280—a balance which, after payment of the Government revenue and village expenses, would have been divisible as profits among the co-sharers of the mahal. But it was no breach of trust or breach of duty on his part to use that balance in paying the demand of Government for the arrears of revenue on account of the six years previous to 1278. There was nothing illegitimate in the course adopted by him and it seems unreasonable to insist that he should have paid to his co-sharers the profits which would doubtless otherwise have been due to them, and that he should have paid the demand of the Government out of his own pocket,

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and sued them for contribution. For the moneys claimed he has accounted most satisfactorily, and it may well be presumed that they were reserved during the years to which the suit refers for the purpose to which they have been applied.

The answer made to the suit being good and sufficient, the suit should have been dismissed. The appeal is therefore decreed by reversal of the lower Courts' decrees, with costs in all the Courts.

SPANKIE, J.—I am sorry that I cannot accept the proposed judgment of my honourable colleague.

The judgments of the lower Courts appear to me to be correct on the point regarding which I differ from Mr. Justice Pearson. In the present case the order for payment of the enhanced jama had been made in 1278 fasli (1), but it had not been complied with by the appellant, the lambardar, until February and March 1874; and in case No. 368, which is a similar one to case No. 369 now before me, the lambardar had not made his second payment until May 1874—that is to say, not until after the institution of the suit. It is found in both cases that the defendant, appellant, had never called upon the plaintiffs to make good their quota of the enhanced jama from 1272 to 1278 fasli (2). Nor had he himself, as far as appears from **[137]** the record, ever paid their portion or any portion of the sum claimed by Government for those six years from his own pocket—the first payment made by him in this case being on the 27th October 1873, *i.e.*, Katik, 1281 fasli.

Now the plaintiff, respondent, claims profits on account of the years 1278, 1279, and 1280 fasli from the defendant, the lambardar, *i.e.*, whatever is due to him after payment of the Government revenue and village expenses. There is no dispute that his quota of the Government revenue on Mr. Currie's jama has been paid for those years, and what he claims is the profits of the three years, after deducting the Government revenue and village expenses. The accounts for each year should be closed and audited annually, and any sum remaining after the satisfaction of the Government jama and village expenses should be made over to the shareholders, and until distributed may be regarded as being in the hands of the lambardar in trust for the shareholders. He is not at liberty to appropriate them for any other particular purpose without authority from the shareholders. In these years 1278, 1279, and 1280 fasli the defendant, as lambardar, had not himself made any extra payment to Government. If he desired to make his co-sharers responsible for their quota of arrears of Government revenue which he had to pay, or expected that he might have to pay he might have sued them for the amount under the Rent Act, or he should have taken such other steps. as a Civil Court or Revenue laws permitted him to take for the recovery of the money, after he had been compelled to pay in 1281 fasli the difference between the jama of 1272 and that of 1278 fasli as settled by the Government. But he was not, in my judgment, at liberty to claim, in answer to this suit, from the plaintiff his share of the profits of 1278, 1279, and 1280 fasli, as a set-off (for it amounts to that), being his quota of the sum actually paid by the defendant on account of the revenue demanded by Government, and levied from him in 1281 fasli.

The Act under which the suit has been brought does not allow a set-off to be pleaded in any claim of this nature. The money which the plaintiff claims in this suit as due to him was withheld by the defendant,

(1) Sept. 1870—Sept. 1871.
(2) Sept. 1864—Sept. 1871.

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appellant, before he had been compelled to make any payment on account of the enhanced [138] Government demand: and I do not think that the share for which the plaintiff may be responsible can be deducted in this suit from the amount of profits due to him on account of the three years for which he has instituted his claim.

OPINION OF THE FULL BENCH.

STUART, C.J., and PEARSON, TURNER, and OLDFIELD, JJ., concurred in the following opinion:—

It appears that Mr. Currie as Collector allowed a reduction of the yearly revenue, subject, it may be presumed, to the sanction of Government. In 1278 fasli sanction was refused, and a demand was made on the respondent, the lambardar, who however did not pay the arrear due until 1281 fasli. Meanwhile he retained in his hands, the profits of 1278 fasli, 1279 fasli, and 1280 fasli, and not improbably for the purpose of meeting the Government demand if pressed. In the suit out of which this appeal arises, the appellants, the patnidars, sue the lambardar for their profits of the years 1278, 1279, and 1280; and he pleads that, out of the sums collected in these years and remaining in his hands, he has paid the arrears of revenue abovementioned; and the question which principally calls for decision in this appeal is whether he is or is not entitled to be allowed this payment. We are of opinion that he is. The lambardar is, in this village, the agent of the co-sharers to make collections, and after payment of the revenue to divide the profits. An arrear of revenue was due to Government, and to discharge this arrear he was entitled to have recourse to the collections for the years 1278 [139] fasli, 1279 fasli, and 1280 fasli, remaining in his hands undivided. There is nothing in the revenue law which restricts a lambardar or other co-sharer, who may make collections, to discharge arrears of Government revenue out of the collections of the particular year in which the arrear may accrue. It would be at least inconvenient to hold that, having in his hands profits to meet the Government demand, the respondent, instead of applying these profits to the discharge of the demand, should be driven to have resort to a suit against each co-sharer.

SPANKIE, J.—I adhere to the opinion expressed in my judgment of the 8th June 1875. Nothing that I have heard leads me to think that my view is incorrect.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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MARCH 13.

APPELLATE CIVIL.

1 A. 156.

HUSSAINI BIBI (*Defendant*) *v.* MOHSIN KHAN (*Plaintiff*).

[13th March 1876.]

1 A. 156.

Act VIII of 1859, (C. P. Code) S. 327—Arbitration—Award—Appeal.

Where, in an application under S. 327 of Act VIII of 1859, to file and enforce an award, made on a reference to arbitration without the intervention of a Court, the Court directed that the award should be filed, but did not make a decree enforcing the award under the provisions of Ch. VI of Act VIII of 1859. *Held*, that the order of the Court did not amount to a decree and was not appealable. [H.C.R., N.W.P., 1868, p. 353 (**F.B.**), *F.*]

Per Spankie, J.—S. 327 of the C.P.C. (1859) applies only to those cases where the reference to arbitration is admitted, and not to cases where it is denied that the reference or the award was made. In such cases the enforcement of the award must be by suit.

[D., 3 A. 427. **R.**, 17 A. 21. **Disappr.**, 84 P.R. 1901 (**F.B.**) = 112 P.L.R. 1901.]

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MARCH 13.

APPELLATE CIVIL.

1 A. 156.

JUDGMENT.

[158] SPANKIE, J.—The prayer of the plaintiff in this case was to be allowed to file a private award of arbitrators in Court and for the enforcement of the award. The defendant (since deceased) denied that he had authorised his agent to refer any matter to arbitration and repudiated the whole transaction. The Munsif after going into the merits admitted the award in the following terms:—"I therefore decree the plaintiff's claim to file the arbitration award under S. 327, Civil Procedure Code, with costs and interest at 6 per cent. to be paid by the answering defendant (the widow of the original defendant deceased)." It does not appear that he made any decree enforcing the award under the provisions of Ch. VI. of the Act.

The defendant appealed. The Subordinate Judge treating the order as a judgment under S. 325 of Act VIII of 1859 held that it was final, and that there was no appeal. The Subordinate Judge cites as his authority the Full Bench decision of this Court in the case of *Jokhun Rai* (1) and others, appellants.

It is contended in special appeal that as it was urged in both the lower Courts that the original defendant was no party to the award, the Subordinate Judge was bound to determine whether this was so or not.

For respondents the Full Bench ruling of this Court (1) and other precedents of the Presidency Court are cited as ruling that there was no appeal.

I am of opinion that we are bound by the decision of the Full Bench of this Court (1), and that we must hold that there is no appeal from the order of the Munsif allowing an award to be filed. At the same time it appears to me that S. 327 intended to provide for those cases only in which a reference to arbitration is admitted, and in which an award has been made. Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award. **[159]** Such, I may add, would appear to be the opinion of the dissenting Judge in one case decided by the Full Bench of the Presidency Court on the 23rd May, 1871 (2). But the Full Bench judgment of this Court (1) must, I think, be followed by us as being applicable to this case, and I would therefore dismiss this appeal with costs.

OLDFIELD, J.—I concur in dismissing the appeal with costs. I think we are bound by the Full Bench ruling of this Court (1), and must hold that the order of the Munsiff under S. 327, Act VIII of 1859, for filing the award, does not operate as a decree, and is not appealable.

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(1) H. C. R. N. W. P. 1868, p. 353.

(2) 8 B.L. R. 315=15 W. R. (F.B.) 9. Two of the other Judges in that case expressed opinions to the same effect.

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APRIL 20.

—

FULL BENCH.

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1 A. 159.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Oldfield.

KALI PARSHAD (*Plaintiff*) *v.* RAM CHARAN (*Defendant*).

[20th April 1876.]

1 A. 159.

Hindu Law—Undivided Hindu Family—Ancestral immoveable property—Son's right to demand partition.

In the case of ancestral immoveable property, the sons in an undivided Hindu family, under the Mitakshara law, have an unqualified right to demand partition in the lifetime of the father.

[R., 5 C. 148 (P.C.). 10 B. 528, 16 B. 29, 4 M.L.T. 288.]

REFERENCE TO THE FULL BENCH.

STUART, C.J., and OLDFIELD, J. referred the following question to a Full Bench, *viz.*,—

"Whether, under Hindu law, as prevailing in this part of India, a son can obtain possession by enforcing a partition of his share in immoveable ancestral property during his father's lifetime and against his father's wish, and under what circumstances."

The learned Judges referred to the following authorities:—*Deo Bunsee Kooer* v. *Dwarkanath* (1); *Ramchandra Dada Naik* v. *Dada Mahadeo Naik* (2); and *Nagalinga Mudali* v. *Subbiramaniya Mudali* (3).

OPINION OF THE FULL BENCH.

[160] The answer to the question referred to us is, it appears to us, supplied by express texts of the Mitakshara. The fifth section of the first chapter of that work treats of the rights of father and son in property ancestral, and in the fifth paragraph the author declares that for or because the right is equal or alike, therefore partition is not restricted to be made by the father's choice; and having explained **[161]** in the seventh paragraph that the texts which he had discussed in the second section referred to property which had been acquired by the father himself, in the eighth paragraph he distinctly announces the rule in the following terms:—"Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." In the ninth and tenth paragraphs he treats of the son's right of interference in the father's dealings with ancestral property as the consequence of their indiscriminate right, and in the eleventh paragraph, in support of his position that "the father, however reluctant, must divide with his sons, at their pleasure, the effects acquired by the paternal grandfather," he deduces the authority of Menu from the text—"If the father recover paternal wealth not recovered by his co-heirs, he shall not, *unless willing*, share it with his sons, for in fact it was acquired by him." In which text the nature of the father's interest in the property so recovered is declared to be the same as would have been the interest of any

(1) 10 W.R. 273.
(2) 1 Bom.H.C. Rep., 2nd ed., App. 76.
(3) 1 Mad. H. C. Rep., 77.

one member of a joint family in such property so recovered, that is to say, he would have the right to treat it as his own.

The author of the Mitakshara himself reconciles what seeming discrepancy there may be between the rules as to partition expounded in S. 2 and the rules expounded in S. 5 by the statement that the texts cited in the former section refer to the father's property, and not to the ancestral property.

In the Vyavahara Mayukha, Ch. IV, S. 4, V. 4, it is declared that the unqualified right of the sons to insist on the partition of ancestral property against the father's will has also the sanction of Brhaspati :—"The father and sons are equal sharers in houses and lands derived regularly from ancestors, but sons are not worthy (in their own right) of a share in wealth acquired by the father himself when the father is unwilling." —"From which," says the author, "it results that sons are worthy of a share in the property acquired by the grandfather or other (ancestor) even though the father do not wish it."

Seeing that the language of the Mitakshara is free from reasonable doubt and that in cases governed by the Mitakshara the right [162] of the son to demand partition *invito patre* has been recognized in *Beer Kishore Suhye Singh* v. *Hur Bullub Narain Singh* (1); *Rajah Ram Tewary* v. *Luckmun Pershad* (2); *Deo Bunsee Kooer* v. *Dwarkanath* (3); *Nagalinga Mudali* v. *Subbiramaniya Mudali* (4), and that if there be no reported cases in this Court, it has been accepted hitherto as well established law in this Court, we should answer that, in the case of ancestral immoveable property, the son has, under the Mitakshara law, an unqualified right to demand partition. It is unnecessary for us in the present reference to express an opinion whether the same rule applies to ancestral moveable property (5).

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APRIL 20.
FULL BENCH.
1 A. 159.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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APRIL 20.
FULL BENCH.
1 A. 301.

HANUMAN PARSHAD (*Plaintiff*) *v.* KAULESAR PANDEY (*Defendant*).

[20th April 1876.]

1. *Act X of 1859, S. 3—Act XVIII of 1873, S. 5—Rent in kind (Bhaoli)—Tenant at a fixed rate.*

Though the quantity or value of the rent in kind delivered by a tenant may vary every year, according to the quantity of the produce, still, if it bears a fixed proportion to the total produce, it is fixed rent, and the tenant is a tenant at a fixed rate (S. 3 of Act X of 1859 = S. 5 of Act XVIII of 1873.)

(1) 7 W.R. 502.
(2) 8 W.R. 15 = B.L.R. Sup. Vol. 731.
(3) 10 W.R., 273.
(4) 1 Mad. H. C. Rep. 77.
(5) *Re* the plaintiff's share, under Hindu law, in the ancestral immoveable property, and the question of possession, the Division Court (Stuart, C.J., and Oldfield, J.), on the case being returned to it, in delivering judgment, said :—"There appears to us to be no doubt that the Judge (lower appellate Court) has erred, the extent of the share in ancestral property to which a son is entitled being equal to that of the father, and he is entitled to such equal share at partition—Mitakshara, Ch. I, S. 5, V. 3, and other texts. In the present case the family interested in the partition consisted of the father and two sons, each of these three being entitled to one-third of the ancestral estate and that is the extent of the share for which the plaintiff is entitled to a decree in this suit.....

1876

APRIL 20.

FULL BENCH.

1 A. 301.

2. *Act X of 1859, S. 4—Act XVIII of 1873, S. 6.*

If, in a suit for enhancement of rent, the tenant proves that for twenty years before suit, he has been paying rent in kind at a fixed rate, he will be entitled to the presumption of law declared in S. 4, Act X of 1859 (S. 6, Act XVIII of 1873), and may demand a pottah at that rate, and the rent cannot be enhanced. (H. C. R. N. W. P. 1874, p. 371—*impugned*, 4 W. R. Act X Rulings, 23=1 Ind. Jur. N. S. 29, *Diss.*)

Suit for enhancement of rents of certain lands held by the defendant. The first Court applied the presumption of law laid down in S. 4, Act X of 1859, held that the rents were not liable to enhancement, and dismissed the suit. The plaintiff appealed. The lower appellate Court gave him a decree in respect of certain lands for which the defendant paid rent in kind (bhovli), holding with reference to the ruling in H.C.R.N.W.P. 1874, p. 271 that the presumption of law declared in S. 4, Act X of 1859 was not applicable to such lands. The plaintiff preferred a special appeal to the High Court.

PEARSON and SPANKIE, JJ. referred to the Full Bench the question whether the ruling of the High Court(1) above-mentioned was correct or not.

OPINION OF THE FULL BENCH.

[302] STUART, C.J., TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion:

The suit falls to be decided under Act X of 1859. By the third section of that Act it was declared that ryots who, in the Provinces therein mentioned, hold land at fixed rates which have not been changed since the permanent settlement, are entitled to receive pottahs at those rates. This provision was introduced to give effect to the design announced by Government, when it established the permanent settlement, that the ryot as well as the zemindar should derive benefit from the boon. There is nothing in the section which limits its operation only to ryots who pay rent in cash. Ryots who pay rent in grain may, therefore, claim the privilege, if they can establish that the rates at which they have held their lands are fixed rates. In the case suggested the land is held on the terms that the tenant shall render to the landlord in each year a fixed share of the crop. The quantity of produce delivered may vary in each year, but the rate or share remains the same, be it a fourth or a third or a half, as the case may be. The rate of rent does not vary, although its quantum or value may. If then the tenant proves that no alteration in the rate has been made since the permanent settlement, or entitles himself to the benefit of the presumption declared in S. 4 of the Act, he may demand a pottah at these rates as fixed rates.

PEARSON, J.—On re-consideration I am of opinion that the ruling (2) which was followed in *Hanuman Parshad* v. *Ramjug Singh* (3) is not maintainable in reference to the terms of Ss. 3, 4, and 5, Act X of 1859. Ss. 3 and 5 show that the word "rent" used in S. 4 means the rate of rent, and whether or not the legislature when enacting these sections had in view a rent paid in the shape of a proportion of the produce, it is impossible to hold that the terms used will not include such a rent as well as a money-rent, and that a ryot in the Province of Benares who claims to hold at fixed rates, and **[303]** proves that he has for a period of twenty years before the commencement of a suit paid as rent the same proportion of the produce of his holding, is not entitled to the presumption which S. 4 declares.

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(1) H. C. R. N. W. P. 1874, p. 371.

(2) *Yacoob Hossein* v. *Wahid Ali*, 4 W. R. Act X Rulings, 23=1 Ind. Jur. N. S., 29.

(3) H. C. R., N. W. P. 1874, p. 371.

CRIMINAL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice.

QUEEN *v.* JAGAT MAL. [21st April 1876.]

1 A. 162.

Crim. Pro. Code, 1872, Ss. 468, 471, 473—Trial for offences against public justice—Jurisdiction.

The only case where a Criminal Court cannot itself try an offence committed before it, is that described in S. 473, Crim. Pro. Code, which relates exclusively to contempts of Court. A charge under S. 193, I.P.C., not being in contempt of Court, the Magistrate before whom the offence was committed may himself try the case.

[Overruled, 1 A. 625 (F.B.); **Diss.**, 1 B. 311.**]**

JUDGMENT.

[163] STUART, C.J.—This is an application for revision of the order of the Judge of Farukhabad made in an appeal to him by Ram Gholam, Gula Mal, and Jagat Mal. These three persons, were, along with others, tried and convicted by Mr. C. W. Watts, Joint-Magistrate of Farukhabad, of false swearing, under S. 193, Indian Penal Code, and respectively sentenced by that officer to two years' rigorous imprisonment.

The circumstances out of which the case arose are these. In January last three men, Kanhaiya, Bishan, and Lalman, were prosecuted and convicted by the Judge on a charge of grievous hurt under S. 326, Indian Penal Code. After convicting and sentencing them, the Judge directed that ten of the witnesses who had been examined in the case before him, including Ram Gholam and Gula Mal, should be tried by the Magistrate of the district on a charge of giving false evidence. On receipt of the Judge's order Mr. Harrison, the Magistrate, transferred the case to Mr. Watts, the Joint-Magistrate, who had made the commitment in the grievous hurt **[165]** case to the Sessions Court. In the course of his investigation for that commitment Jagat Mal had been examined as a witness, and had then, in Mr. Watts' opinion, given false evidence, and Mr. Watts, having represented this state of things to the Magistrate, received sanction for Jagat Mal being included in the proceedings directed by the Judge under S. 193. Mr. Watts having concluded the inquiry committed the whole eleven accused for trial before himself, and convicted Ram Gholam, Gula Mal and Jagat Mal, and another (deferring judgment as regards the remaining seven). There was an appeal to the Judge, but the result was its dismissal by him.

Ram Gholam, Gula Mal and Jagat Mal, now apply to this Court in revision, urging that Mr. Watts had no jurisdiction to try and convict them, because, according to the terms of S. 471 of the Criminal Procedure Code, he should have sent the case to another competent Magistrate. This, however, is a clearly mistaken view of the law, Mr. Watts being fully competent for all he did. The only case where a Criminal Court cannot itself try is that described in S. 473, which relates exclusively to contempts of Court. Here the charge was not for a contempt, but under S. 193 for false swearing. The conviction and sentence in the case of the three applicants are approved and confirmed, and their application to this Court is refused.

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APRIL 24.

FULL BENCH.

1 A. 212.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

GHAZI (*Defendant*) *v.* KADIR BAKSH AND ANOTHER (*Plaintiffs*).

[24th April 1876].

1 A. 212.

1. *Execution of decree—Irregularity—Sale.*

An irregularity in execution proceedings, which did not prejudice the judgment-debtor, does not vitiate a sale.

2. *Continued execution of earlier reversed decree even after later final decree to same effect passed—Not an irregularity prejudicing judgment-debtor.*

Where execution was taken out on an earlier decree in appeal (which was afterwards reversed) and continued even after a final appellate decree was passed, *held*, the irregularity was one which did not prejudice the judgment-debtor.

3. *Act VIII of 1859, S. 257—Suit by judgment-debtor to set aside sale.*

Held that a suit by the judgment-debtor to set aside a sale under the above circumstances, on the ground of nullity, was not maintainable with reference to Act VIII of 1859, S. 259.

Ghazi and Mangali obtained a money-decree against Kadir Baksh in the Court of the Principal Sudder Amin of Allahabad on 12-12-1864. This decree was reversed by the District Judge on 28-7-1865; but on 5-3-1866, the Sudder Court set aside the Judge's decree and ordered a new trial. On 5-5-1866, the District Judge affirmed this decree of the Court of first instance. On 3-12-1866, the High Court again set aside the Judge's decree and ordered a new trial. On 14-1-1867, the District Judge again affirmed the decree of the Court of first instance, and no appeal being preferred the decree became final. The decree-holders had in the meantime taken proceedings to execute the decree of 5-5-1866, and from time to time, and finally on 7-11-1870, they renewed these proceedings, in each instance referring to the decree of 5-5-1866, even after it was set aside and the decree dated 14-1-1867, passed. On the application of 7-11-1870, a sale of certain immoveable property belonging to Kadir Baksh was ordered, and took place on 15-2-1871. Kadir Baksh objected to the confirmation of the sale on the ground of irregularity in the application, but his objections were disallowed and the sale was confirmed. Kadir Baksh sued to recover other properties sold at the same time and under the same circumstances. The Court of first instance passed a decree in favour of Kadir Baksh. The lower appellate Court reversed it, holding that the error in the application of 7-11-1870, for the sale of the property was a mere clerical error. The decision of the lower appellate Court was reversed, on special appeal, on the ground that the reference in the application of 7-11-1870 to the decree dated 5-5-1866, was not a clerical error, and that if it could be held to refer to the decree dated 14-1-1867, that application would have been barred by limitation. In the present suit, instituted on 7-9-1873 to recover possession of a certain property from the auction-purchaser on the plea that the decree in execution of which it had been sold had been reversed and that the sale and all other proceedings relating to the execution were therefore null and void, the first Court held that the claim was barred by

limitation, under Art. 14-A, Sch. II, Act IX of 1871. The lower appellate Court remanded this suit for a new trial. The defendants preferred a special appeal to the High Court.

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APRIL 24.

FULL BENCH.

1 A. 212.

REFERENCE TO THE FULL BENCH.

TURNER, J. These two grounds appear to resolve themselves into one ground, or if the date of the decree given in the application of the 7th November, 1870, be held to be a clerical error, then the dates of the decree mentioned in the other applications made subsequently to the decree of the 14th January, 1867, were clerical errors, and those applications would be sufficient to keep alive the decree. Having succeeded in setting aside other sales, the judgment-debtor has now brought the present suit to set aside the sale of the property in suit.

As I entertained doubt whether the sale ought to be set aside for an error which in no way prejudiced the judgment-debtor, I propose that the case should be submitted to the Full Bench that the propriety of the former ruling may be considered.

SPANKIE, J.—I concur in the reference.

OPINIONS OF THE FULL BENCH.

[215] STUART, C. J.—The wrong date given to the decree in the application for execution must have been, I think, not so much a clerical error as a legal mistake on the part of the pleader or other person who prepared the application. But it is a mistake, an innocent mistake perhaps, which clearly appears as such on the face of the record, and which, I think, we are entitled to disregard, being, as the reference suggests, a mere error which in no way prejudiced the judgment-debtor.

PEARSON, J.—What is called a clerical error appears to me to have been rather erroneous procedure; but I am bound to admit that the ruling of which the propriety is called in question is not one which on reconsideration I am prepared to maintain, and that **[216]** the view that the sale ought not to be set aside for an error which did not prejudice the judgment-debtor commends itself to my judgment.

TURNER, J.—The decree which Mussamut Zahuran obtained in the Court of the Principal Sudder Amin in December, 1864, was affirmed in appeal on the 5th May, 1866, and although the decree of the appellate Court was set aside, and a re-hearing of the appeal ordered in December, 1866, the original decree was again affirmed in January, 1867. When then the decree-holder in 1869 and in 1870 applied to continue the proceedings in execution which she had commenced in 1866, although she erroneously referred in the heading of her application to the decree of the appellate Court passed in May, 1866, which had been set aside, both the decree of the Court of first instance subsisted and a decree of the appellate Court affirming that decree.

The proceedings in 1869 and in 1870 were a continuation of the proceedings commenced in 1866, wherein she had sought to execute not only the decree of the appellate Court, but the decree of the Court of first instance, which the decree of the appellate Court affirmed.

Under these circumstances, it seems inequitable to hold that an innocent purchaser is to be damnified by an error which in no way prejudiced the judgment-debtor, and which, had he thought fit to intervene before the sale was ordered, might easily have been corrected. In my judgment the sale ought not to be set aside.

SPANKIE, J.—I am of opinion that the error was more than clerical and amounted to a material irregularity, but not to one by which the

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judgment-debtor could be really said to have been prejudiced, and therefore I do not think that the suit can be maintained.

OLDFIELD, J.—The application for execution contained this error, that it referred to the decree of which execution was sought as bearing date May 5th 1866, whereas the subsisting decree which alone was capable of execution was of date December 12th, 1864.

[217] Notwithstanding this error in the application, the execution-proceedings were made in effect, though not nominally, with reference to the latter decree, and the irregularity, such as it was, pervaded the entire proceedings in execution, including the publication of the sale, and it was made the ground of an objection to the confirmation of the sale under S. 256, Act VIII of 1859, and the objection was disallowed. This being so, I am of opinion that this suit cannot be maintained with reference to S. 257, Act VIII of 1859.

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PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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RATAN SINGH AND ANOTHER (*Defendants*) *v.* WAZIR (*Plaintiff*).

[24th April 1876.]

1 A. 165.

1 A. 165. *Act VIII of 1859, S. 354—Remand—Memorandum of objections.*

A party, who has failed to file a memorandum of objections, within the time fixed by the appellate Court, under S. 354 of Act VIII of 1859, cannot afterwards claim, as a matter of right, to urge objections. But he can do so with the leave of the Court, which can also extend the time for filing objections.

[F., 2 A. 908, 6 A. 391 = (1884) A.W.N. 129; R. 7 A. 70 (F.B.).]

The defendants in this suit preferred a special appeal. Turner and Spankie, JJ., under S. 354, Act VIII of 1859, directed the lower Court to try certain issues and gave one week's time to either party to the appeal to file a memorandum of objections to the finding of the lower Court; but the appellants did not file any such memorandum, and, at the further hearing of the appeal, claimed that, notwithstanding this omission, they were entitled to object to the finding.

The Court referred the question involved in the appellants' contention to a Full Bench, as it appeared to it that the rulings of the Calcutta High Court in *Ashrufoonnissa Begum* v. *Stewart*, (1) and *Woomesh Chunder Roy* v. *Jonardun Hajrah* (2) and of this Court in *Munrakhun Lall* v. *Raheem Buksh* (3) and *Sheo Gholam* v. *Ram Jeawun Singh* (4) were inconsistent.

OPINIONS OF THE FULL BENCH.

[167] STUART, C.J.—I am clearly of opinion that objections to findings on remand, whether in writing or taken orally at the hearing of the appeal, may, with permission of the Court, be considered. Whether such objections may be allowed as of right may be doubted. I am rather inclined to think that the hard line drawn by the language of the Code excludes

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(1) 9 W. R. 438. (2) 15 W. R. 235. (3) H. C. R. N.W. P., 1872, p. 72. (4) H.C. R. N. W. P. 1873, p. 114.

them. But that, on the other hand, we may, in our judicial discretion and in the interests of justice and the legal requirements of a suit, permit such objections to be taken. I should be sorry to think there can be any doubt. This is a High Court of Judicature, and when the Code of Procedure is merely silent, and does not expressly prohibit any particular action, we are entitled to use all necessary and proper means and appliances, the power to permit or refuse which must reside within the inherent authority of a Court of Record.

My answer, to this reference, therefore, is that the objections to which it refers, whether in writing or taken orally, may, with permission of the Court, be received and considered, but that they cannot be admitted without such permission.

I may add that I have looked into the cases referred to in the order of reference and entirely concur in the rulings in the two cases of this Court (1). One of them, that of *Munrakhun Lal* v. *Raheem Buksh* (2), was decided by Mr. Justice Pearson and myself, and I firmly and advisedly adhere to every word of our judgment. There we said—"The terms of S. 354 are permissive; the parties *may* prefer objections within a specified time, after which the appellate Court shall proceed to determine the appeal. There is nothing in the law to the effect that an objection **[168]** made after the time fixed shall not be listened to; and, indeed, when the Court proceeds to determine the appeal in reference to the evidence submitted, any objection made, or suggesting itself in the course of the hearing, would necessarily have to be considered, whether a memorandum of it had been previously filed or not, unless the Court determined the appeal by simply affirming without consideration the finding received. Such a course is not one which the section directs the Court to take in the event of no objection having been put forward in writing within the time specified. We are aware that it has been held that the objections cannot be received after the time fixed, but so strict a ruling is, in our opinion, beyond the terms, and not within the intention of the law. Here we allowed a week, and our meaning was that that should be the time *at least*; in other words, that a week should be allowed, subject to any further orders of the Court, for reasons assigned or cause shown." That to my mind is a most satisfactory statement of the law on this point. The Calcutta cases (3) do not seem to apply, but, so far as I can understand them, I dissent from their conclusions.

PEARSON, J.—On full consideration I am of opinion that the intention of the law was effectively to limit the time within which objections might be taken to the findings submitted to the appellate Court under S. 354. The words that either party may, within a time to be fixed by the appellate Court, file a memorandum of any objection to the finding, imply that the memorandum may not be filed after that time. It seems unreasonable to hold that although an objection may not be preferred in writing, it may nevertheless be urged orally after the expiry of the fixed period. Such an interpretation would defeat the object of the law. Just as the law fixes a time within which the appeal against the original decree or decision must be presented, so in the like manner the objections to the supplementary findings on fresh issues remitted for trial under S. 354 must be put in within the time fixed for the purpose. The Court

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(1) H. C. R. N. W. P., 1873, p. 114; H. C. R. N. W. P., 1872, p. 25.
(2) H. C. R. N. W. P., 1872, p. 25.
(3) 9 W. R. 438; 15 W. R. 235.

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might probably, on application and sufficient cause shown, extend the time in the same manner as an appeal may be admitted after time on sufficient cause being shown for the [169] delay in preferring it. The objections under S. 354 being of the nature of an appeal, S. 5, Act IX of 1871, might be applicable. I also presume that Ss. 348 and 374 of the Code would be applicable in respect of findings under S. 354.

TURNER and SPANKIE, JJ.—If an appeal is presented from the decree of a subordinate Court and in the memorandum of appeal no objection is taken to the finding of the subordinate Court on a question of fact, the appellant cannot of right urge or be heard in support of the objection at the hearing; he must obtain the special leave of the Court. And although in deciding the appeal the Court is not confined to the grounds set forth by the appellant in his memorandum, it would not ordinarily, we apprehend, be justified in interfering with a finding of fact to which no objection had been taken in the memorandum of appeal, unless the appellant could show that from some sufficient cause the objection was not taken at the proper time. Now when it becomes necessary for the right determination of the suit on the merits that an appellate Court should remit an issue to the Court below for trial, the Court in S. 354 directs the Court below to try the issue and return its finding with the evidence to the appellate Court; it declares that such finding and evidence shall become part of the record, and it authorizes either party, *within a time fixed by the appellate Court*, to file a memorandum of any objection to the finding, and on the expiration of that period it directs the appellate Court to proceed to determine the appeal. There is no provision empowering a party to take objection to the finding at any other time than within the period fixed by the appellate Court. It cannot be contended then that either party is as a matter of right empowered to take an objection at the hearing which he has neglected to take within the period allowed him by law.

There remains the question, can he do so by leave of the Court? After the return of the finding and evidence which by the terms of the law form part of the original record, the appellate Court ought, in our judgment, to proceed as if the necessary issue had formed part of the record originally submitted to it with this difference, that it must determine not only the pleas in appeal but also any objection preferred within due time to the finding on the [170] issue remitted—and in determining the appeal the Court is not deprived of the powers conferred on it by S. 334. The finding on the issue remitted falls within those powers as much as the findings on the issues originally tried. If this be so, it follows that the Court might at the hearing allow a party to urge an objection to the finding which had not been taken at the proper time, and in deciding the appeal is not confined to the grounds set forth in the original memorandum or in any statement of objections to the finding on the issue remitted taken within due time; but the Court ought not as a matter of course to allow an objection to be urged which has not been taken at the proper time; it should satisfy itself that there are grounds which warrant the indulgence.

OLDFIELD, J.—It appears to me that a party who has failed to file a memorandum of objections within the time fixed by the appellate Court under S. 354, Act VIII of 1859, cannot afterwards claim as of right to be allowed to urge objection; but I do not consider that it was intended to leave no discretion to the Court whether it should admit objections, either orally or in writing, after the time fixed had expired. I apprehend that the appellate Court can always extend the time within which the written memorandum of objections can be filed.

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PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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TAJUDDIN KHAN (*Defendant*) *v.* RAM PARSHAD BHAGHAT (*Plaintiff*).

[27th April 1876.]

1 A. 217.

Act XVIII of 1873—Suit for money equivalent—Rent—Revenue Court—Jurisdiction.

A Revenue Court has jurisdiction to entertain a suit for the money-equivalent of arrears of rent payable in kind, as it is a suit for arrears of rent within the meaning of S. 93 of Act XVIII of 1873.

[F., 1 C.W.N. 55].

The facts of the case which are material appear in the judgments of the learned Judges.

REFERENCE TO THE FULL BENCH.

Re, the second ground taken in the memorandum of appeal, *viz.*, that a suit for the value of grain was not cognizable by the Revenue Court, PEARSON and TURNER, JJ. referred to a Full bench the following question:—

" Whether, when rent is payable in grain, it is competent for the landlord to sue in a Revenue Court for the equivalent in cash?"

JUDGMENT OF THE FULL BENCH.

[218] STUART, C.J.—The referring order in this case is as follows:—" Whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash," and the second plea in appeal to which our attention is directed is in these terms:—" The decision is bad in law: the present action for the value of grain was not cognizable by the Revenue Court." The reference therefore goes further than the bare question whether the money-equivalent of a grain-rent can be sued for in the Revenue Court. The reference also assumes that the rent agreed to be paid by the defendant was a grain-rent, or a rent payable in kind. But the suit is for arrears of rent, Rs. 29-1-2, being the price or money-value of the grain from 1278 to 1280 fasli, and this suit is brought in the Revenue Court.

[219] If the question had simply been, as put in one portion of the referring order, whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash, I would have no hesitation in answering it in the negative. But the second plea in appeal to which the referring order directs our attention raises the question in a simple form. By S. 3 rent is defined to mean "whatever is to be paid, delivered or rendered by a tenant on account of his holding, use, or occupation of land:" by which I understand to be meant that the contract or agreement for rent may be either that it be paid in money or delivered in kind or by services to be rendered. It does not mean that the rent may be satisfied in any one of these three ways, or that the tenant is to be at liberty to substitute one mode of compliance with his agreement for another; in other words, the definition does not mean that where the rent is a grain one it can be either claimed or recovered in money. The other provisions of the Rent Act to be considered are S. 93,

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which provides that no Courts other than Courts of Revenue shall take cognizance of the disputes in matters therein mentioned, and the very first there mentioned are "suits for arrears of rent on account of land." We thus see in the first place that a grain-rent is a good rent according to the Rent Act, and is recoverable as such, and in the next place that a suit for "arrears of rent" is exclusively cognizable by the Revenue Court. There is, however, no explanation given in the Act as to what these arrears may be, or whether, in regard to any particular form or kind of rent, the arrears meant by this section are arrears of the same kind or form of rent; in other words, whether, in the case of a grain-rent, the arrears here intended are arrears in grain or according to their value in money. There could, of course, be no difficulty where the stipulated rent is a money one, and a suit for a year's rent in grain brought immediately upon the rent becoming due could be easily worked out to decree, which would be for the delivery of the stipulated quantity of grain. But the claim made in the present case is not only for arrears of rent, but for arrears to be made good not in grain, but in money. Such a claim in the form of damages could, of course, be made in the Civil Court. But is such a claim for rent to be sued for in the Revenue Courts? In other words, is the suit in the present case a proper application of S. 93 of the [220] Rent Act? It would almost appear to be not. But, on the other hand, there are difficulties. It is not easy to understand how arrears of grain-rent can be recoverable at all, or can be even made intelligible excepting in regard to their money-equivalent. I observe that the Assistant Collector refers in his judgment to certain decrees which had been obtained by the plaintiff against his tenants for arrears of rent, and it would have been desirable to have seen these decrees. If the rent in those cases was also a grain one, what did those decrees, being decrees for *arrears*, give the plaintiff? Did they decree the arrears in the grain, leaving the rest to the execution department, or did they directly decree in money? It would have been interesting to have known this. But we must dispose of this reference as best we can on the papers before us. Supposing a decree for arrears of rent payable in grain, how can such a decree be executed by the Revenue Court? Strictly it ought to be a decree for specific performance. But how can there be specific performance with respect to arrears of a grain-rent extending over several years; and what kind of grain is to be delivered at the end of the period? Not surely and specifically the particular grain which alone can be had at the end of the period? Thus, in the present case, the claim is for arrears for 1278 to 1280 fasli. Would the delivery for the whole period of the grain of 1280 be valid performance on the part of the defendant? Unless there be some facilities, of which I am not aware, in the execution department for conversion into money, serious difficulties present themselves to my mind against such procedure. Mr. Justice Pearson, with reference to the summary procedure provided by S. 43 of the Act without having recourse to a regular suit, very pertinently remarks that such a suit "would be of little use if the tenant had already appropriated and dissipated the whole crop." No doubt, unless you allow the landlord to sue for the money-equivalent for the produce, a suggestion which appears to me to be pregnant with some relevancy to this reference. This S. 43, it will be observed, does not enact that if a landholder does not avail himself of it he shall have no other remedy; nor does it follow that because this section has not been acted upon, therefore the landlord may not fall back upon S. 93 and sue in the Revenue Court for his arrears. On the whole, the conclusion

would seem to be that, as suits for arrears of rent are exclusively cognizable by the Revenue Court, they can only be so where grain is [221] the rent, either by the claim for a money-equivalent being allowable in them, or by the decree in them being made capable of being satisfied in money; otherwise it seems to me that a suit for arrears of a grain-rent can in no case be instituted in a Revenue Court and that S. 93, therefore, has no application to such a suit. But this would be a conclusion rather too violent. I have little doubt that the intention of the legislature was to give every reasonable facility for recovery of such arrears as are mentioned in S. 93, and I think we may help that intention by holding that conversion into, or recovery in, money, is such a reasonable facility, and that such recovery may either be made by a claim to that effect in the plaint, or by allowing the decree to be executed to the same effect.

It is not without doubt and hesitation that I have formed this opinion, but it suggests a view of the question before us which appears to me to be the only one that can possibly be entertained, unless we hold that, in no case, can arrears of rent in grain be recovered in a Revenue Court, S. 93 notwithstanding.

The argument maintained in the judgment of my hon'ble and learned colleague, Mr. Justice Turner, is unfavourable to the jurisdiction of the Revenue Court, but he says that suits of this nature have for a very long period been regarded as suits for rent, and tried in the Revenue Courts, and he points out that in Mr. Thomason's Directions to Revenue Officers such suits are mentioned as cognizable by the Revenue Courts. These may be very proper considerations, although I must remark that Mr. Thomason's work, however useful, is not a legal authority, and I could not allow it to influence my mind on the law of any case. What I go upon is not so much the habits or customs of the authorities in such matters, or the sentiments or ideas contained in Revenue Books, as our duty to recognise the legal necessities of the Rent Act, and to make the law and procedure provided by it reasonably practicable and available for the purposes for which the Act was enacted. My answer, therefore, to this reference is in the affirmative.

PEARSON, J.—The question referred to us for determination must, in my opinion, be answered in the negative. If a tenant agreed to make over to his landlord a certain portion or proportion [222] of the produce of the holding, *or* the money-value thereof according to market-rates, as rent, a suit for the recovery of the rent in either form might doubtless be brought. But the question referred to us imports or implies that the rent is payable in grain only; and this being so, it is impossible to hold that the money-value of the grain is the rent which the landlord is entitled to demand. What is really sought in this suit is not the stipulated rent, but an equivalent for it; or, in other words, damages for the tenant's breach of contract by having failed to pay it. A suit for damages on account of such a breach of contract would be not in the Revenue, but in the Civil, Court, and the period of limitation applicable to such a suit would not be the same as that which applies to a suit for arrears of rent under S. 94, Act XVIII of 1873. S. 43 of that Act provides a mode whereby, whenever rent is taken by division of the produce in kind, a landholder may summarily obtain his share of it, without having recourse to a regular suit, which would be of little use if the tenant had already appropriated and dissipated the whole of the crop.

TURNER, J.—The 93rd section of the Rent Act declares that, except in the way of appeal as thereinafter provided, "no Courts other than Courts

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of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in that section might be brought, and such suits shall be heard and determined in the said Courts of Revenue * * * and not otherwise."

The terms of this section admit of a very wide construction. Reading the paragraphs separately, not only is it declared that such suits as are mentioned in the section are to be tried only in the Revenue Courts, but there is also a direction that no Courts other than Revenue Courts are to take cognizance of any dispute or matter in which any suit of the nature mentioned in the section might be brought.

If this direction be construed strictly, there are classes of cases constantly entertained by the Civil Courts erroneously. There are disputes and matters in which suits of the nature mentioned in S. 93 might be brought in the Revenue Courts, but of which the Civil Courts take cognizance for the purpose of granting other relief than could be granted by the Revenue Courts. If those **[223]** Courts ought not to entertain them, the provisions of the Rent Act worked a far more extensive change than has been generally understood. Possibly the proper construction of the first paragraph of the section, reading it with the second, would be this, that it prohibits the Civil Courts from entertaining claims when relief substantially similar to that sought might be obtained by a suit in the Revenue Court of the nature mentioned in S. 93. Otherwise I can conceive instances in which suitors would be debarred from obtaining relief which, before the passing of the Act, they might have obtained in the Civil Court, and which the Revenue Court is not competent to grant.

I cannot then rest the conclusion at which I have arrived altogether on the ground that, if this suit be not a suit for rent, the dispute or matter is one in which a suit for rent might be brought, and that the jurisdiction of the Civil Courts is excluded.

That the suit is not strictly what would be termed a suit for rent is, I think, clear. Rent is defined in the Rent Act (and the definition expresses the ordinary sense of the term) as meaning "whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land." It was admitted in the course of the argument that the suit was brought on an alleged contract or understanding to deliver a certain share of the crop as the rent of the holding, and that there was no contract or understanding to pay money in the event of a failure to deliver the share of the crop. If the contract or understanding had been in the alternative, for the delivery of the crop or its market-value at the date on which delivery should have been made of the share of the crop, then a suit for the share of the crop or a suit for its money-value would have been a suit for rent: it would have been a suit for that which was to be paid, delivered, or rendered by the tenant, but inasmuch as in the case referred there was no such alternative contract, the only suit for rent in its strict sense which the landlord could have brought would have been a suit for the share of the crop, and in claiming the money-value of the crop he is claiming not rent, but damages or compensation for the non-payment of rent. I would here notice that the decision of the Sudder Court in *Phulloo Kooaree* v. *Immam Bandee* (1) has been overruled by innumerable **[224]** decisions of this Court, and the suits of the nature of that suit are now brought in the Civil Court and tried as suits for damages.

In a strict sense, then, I cannot allow that the suit out of which this reference arises is a suit for rent, but suits of this nature have, I

(1) S. D. A. Rep., N. W. P., 1864, Vol. II, 671.

believe, for a very long period been regarded as suits for rent and tried in the Revenue Courts. In Mr. Thomason's Directions for Collectors of Land Revenue, S. 265, they are expressly mentioned as suits cognizable by the Revenue Courts. When Act X of 1859 was in force, and subsequently to the passing of Act XVIII of 1873, I believe I am right in asserting that such suits have been instituted in the Revenue Courts as rent suits, and heard on appeal by this Court, and that hitherto no objection has been taken to the competency of the Revenue Courts to entertain them. On the other hand, I do not remember any case in which such a suit has been instituted in the Civil Court. Under these circumstances, I think the rule *cursus curiæ lex curiæ* should be applied, and that we should hold that such suits, although they may not be strictly suits for rent, are to be regarded as embraced in that term in S. 93 of the Rent Act, and that the large terms in which the first paragraph of S. 93 is couched may fairly be read as prohibiting the Civil Courts from entertaining a suit of the nature mentioned in the reference.

SPANKIE, J.—The claim here was for the balance of the corn-rent of the sir-land in suit, amounting to Rs. 29-1-2, being the market-price of the grain to which plaintiff was entitled as his share of the produce from 1278 fasli to 1280 fasli.

The defendant entirely repudiated any relation of landlord and tenant between the plaintiff and himself, and urged that the land on account of which rent was claimed had been in his possession as his sir, he being a sharer in the mahál.

The Assistant Collector found that the farmers (they are thus described by the Assistant Collector) of the plaintiff's share, and other sharers had always received corn-rent out of the produce of the land in suit, and other lands paying rent in kind, and held by the defendant, in proportion to their shares. In 1278 fasli, plaintiff's land was released from possession of the farmers and defendant was found to be in arrears. He also found by **[225]** reference to the Revenue Court's decisions that the plaintiff in this suit and other sharers had brought suits against their tenants for arrears of rent of their shares and had obtained decrees. The defendant was a sharer in the mahál, but he was a cultivator only of the lands on account of which rent was claimed. He made no objection to the amount of the price of grain. But the Assistant Collector made an inquiry and found that it had been entered correctly in the balance-sheet furnished by the patwari according to the market-rate. He therefore made a decree for the sum claimed.

There was an appeal to the Collector. It was urged that as the Assistant Collector had admitted that defendant was a sharer in the mahàl, he could not decree against him for rent, and that defendant held the land as his sir and not as a cultivator. The Collector held that the evidence in support of the plea that plaintiff's lessees used to get a portion of the produce of these three bighas was unworthy of credit. The plaintiff allows that he never received a share of the rent, and therefore there was no custom of previously receiving a share of the rent proved. He also found the land to be defendant's sir.

The Judge in appeal held that there was proof that the rent had been received by plaintiff, who distinctly deposed that he had received it, and during the lease that the lessees had received it. There was no proof that defendant had ever held these lands in any other character than as a cultivator. The land was not his sir.

Amongst other pleas in special appeal it was contended that an action

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for the value of grain was not cognizable by the Revenue Court. The Division Bench before whom the appeal was heard has referred the following question to the Court at large—whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash.

It has been necessary to set out the facts in order that we may thoroughly understand the question before us. In my opinion, the suit cannot be regarded as merely an action for the value of grain, or as one for damages on account of rent wrongly withheld. It is substantially a claim for rent to which the plaintiff considers himself entitled, and which the defendant refuses to pay, as he sets **[226]** up his own proprietary title. The rent is payable in kind after a division of the produce. Now rent under Act XVIII of 1873 is defined to be whatever is paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land. Where rent is due and withheld, the remedy provided by Act X of 1859, which had not been repealed when the cause of action arose in this case, was distraint (1) or a summary action. But distraint could have been had for a balance of one year and no more (2). The present suit is for a balance of three years. Under the new law, as under the old, the produce of all land in the occupation of a cultivator shall be deemed hypothecated for the rent payable in respect of such land (3), and under S. 43 of the Act provision has been made in cases where the rent is taken in kind by division of the produce, or by estimate or appraisement of the standing crop, or other procedure of a like nature requiring the presence both of the cultivator and landholder. If either the landholder or the tenant, personally or by agent, neglect to attend at the proper time, or if there is a dispute as to the amount or value of the crop, an application may be made by either party to the Collector requesting that a proper officer may be deputed to make the division, estimate or appraisement. After following the procedure set forth in the section, written authority shall be given to the party applying for it to divide the crop or cut the crop. But this section would not apply to a case like the one before us, in which rent is claimed for a period of three years. Moreover, S. 43, in my opinion, contemplates a case in which there is no denial of the relationship of landlord and tenant between the parties, and in which it is not disputed that the rent is ordinarily taken in kind by division, or by estimate or appraisement. It would not apply to a case in which the tenancy was denied and proprietary right was asserted by the person occupying the land. The procedure to be followed under S. 43 is a summary one for the purpose of enforcing division when the crop, already hypothecated to the landlord, is ripe, and the latter is at liberty to take his share of the produce as his rent, the rent being due when the crop is ready to be cut or is cut. But I do not understand that the remedy provided by S. 43 would **[227]** deprive the landlord of his right of action under S. 93 for arrears of rent.

Prior to the passing of Act X of 1859 the landlord was at liberty to distrain the crop of his tenant for rent due for one year; but, if he did not do so, he was at liberty to bring a summary suit for the arrear. So, as noticed above, Act X provided similar remedies, which have been continued under Act XVIII of 1873, and indeed enlarged as regards cases in which the rent is payable by division of the produce. But there is nothing in S. 43 which bars recourse to any other remedy provided by the Act. Nor does S. 93

(1) Act X of 1859, S. 112.
(2) Act X of 1859, S. 113.
(3) Act XVIII of 1873, S. 56.

bar any suit for arrears of rent that is not paid in cash. Bearing in mind that rent is whatever is to be paid, delivered, or rendered by a tenant, it would seem to me that the suit would be for cash rent, for rent payable in kind, or, if the produce itself is not to be had, that a suit would lie for its equivalent in money. It is clear that when a crop is ripe it must be cut, or it would wither and be lost, and if cut, a share of it could not be recovered in a summary suit under the Act, for the grain would have disappeared, or if not cut, it would be worthless as some time must elapse before a suit could be brought or a decree obtained. Again, the dispute may be one, as this is, in which the right to recover any rent is denied, and if there could be no suit under S. 93, then the landlord would be deprived of all remedy under the Act, or he must have recourse to an action in the Civil Courts, and if so, what becomes of the provision of S. 93 that, except in the way of appeal, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in the section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in the Act and not otherwise? Amongst these suits are suits for arrears of rent on account of land or an account of any rights of pasturage, forest rights, fisheries, and the like. In sucb suits the plaint is to state the subject-matter of the claim. Now, merely looking at the plaint in this case, the subject-matter of the claim is that the landlord wants his rent and nothing else. It has not been paid for three years, so he cannot get the share of the produce in actual grain, therefore he asks for the equivalent, *i.e.*, the market value of the crop proportionate to the share to which he was entitled. **[228]** It is not urged by the defendant that the suit was bad because a claim could not be heard in the Revenue Court for an equivalent in cash of the share of the grain to which the plaintiff was entitled as rent. It was not so urged in appeal until the case came to this Court. Prior to the passing of Act X of 1859 it was the custom of our Revenue Courts to hear such suits as this. After quoting the law applicable to distraint, Mr. Thomason says:—"By summary suit the landlord may establish his right to a certain quantity of grain, *or its money-equivalent* at the market-price of the day" (1). This section, it is true, has been superseded, but it indicates the practice of the Courts prior to the passing of Act X of 1859, which superseded the law on which the remarks in S. 265 and other sections on the same subject are based; and, as pointed out above, Act X of 1859 re-enacted the same remedies, and Act XVIII of 1873 has enacted and even enlarged those of Act X of 1859. I cannot doubt that the same practice of suing in some cases, such as this, for the equivalent in money was followed as long as Act X was in force. I would here refer to the case marginally cited, in which the Sudder Dewanny Adawlat held that, where a Zemindar sued a ryot to recover the value of half the produce of two fruit-trees standing on the cultivated land held by the latter, the suit was one for arrears of rent due on account of a manorial right contiguous to a forest right and cognizable under Cl. 4, S. 23, Act X of 1859. It will be observed that the Collector in the case now before us calls attention to the fact that rent had been taken from the defendant and other tenants in the village in which the parties reside, and I apprehend from his remarks that these rents were payable in the same way as the rent in this suit is said to be payable—that is, in kind.

Phulloo Kooaree v. Immam Bandee Begam (2).

(1) Directions for Collectors of Land Revenue, S. 265.
(2) S. D. A. Rep., N. W. P., 1864, Vol. II, 671.

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1 A. 217.

I may add that in the Lower Provinces suits of this nature are heard and determined under the Bengal Revenue Act. I find in the case cited in the margin that it was held, in a suit to recover money due on payment in kind for the use of plaintiff's land by stacking timber thereon, that the claim was of the nature of one for rent. In this [229] case the suit "was in substance a suit brought to recover money due, or the value of a certain proportion of goods which ought to be paid in kind." I cannot say whether this particular suit was brought under the Bengal Revenue Act (VIII of 1869); possibly it was not so brought, but whether it was so or not, it is a case which shows that a suit may be entertained for money due or the value of a certain proportion of goods which ought to be paid in kind. The case now to be cited was one for arrears of rent and brought under the special Revenue Act. The rent was said to have been payable in kind, and the plaintiff's suit was for the value of his share. So again, in another case, the suit was for arrears of rent, and with respect to a portion of the claim the Court remarked:—"In respect to what are called cesses, we think they are not so much in the nature of cesses as of rent in kind (3)." In this case money was sued for. I notice these cases to show that suits, such as this is, appear to have been admitted without question, and such a plea as that raised in special appeal which has led to the present reference was never, as far as I can discover, brought before the Calcutta High Court (4).

Jumna Doss v. Gawsee Meah (1).

Bibee Jan v. Bhajul Singh (2).

Looking therefore at past practice, at what appears now to be the practice of the Courts, having due regard to the definition of rent in Act XVIII of 1873, to the fact that the jurisdiction of all Courts but the Revenue Courts is barred in these Provinces in suits which are of the nature of those mentioned in S. 93, and considering that the suit before us is one substantially and entirely for rent, I would say, in answer to the reference, that the landlord is competent to sue in the Revenue Court for the equivalent in cash where rent is payable in grain.

OLDFIELD, J.—I concur in the view taken by Mr. Justice Spankie on the question referred and in his proposed answer to the reference.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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FULL BENCH.
1 A. 170.

GANGA BAI (*Plaintiff*) *v.* SITA RAM (*Defendant*). [8th May 1876.]

Hindu Law—Hindu widow—Maintenance.

(1) A Hindu widow is not entitled to claim maintenance from her husband's relations, irrespective of the possession by them of any ancestral property, and solely on the ground of their relationship. (By the Full Bench).

(2) The circumstances that the father-in-law was possessed of ancestral immovable property, at the time of his son's death, which he had subsequently sold

(1) 21 W. R., 124 (Civil).
(2) 21 W. R., 438 (Civil).
(3) 24 W. R., 4 (Civil).
(4) See Mullick Amanut Ali v. Ukloo Pasec, 25 W. R., 140 (Civil), where a similar plea was raised, with a reference to Act VIII (Bengal) of 1869. Here, the Calcutta High Court ruled that a suit for rent in kind was cognizable under that Act.

away for paying his own debt, does not make him liable for maintenance personally. (By the Division Bench).

[1 & 2—R., 23 B. 608 (609) ; 1—F., 7 B. 127 (130) ; 1—Expl., 4 A. 296 (F.B) ; 1—R., 3 B. 44 (45), 11 A. 194 (199, 206) (F. B)=9 A.W.N. 30, 2 B. 494 (519) ; 2—F., 2 B. 573 (622)].

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1 A. 170.

REFERENCE TO THE FULL BENCH.

PEARSON AND TURNER, JJ. made the following reference to a Full Bench :—

The plaintiff in this suit claimed an allowance of Rs. 5 per mensem by way of maintenance from her father-in-law, the (defendant) respondent, and to be allowed to occupy two rooms in a house in which her deceased husband had an equal right with him, and to recover certain trinkets. The lower Courts have dismissed the first and last portions of the claim, and decreed the second ; and in regard to that portion of the claim which has been decreed objection to the decree has not been made by the defendant who, as purchaser of the house, is interested in the matter.

The plaintiff is the appellant whose pleas (1) we have to consider, and we at once disallow the second and third of the pleas set forth in the memorandum of appeal, concurring as we do in the lower Court's finding that the allowance drawn by Sita Ram (2) is not of the nature of ancestral property, and being of opinion that the Judge has sufficiently disposed of the issue relating to the trinkets in suit.

There remains the question as to the plaintiff's right to receive a money allowance by way of maintenance from her father-in-law under the circumstances found by the lower Courts. Those circumstances are as follows :—Her husband died about 15 years ago, and after his death, until lately, she resided with her father-in-law, and was maintained by him, and she has not forfeited by misconduct any right which she may possess to be maintained by him. He has recently sold a moiety of a house, which descended to him from his grandfather, to Kailash Nath Sukul, the other defendant in the suit, who is not a party to the appeal nor an appellant here ; the value of the moiety is reckoned at Rs. 850. But the plaintiff's claim to occupy two rooms in the house has been decreed. There is no ancestral property left in Sita Ram's possession, and it is for this reason that her claim to a maintenance payable by him has been dismissed.

It is now contended on her behalf that, notwithstanding the non-existence of any ancestral fund or property in the hands of her father-in-law applicable to the maintenance, she is, under the provisions of the Hindu law, entitled to be maintained by him, and our attention has been drawn to a recent ruling of the Bombay High Court in a case decided by West and Nanabhai Haridas, JJ. (3) to the effect that a Hindu father-in-law is legally bound to maintain his deceased son's widow, notwithstanding that no property belonging to his son may have come into his hands. The Court appears to have also held in other

(1) The pleas of the plaintiff were :—
(i) that the right of a daughter-in-law to be maintained by her father-in-law did not depend upon the existence in his hands of ancestral property ;
(ii) that the pension could not be considered as the exclusive and acquired property of the defendant, and
(iii) that the lower appellate Court had not given the claim in respect of the jewels sufficient consideration.
(2) Sita Ram—father-in-law of plaintiff.
(3) *Udaram Sitaram* v. *Sonkabai*, 10 Bom. H. C. Rep., 483.

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1 A. 170.

cases that a Hindu father is liable for the maintenance of his son's widow, notwithstanding a separation in estate of father and son. These rulings do not absolutely support the present contention, because they do not negative the hypothesis of ancestral property being in the father's possession. A Full Bench of this Court has recently recognized the right of the widow of a son who predeceased his father to be maintained out of ancestral funds or properties in the latter's possession (1). Whether such a widow has a right to be maintained by her husband's relations, irrespectively and independently of the existence in their hands of such funds or properties, under the law obtaining in this part of India, is a novel question, which, with regard to its importance, we think it proper to refer to a Full Bench for determination.

OPINIONS OF THE FULL BENCH.

[174] STUART, C. J., TURNER and SPANKIE, JJ., concurred in the following opinion :—

As we understand the question put to us, we must assume for the purpose of this reference that the father-in-law is in possession neither of ancestral nor immoveable property, that he has no fund with the disposal of which his son, if alive, could interfere, that he has inherited nothing from his son, nor have his rights in any property become enlarged by his son's death. Under these circumstances the plaintiff's pleader has failed to satisfy us that her father-in-law is under any legal obligation to provide her with maintenance. No text has been cited from any work of authority in these Provinces which supports the claim, nor has any decision been produced in which it has been ruled by any Court in these Provinces or in this Presidency, or in those parts of the Presidency of Madras which are governed by the Mitakshara, that such a claim has been allowed. The right, then, of the daughter-in-law appears to be one of moral and not of legal obligation.

Hindu law no doubt imposes on the daughter-in-law the duty of living in the house of her father-in-law, yielding him obedience and ministering to his needs, but the Privy Council, in *Raja Pirthee Singh* v. *Rani Rajkooer* (2) has ruled that this is merely a moral obligation, and that she does not even forfeit her right to maintenance if she incapacitates herself from performing her duty to her father-in-law by electing to reside elsewhere than in his house. Except in so far as the possession of property liable to a charge of maintenance alters the nature of the obligation of the father-in-law to the daughter-in-law, there is no more ground for holding that he is legally bound to support her than there is for asserting that **[175]** she is legally bound to live in his house and minister to his wants. Of both duties the neglect is discreditable in this world, and may, according to the Hindu religion, subject the offender to punishment hereafter.

PEARSON, J.—My answer to the question put to us must be in the negative. In the case of *Lalti Kuar* v. *Ganga Bishan* (1) to which allusion is made in the referring order, I assented, not without doubt and hesitation, to the doctrine that a Hindu widow was entitled to be maintained out of the joint ancestral estate of the family of which her husband was a member, although he had predeceased his father. That doctrine, although not expressly laid down in the Hindu law, was supported by many considerations of reason and equity, and had been recognized by

(1) H. C. R., N. W. P., 1875, p. 261.
(2) 12 B. L. R. 238.

several decisions. But I am not prepared to go further and to allow that a widow is legally entitled to be maintained by her husband's relations after his death *merely* in consequence of such relationship. The text which countenance such a view appear to be of the nature of moral or religious precepts. In the oral pleading before us it has indeed been mainly urged that the respondent is liable to the claim of the plaintiff, appellant, *because* he sold an ancestral house; but this argument was not the plea set forth in the first ground of the appeal, and we can only address ourselves to the question referred to us.

OLDFIELD, J.—The legal right of a widow to maintenance from her husband's family can, I apprehend, scarcely be supported with reference solely to those texts of Hindu law which indicate the position a woman obtains by marriage in her husband's family, and those which generally inculcate the duty of maintenance of the female members of a family.

It is said that by marriage a woman leaves her own family or gotra and enters that of her husband, and her connection with her own family is at an end. There is the passage of Vijnanesvara translated in West and Bühler's Digest of Hindu Law Cases, Bk. I, p. 141, declaring the wife and husband to be Sapinda relations to each other because they together beget one body (the son), the Sapinda-relationship arising by connection with **[176]** one body, either immediately or by descent; and there are other texts on the connection formed by marriage, such as—"Women by marriage are born again into the family of the husband."—"By marriage a husband and wife become one person."

These texts admittedly do not mean that a woman on marriage enters into her husband's family or gotra in the sense that she enters it assuming the rights of a daughter. Were it so, she would inherit in the same way as a daughter, and if she cannot claim under these texts the full rights of a daughter by reason of entering the family or gotra of her husband, I do not see how any legal claim to maintenance can be supported on that ground; the ground, if good at all, should be good for entitling her to the full position of a daughter.

The above texts and others which inculcate in general terms on women dependence on their husband's family and impose a duty of maintenance on the husband's family do not necessarily impose any legal obligation. This distinction, which is one to be carefully observed in applying texts of the Hindu writers, was pointed out by Sir Barnes Peacock, Chief Justice of Bengal, in *Khetramani Dasi* v. *Kashinath Das* (1), and the rule appears to be that when the deceased member of a family has left property, they who take it to the exclusion of his widow will be legally bound to maintain her out of the property. There is the following passage in Viramitrodaya cited at the hearing of this reference:—"The brother and others taking the wealth of the husband of an istri widow other than a putni capable of receiving her husband's share should allow subsistence to her." "To give" means "must give." "Regarding this is also the text of Narada—that all virtuous widows should be allowed food and raiment by the husband's eldest brother or father-in-law, or by a person born in the same family. This text means all those taking the wealth of the husband, for subsistence is allowed because of taking wealth," and there are other texts to the same effect—Colebrooke's Digest, Vol. II, Bk. V., Ch. I, S. 1, ccccxii, Smriti Chandrika, Ch. XI, S. 1, V. 34. This particular obligation, so expressly declared, is probably founded on the intimate connection which marriage is held to give rise to between husband and

(1) 2 B. L. R., A. C., 15 = 10 W. R., (F. B.), 89.

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1 A. 170.

wife, as shown by the texts I have already cited, and which is said [177] to extend to the property; for instance, we have the text Smriti Chandrika, Ch. IX, S. 2, V. 14—"It must be understood that in a husband's property the wife by reason of marriage possesses always ownership, though not of an independent character"—and Colebrooke's Digest, Vol. II, Bk. V, Ch. VIII, S. I, ccccv.

In a joint family where there is ancestral property such a legal obligation will lie on the father-in-law to maintain his son's widow—*Lalti Kuar* v. *Ganga Bishan* (1); but in a case like the present, where the property is entirely the self-acquired property of the father, the son in his father's lifetime cannot be said to have had such an interest in the property as will impose at his death an obligation on his father to maintain the widow.

JUDGMENT OF THE DIVISIONAL BENCH.

When the case came back to the Division Court (TURNER and PEARSON, JJ.) for disposal, the judgment of the Court was as follows:—

We accept the opinion of the Full Bench on the general rule that a father-in-law, who is not in possession of ancestral property, is not legally bound to maintain his daughter-in-law. The appellant's pleader now contends that there are peculiar circumstances which take this case out of the purview of that general rule, namely, that one moiety of a house valued at Rs. 425 was held by the respondent as ancestral property and was sold by him. This is true, but it is shown that the sale was made to pay debts. It was then a sale which the son himself, if alive, could not have resisted, for it is not suggested the debts were contracted for immoral purposes. Consequently, in our judgment, the alienation by the father-in-law does not in this case impose on him personal liability of maintaining the appellant.

FULL BENCH.

PRESENT:

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

FULL BENCH.

IN THE MATTER OF THE PETITION OF HARSHANKAR PARSHAD.

[11th May 1876.]

1 A. 178.

1. *Act XXIII of 1861—Miscellaneous proceedings.*

The expression, "Miscellaneous proceedings," in S. 38 of Act XXIII of 1861, embraces all proceedings, not being regular suits or appeals, for which no regular procedure is expressly provided; and, in that sense, it embraces proceedings in execution of decree.

2. *Act VIII of 1859, S. 338—Stay of execution pending appeal.*

Pending the determination of a miscellaneous regular appeal to the appellate Court, against the order of the Court of first instance, refusing to postpone a sale in execution of a decree, the appellate Court has power, under S. 338 of Act 1859, to stay execution.

[1—R., 1 A. 180 (F.B.), 1 A. 668 (F.B): 2—R., 28 C. 734.]

Application to the High Court by the judgment-debtor for the postponement of a sale in the execution of a decree pending the determination

(1) H. C. R., N. W. P., 1875, p. 261.

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of a miscellaneous regular appeal to the Court against the order of the Court of first instance refusing to postpone the same.

ORDER OF REFERENCE TO THE FULL BENCH.

FULL BENCH.

The application was referred to a Full Bench by the Court (PEARSON, J.), with the following order of reference :—

1 A. 178.

This application is stated to be preferred under the provisions of S. 338, Act VIII of 1859, a section which refers to the subject of staying the execution of decrees under appeal. There is no appeal pending in this Court against the decree which is in course of execution. I am, therefore, of opinion that S. 338 is *prima facie* inapplicable to the present case. Whether it can be held to be applicable under S. 38, Act XXIII of 1861, is a question which I refer to the Full Bench, as I am informed that the practice of the Court in dealing with applications of the nature of the present is not uniform. To allow the present application would in effect be to allow the appeal beforehand.

OPINION OF THE FULL BENCH.

[179] Proceedings in execution of decree would not, in our opinion, ordinarily fall within the term "miscellaneous proceedings." They should be regarded rather as stages in the suit or proceeding in which the decree or order under execution was passed; whereas by miscellaneous proceedings we should understand ordinarily those applications commenced by petition, and not by plaint, of a less formal character than suits, and generally if not universally calling on the Court to exercise special powers conferred on it by the Legislature, such as applications for certificates to collect debts, applications for probate or letters of administration, applications for appointment of guardians, &c.; and possibly also the term miscellaneous proceedings may also be applied with propriety to those proceedings which the Court is empowered to institute of its own motion, such as proceedings for the institution of prosecutions in certain cases.

But unless we hold that the term miscellaneous proceedings in S. 38 has a wider significance, and applies to all proceedings for which no special provision is made, the Court appears to be left without powers which are necessary to enable it to deal with such proceedings. It would have no power to deal with them in default of appearance; it would have no power to enforce the attendance of witnesses; and there are no directions as to the form of the order nor as to the form of appeal from an order passed in such proceedings in cases in which an appeal lies. We would, therefore, read the term in this section as embracing all proceedings, not being regular suits or appeals, for which no procedure is expressly provided, and in that sense it embraces proceedings in execution of decree. In support of this contention, it may be mentioned that, in mofussil Courts, proceedings in execution have been treated as falling within the class **[180]** of "*mutafarrikát*," or miscellaneous proceedings or cases, as opposed to "*nambari*," or regular suits, and appeals from orders passed in proceedings in execution have up to the present time been filed as miscellaneous appeals. We are, therefore, of opinion that the Court had power to stay execution under the circumstances stated in the reference.

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1 A. 180.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

GAYA PARSHAD (*Decree-holder*) *v.* BHUP SINGH (*Judgment-debtor*).

[11th May 1876.]

1 A. 180.

Act VIII of 1859, S. 6—Miscellaneous proceedings—Act XXIII of 1861—Execution of decree—Transfer.

Under S. 6 of Act VIII of 1859, and S. 38 of Act XXIII of 1861, a District Judge can transfer, to his own file, execution proceedings pending in a Court subordinate to him.

[R., 1 A. 668 ; **Not F.**, 15 C. 177 ; **F.**, 22 B. 778.**]**

A District Judge, on being informed by the Subordinate Judge that a person applying in his Court for the execution of a decree was a person to whom he owed money, and that he considered himself precluded by that fact from entertaining the application, transferred the case to his own file by an order purporting to be made under S. 25, Act VI of 1871, and eventually rejected the application. The decree-holder appealed to the High Court.

REFERENCE TO THE FULL BENCH.

PEARSON and OLDFIELD, JJ., referred the following question to a Full Bench, viz :—

" Whether he (the District Judge) was competent to do so under the terms of S. 6, Act VIII of 1859, or S. 38, Act XXIII of 1861, or otherwise ?"

OPINION OF THE FULL BENCH.

[181] In our judgment the provisions of S. 6, Act VIII of 1859, are extended to miscellaneous proceedings, and inasmuch as we have this day held on a reference in the case of *Harshankar Parshad* that proceedings in execution fall within the term " miscellaneous proceedings " in S. 38, we reply that the Judge had power to transfer the proceedings in the case out of which this reference arose.

FULL BENCH.

PRESENT:

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1 A. 181.

Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

RAM DIAL AND OTHERS *v.* RAM DAS AND ANOTHER. [11th May 1876.]

1 A. 181.

1. *Act VIII of 1859, S. 254—Sale in execution—Defaulting purchaser—Appeal.*

An appeal lies from an order passed on an application, under S. 254 of Act VIII of 1859, to make a defaulting purchaser liable for the loss occasioned by a re-sale.

2. *High Court—Appellate Civil jurisdiction—Division Court—Letters Patent, cl. 10.*

An appeal to the Full Bench, under cl. 10 of the Letters Patent, is not confined to the point on which the Judges of the Division Bench differ.

[F., 16 C. 535 ; **Diss.**, 12 A. 397 **(F.B.)** ; 14 A. 201 **(F.B.)** = A.W.N. (1892), 74 ; **Ap.**, 11 M.L.J. 10 **(F.B.)** ; **R.**, 18 M. 439 ; **D.**, 23 M. 73.**]**

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1 A. 181.

JUDGMENT OF THE DIVISION BENCH.

[183] STUART, C.J.—A preliminary objection is taken by the pleader for the respondents that this appeal does not lie, on the ground that the order complained of is one relating to the execution of a decree as provided by Ss. 363 and 364 of the Code, which limit appeals from orders passed in execution of a decree to the parties to the suit in which the decree was passed, and that the defaulting purchaser, by the enforcement of S. 254, is not a "party" within the meaning of S. 11 of Act XXIII of 1861. But this is an objection which, in my opinion, cannot be maintained. S. 254 applies to the case of default by a purchaser within the prescribed time, and it provides that—"If the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court;" and several rulings of the Calcutta High Court were referred to in support of the contention that a defaulting purchaser was, under S. 254, placed in the position of a judgment-debtor, and therefore a "party" within the meaning of S. 11, Act XXIII of 1861. Our attention was, among others, particularly directed to a ruling to this effect by Mr. Justice Loch and Mr. Justice Macpherson (1), and such ruling I approve. The question, however, does not appear to have been finally determined in Calcutta, for in a case (2) decided there so late as August 1873, before a Full Bench on appeal from a Division Bench, the Chief Justice, after disposing of the case, observed that—"This decision must not be understood as in any way deciding that an appeal will lie in such a case as this. It has not been necessary for us to determine that." I should be glad to be instructed by the High Court of Calcutta **[184]** when it finally and advisedly delivers its mind on this question; but meanwhile I am not relieved of the duty of forming and expressing my own opinion, which is in accordance with the judgment of Mr. Justice Macpherson. And meanwhile I may observe that, in the above case, and notwithstanding the remark of Sir Richard Couch, the appeal was entertained, and apparently without objection. Even if I was more doubtful than I am on the subject, the reasonableness and convenience of procedure by appeal in such a case as the present appears to me to be so great as to afford a presumption in its favour, and I feel bound to decide in favour of its competency, and that the order therefore of the Subordinate Judge is open to appeal. [After considering the appeal on its merits and expressing his opinion that the decision of the Court of first instance was erroneous, the learned Chief Justice proceeded as follows:—] The appeal must therefore be allowed, and the order of the Subordinate Judge reversed with costs against the respondents in both Courts.

SPANKIE, J.—This is a case in which action was taken under S. 254 of Act VIII of 1859, under the following circumstances:—The holders of a decree against Shaikh Iradatullah, judgment-debtor, took out execution of the same, and caused the rights and interests of their debtor in Tal Ratwi, amongst other properties, to be sold on the 21st July 1873. Four persons, Champa Ram, Ram Dial, Bundhu Ram, and Kaidar Ram, purchased the rights in Tal Ratwi through their agent for Rs. 9,600. They paid the earnest-money, but failed to deposit the balance within the prescribed time. The property was re-sold and was purchased on the 21st November of the same year for Rs. 1,000. The second purchaser also failed to make

(1) *Joobraj Singh* v. *Gour Buksh Lal*, 7 W. R. 110.
(2) *Huree Ram* v. *Hur Parshad Singh*, 20 W. R. 397.

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the necessary deposits. The property was again put up for sale and was bought on the 20th May, 1874, by Shaikh Muzhur Ali for Rs. 1,000, and the sale was confirmed. The decree-holders now claim that the difference, Rs. 8,600, between the sale eventually consummated and the price bid by the defaulting purchasers, shall be levied from them under the rules for enforcing the payment of money in satisfaction of a decree of Court. (S. 254, Act VIII of 1859).

The Subordinate Judge *held* that the difference would be claimable from the first auction-purchaser who defaulted; but in **[185]** this case he was of opinion that there was not sufficient proof that Kali Charan had authority from Champa Ram, &c., to purchase for them the rights and interests in Tal Ratwi. He therefore rejected the application of the decree-holders as against these persons.

An appeal is filed by the decree-holders, which is met by a preliminary objection on the part of the respondents that no appeal lies, the other auction-purchasers on the first sale being no parties to the suit, so as to bring them under the provisions of S. 11, Act XXIII of 1861.

I am aware that there are decisions bearing on the point in the Calcutta High Court, two of them being cited from the 6 and 7 W. R. In the latter case, the view taken would appear to be that the terms of the section (254) bring any one proceeded against under it amongst the parties of the suit. I am not, however, satisfied that this is so. The section certainly does not say so. The section recites that the difference shall be leviable from the defaulting purchaser under the rules for enforcing the payment of money in satisfaction of a decree of Court, that is to say, by an application for execution against him by arrest, or by attachment of his property. But the section does not go on to say that when any application has been made against such defaulting purchaser, he is to be regarded as one of the parties to the original suit in which execution was taken out. On the other hand, S. 364 recites that no appeal shall lie from any order passed after decree and relating to the execution thereof, except as is hereinbefore expressly provided. The appeal is not expressly provided for in S. 254. It is provided for in S. 257. So S. 283 provides for an appeal. But that section has been repealed by S. 11, Act XXIII of 1861, and this section, though it greatly enlarges the matter of which the Court executing a decree may take cognizance, inasmuch as, after expressly stating what it may do specifically, it includes any other question arising *between the parties* to the suit in which the decree was passed and relating to the execution of the decree, does not meet the difficulty. The question before us certainly relates to the execution of the decree, but is it one between the decree-holder and the judgment-debtor? It might be convenient to hold so, as giving the defaulting pur-**[186]**chaser, the decree-holder, and the judgment-debtor an opportunity of being heard by the appellate Court. On the other hand, it may have been intended not to give a defaulting purchaser the benefit of an appeal on the summary side. There could be no doubt of his default, where, in consequence of it, re-sale has been rendered necessary; and there can be no doubt as to the injury such default may do both to the decree-holder and judgment-debtor. The defaulting purchaser appears to me to be in the position of a man who has allowed judgment to go against him by default. He has nothing to say for himself, and execution follows against him as a matter of course. But then, if there be an appeal, it would lie because he was the judgment-debtor in another suit between the original decree-holder and himself, or the judgment-debtor and himself. I do not find that the Presidency High

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Court's decisions (1) already referred to have been accepted as conclusively settling the point. On the contrary, I find an appeal in a case (2) very similar to the one before us, wherein it was held that the party purchasing at an execution-sale under the Civil Procedure Code in the character of an agent cannot be made liable as a principal, and a proceeding upon the contract under S. 254 of the Act in such a case must be taken against the principal. This was an appeal under cl. 15 of the Letters Patent from a Divisional Bench, and the Full Bench decided which of the two judgments before it was to be followed; but the Chief Justice added at the close of the judgment that "this decision must not be understood as in any way deciding that an appeal will lie in such a case as this. It has not been necessary for us to determine that." From this I conclude that the point was not held to be definitely determined by the High Court of the Lower Provinces. It has not, to my knowledge, been determined by this Court.

I think that it would be better that we should take the opinion of the Full Bench before disposing of the appeal on its merits. At the same time, if the learned Chief Justice should hold that there is an appeal, his judgment would prevail, and I should have no hesitation in concurring with his decision on the merits, as we were both satisfied at the hearing that all the evidence was in favour of the appellants.

The respondents appealed to the Full Court against the judgment of the learned Chief Justice, under cl. 10 of the Letters Patent of the High Court.

JUDGMENT OF THE FULL COURT.

[187] PEARSON, TURNER, and OLDFIELD, JJ.—We proceed to consider in the first place the issue on which the learned and honourable Judges differed.

The provisions of S. 254, Civil Procedure Code, declare that, if the purchaser of immoveable property at an auction-sale held in execution of a decree. after payment of the deposit, fails to make good the full amount of the purchase-money before sunset of the **[188]** fifteenth day from that on which the sale took place, * * * the deposit after defraying the expenses of the sale shall be forfeited to Government, and the property shall be resold, * * * and that, if the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court.

Had the law simply declared the liability of the defaultiug purchaser without going on to declare how that liability should be enforced, the proceeding must have been by suit. To avoid the circuity of the proceeding by suit, the Legislature has given to the decree-holder and judgment-debtor a more speedy remedy, and the defaulting purchaser is placed in a position which is very similar to that which he would have filled had a suit been brought against him. It is true there is this difference, that in a proceeding by suit the question now in issue between the parties would have been determined prior to and not subsequently to decree. In other respects his position is assimilated to that of a judgment-debtor and the rules for enforcing a decree against the judgment-debtor are made available to enforce the demand arising out of his default against the defaulting purchaser. Among these rules is the rule ordained by S. 11, Act XXIII of 1861, which gives a right of appeal to the parties to a suit on all questions arising in the execution of the decree and relating to the execution

(1) 6 W. R., Mis., 126; 7 W. R., 110.

(2) 20 W, R., 397.

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thereof. There seems no difficulty in applying this rule *mutatis mutandis* to the proceeding taken against the defaulting purchaser. The judgment-debtor and (if his claim be not satisfied out of the proceeds of the re-sale) the original decree-holder stand in the position of decree-holders who have obtained judgment against the defaulting purchaser for damages occasioned by his default; the defaulting purchaser stands in the position of a judgment-debtor against whom a decree for such damages has passed. They are parties to the proceeding which is substituted for the suit, and inasmuch as S. 254 declares without exception that the difference in price, which is the amount of the damages, shall be leviable under the rules for enforcing payment of a money-decree, the rule relating to appeals must be applied *mutatis mutandis* equally with any other of those rules.

[189] Having disposed of this plea, the appellants contend the Court is bound to go on to consider the appeal on the merits. The respondents, on the other hand, argue that only the appeal must be confined to the point on which the Judges constituting the Division Bench differed, and in support of their argument they refer to the ruling of the High Court of Bengal in *Roy Nandiput Mahata* v. *Urquhart* (1).

This ruling came before the Privy Council, but no question arose upon it, and the Right Honourable Committee, while alluding to it, expressed neither dissent from nor assent to it.

The 10th clause of the Letters Patent constituting this Court declares that an appeal shall lie to the Court from the judgment of one Judge of the said Court or of one Judge of any Division Court, pursuant to S. 13 of the High Courts' Act, and that an appeal shall also lie to the Court from the judgment of two or more Judges of the Court or of such Division Court wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the Court.

Now there can be no question that, on the hearing of an appeal from the judgment of a single Judge, the whole case may come before the Court in appeal, and it is competent to the Court to entertain objections to any part of the judgment, and it is a fair argument that the word judgment must be read in the same sense whenever it occurs in the same section, and that it must be held to mean the whole judgment in the second paragraph as it does admittedly in the first paragraph, unless its sense is restrained by the context. The question then must turn on the construction to be put on the word "wherever." Does it mean "on any point on which," or does it mean "in any case in which." Let us substitute these different meanings for the doubtful term and read them with the rest of the sentence. Adopting the former, the passage will then run "on any point on which such Judges are equally divided in opinion, and do not amount in number to the majority of the whole of the Judges." This construction would, it is clear, accord with the first clause of the sentence, but not with the latter. Adopting **[190]** the other construction, the passage would run "in any case in which the Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges." This construction accords with both clauses of the section. Ordinarily where an appeal is given it must be taken to be a general appeal, and express language should be used to restrict it. For this reason, because the construction of the doubtful term which appears to accord best with the context ought to be accepted, it must be held that the appeal given to the Full Court is not confined to the point on which

(1) 4 B. L. R., A. C., 181 ; 13 W. R., 209.

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the Judges of the Division Bench differed in opinion. We have then to consider the objection taken to the judgment of the Division Bench on the merits (1).

SPANKIE, J.—After fuller consideration of the question, I now am of opinion that, when the decree-holder or judgment-debtor proceeds against a defaulting purchaser under S. 254, Act VIII of 1859, the latter must at any rate be regarded as a party to a suit as between himself and the person insisting on the enforcement of the provisions of the section, and therefore, as the proceedings are in execution, there is an appeal under S. 11, Act XXIII of 1861. Another question, however, has been raised during the hearing of the appeal. Is the Court at liberty to go into the merits of this case, or should it have confined itself to the point regarding which the Judges of the Division Bench have differed?

The appeal permitted by cl. 10 of the Letters Patent is from the judgment of two or more Judges or of a Division Court, wherever such Judges are equally divided in opinion. It will be observed that the word *whenever* is not used, but wherever, and cl. 27 provides that when the Judges of a Division Court are divided in opinion as to the decision to be given on any point, *such point* shall be decided according to the opinion of the majority of [191] the Judges, and if the Judges be equally divided, then the opinion of the senior Judge shall prevail. When this happens, the door is opened for an appeal. If the difference of the Division Court has been on a particular point, and on such point the decision of the senior Judge has prevailed, it would seem to follow that the appeal to the Court at large would be confined to that point of difference alone. Then no violence is done to cl. 10, which provides for an appeal from the judgment of one Judge, or from the judgment of two or more Judges, or of the Division Court, wherever such Judges are equally divided in opinion. This seems to refer to the particular point upon which they are equally divided in opinion, and so far cls. 10 and 27 are consistent. "Wherever" also would appear to indicate the point of difference respecting which the Court at large is to pronounce an opinion. When the difference of opinion goes to the entire case, the Court at large in appeal would of course deal with all the questions raised before the Division Bench. When the opinion of the senior Judge has prevailed on any point, the Court on appeal would confine itself to that point alone.

I am fortified in this opinion by the precedents cited in the margin. In the first case it was observed by the learned Chief Justice—"In deciding upon the point which the two Judges considered to be the only one before them for decision, there was a difference of opinion. The judgment of the senior Judge, that of Mr. Justice Kemp, therefore prevailed. An appeal lies to us, because the Judges have differed, and I think that on this appeal it is not now open to the parties to go into the whole of the case and to raise before us points which were not raised before the Judges of the Division Bench" (3). In the second case the judgment just cited

Shahzadi Hajra Begam v. *Khaja Hossein Ali Khan* (2).

(1) The Court of the first instance was finally ordered, under S. 356, Act VIII of 1859, to examine Kali Charan; and this being done and the appeal coming on for final hearing, the learned Judges decreed it and reversed the decree of the Division Court observing that, in their judgment, there was not sufficient evidence to show that Kali Charan was authorized by the appellants to make the purchase of Tal Ratwi on their behalf and therefore they could not be charged with the deficiency in the price obtained on the resale.

(2) 4 B. L. R., A. C. 86=12 W. R., 198.

(3) 4 B. L. R., A. C. at p. 101; 12 W. R., at p. 499.

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was quoted in support of the ruling that in appeal under the Letters Patent no point can be argued except a point on which the two Judges of the Division Bench have differed [192] in opinion. The Officiating Chief Justice remarked—"The 36th clause of the Charter of 1865 provides 'that if the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, but if the Judges shall be equally divided, then the opinion of the senior Judge shall prevail.' The point on which the learned Judges differed was whether the appellant proved that there had been any material injury by reason of the irregularity. The 15th section gives an appeal from the judgment of two Judges, wherever such Judges are equally divided in opinion. In the case of *Shahzadi Hajra Begam* v. *Khaja Hossein Ali Khan*, which has already come before the Chief Justice and two Judges, on the construction of S. 15, it has been determined that an appeal only lies in respect of that part of the judgment upon which the two Judges differ" (2).

Roy Nandipat Mahata v. *Urquhart* (1).

The third case (3) was before Mr. Justice Macpherson on the petition of the Court of Wards on behalf of the Rajah of Darbanga. I cite it to show that that learned Judge, who was a party to the first judgment quoted, had not changed his opinion. His remarks that " it is most desirable and fit that, under the peculiar circumstances of this case, the appeal should now lie to the Privy Council, and not to the High Court. The Division Court decided to a certain extent in favour of the present petitioner ; and to that extent the Judges were not divided in opinion. There being no appeal under cl. 15 from that portion of the decree, Rajah Lilanand Singh has appealed to the Privy Council, as he has an undoubted right to do " (4). Accepting the decisions quoted as authority on the point, and also for the reasons assigned by me, I am of opinion that the Court was not at liberty to go into the merits of this case, but should have confined itself to the point of difference between the two Judges of the Division Bench.

Entertaining this opinion, I do not think it necessary to go into the evidence. I would merely remark that I am of the same opinion as I was at the hearing of the appeal, that the evidence was in favour of the appellants.

CRIMINAL JURISDICTION.

PRESENT :

Mr. Justice Pearson.

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QUEEN *v.* GUR BAKSH AND OTHERS. [11th May 1876.]

Crim. Pro. Code, 1872, Ss. 467, 468, 469, 471—Trial for offences against public justice —Jurisdiction.

The Magistrate before whom an offence under S. 193 is committed is himself competent to try the case.

[Overruled, 1 A. 625 **(F.B.).]**

The Magistrate who convicted certain accused persons for assault and robbery, tried the petitioners, who gave evidence on behalf of the

(1) 4 B. L. R., A. C., 18=13 W. R., 209.
(2) 4 B. L. R., A. C., at p. 193 ; 13 W.R., at p. 212.
(3) 7 B.L.R., 730.
(4) 7 B.L.R., at p. 736.

accused, under S. 193 I. P. C. and convicted them. The Court of Session, on appeal, affirmed the conviction. The petitioners applied for revision to the High Court.

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JUDGMENT.

[193] PEARSON, J.—S. 471 of the Code does not expressly prohibit the procedure adopted by the Magistrate in this case, and unless it does so, it is not contended that he was not competent to adopt it. What that section does is only to authorize any Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into any charge such as one under S. 193, Indian Penal Code, after making necessary preliminary inquiry, either to commit the case itself, or to send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged. This provision is very necessary for a Court not having power to try the offence itself, as for instance a Civil Court, but does not necessarily deprive a Magistrate of any power which he may possess to try the case himself. I therefore decline to interfere in the present case and reject this petition.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson, and Mr. Justice Turner.

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RAJAH RAM (*Plaintiff*) *v.* BANSI (*Defendant*). [22nd May 1876.]

1. *Remarks on the right of pre-emption existing in villages in the N.W.P.*
See pp. 208, 209 of the Report.

2. *Stipulations in Record-of-rights—Construction of.*
In all cases, in which the right of pre-emption is asserted as based on a stipulation entered in the record-of-rights, the terms of the stipulation must be regarded and those conditions only imposed, which the language of the stipulation warrants.

3. *Pre-emption—Minor—Legal disability—Limitation.*
Where the condition in a record-of-rights was clearly intended to take effect at the time of sale, and its language implied that those, in whose favour it was created, were to be persons competent, at the time, to make a binding contract of acceptance or refusal, *held* that no right of pre-emption could be afterwards claimed by a co-sharer, who, at the time of sale, was a minor, and was not represented by a person competent to make a binding contract for him. (S. D. A. Rep. N. W. P. 1865, p. 97, *remarked on.*)

4. *Condition in Record-of-rights, legal aspect of.*
A stipulation in a record-of-rights may be viewed as arising out of contract or as being a record of custom. In either aspect, it must satisfy certain conditions, in the absence of which it cannot be valid.

5. *Pre-emption under Mahomedan Law and in Record-of-rights.*
Under Mahomedan law, certain formalities are attached to the right of pre-emption, and, among other things, immediate demand is essential, as the nature of the pre-emption right is such as to require immediate assertion as a condition essential to its recognition. These do not necessarily apply to stipulations in the record-of-rights.

JUDGMENT.

[208] The *haqq-i-shuf'a* or right of pre-emption known to the Muhammadan law, and of which some of the expounders of that law

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declare the operation limited to houses and parcels of enclosed land, had in some instances become a village custom and attached to the alienation of shares in revenue-paying mahals when the first settlement under Regulation IX of 1833 was made in these Provinces. These instances were, we believe, not numerous, but inasmuch as it was deemed conducive to the welfare and tranquility of village communities that some such provision should be made to prevent the incursion into the community of strangers in race or religion, the officers engaged in the preparation of the record-of-rights induced the proprietors to consent to the introduction of a stipulation binding each co-sharer when transferring his share to [209] give the first refusal of it to one of his own family or to the other co-sharers in the patti or mahal. These stipulations vary in their terms, and while they are not clogged with the formalities which attach to the Muhammadan *haqq-i-shufa* they also differ from that right, in that while the latter is regarded by Muhammadan law as a feeble right, the former, arising out of contract, are enforced with the same rigour as contracts.

Unfortunately, the introduction of these restrictions on the freedom of alienation has worked results wholly unexpected, and produced evils scarcely less than those they were designed to avert. So long as land possessed no great value in the market, the consequences were not plainly apparent. Now that land has acquired greater value, and that in some districts there is an active demand for it, the results of these restrictions cannot escape observation.

Except under the pressure of necessity, land-owners rarely part with their landed property. It is therefore of the utmost moment to them to obtain its fair value and without unreasonable delay. Now in a village held by a number of co-sharers it is almost impossible to obtain within a reasonable time from every co-sharer an explicit refusal of an offer of sale, or such evidence of the refusal as will thereafter be incontrovertible. Not unfrequently when a co-sharer desires to sell his share, and in fulfilment of the stipulation offers it to his co-sharers, some one or more of them will neither explicitly accept nor decline the offer, but haggle to obtain it at a price far below its value. When the patience of the seller is exhausted, or the urgency of his need no longer permits delay, he is driven to effect a sale with a stranger, which is followed after the longest delay allowed by law by the institution of one or more suits to enforce the right of pre-emption. The stranger, aware of the risk to which his purchase is exposed, either at once takes account of it by offering less than the property ought to fetch if it could be sold freed from the risk, or retains a portion of the purchase-money until it be seen whether the sale is contested, or, if contested, the result be known. Fictitious considerations are entered in sale-deeds, fictitious payments made before the registering officers, fictitious receipts executed, and wholesale perjury committed on the one side or the other when the Courts come to inquire into the prices actually paid.

[210] In the case now before us a claim is made which, if allowed, will render the condition for pre-emption still more onerous, and impair still further the value of property to which it attaches. The plaintiff seeks to disturb sales made some years before suit at a time when he was a minor and unrepresented by any person competent on his behalf to conclude a purchase. Having brought a suit within a year from the date on which he attained his majority, he is not barred by limitation from enforcing his claim, and the main question is whether or not the right accrued to him. The Court of first instance assumed that the right accrued to the plaintiff, notwithstanding his minority, and decreed the claim. The Judge on appeal considered that, inasmuch as no claim had

been advanced either by the minor or his mother, who managed her son's property within a reasonable period after the sale, the right was lost. The Judge relied on the decision of the late Sudder Court, North-Western Provinces, in *Nanao* v. *Tirkha* (1) in which it was held the nature of a pre-emptive right to be such as to require immediate assertion as a condition essential to its recognition, and that minority will not excuse laches in the assertion of the claim.

In special appeal the propriety of this ruling has been impugned, it does not appear from the report whether the claim which was before the Sudder Court was based on the Muhammadan *haqq-i-shufa* or on a special condition in the record-of-rights. Under the Muhammadan law immediate demand is certainly essential, but, as we have said, the formalities which are requisite under that law do not apply to rights of pre-emption created by contract, unless it appear that it was the intention of the parties to attach to the exercise of the right the same formalities as are required by Muhammadan law.

In all cases in which the right is asserted as based on a stipulation entered in the record-of-rights, the terms of the stipulation must be regarded, and those conditions only imposed which the language of the stipulation warrants.

In the case before us the stipulation has been thus translated :—

"Every co-sharer is to the extent of his possession at liberty to **[211]** alienate his share by sale or mortgage, but at the time of alienation there is this condition, that whoever desires to alienate his share first of all the nearest co-sharer will be entitled to it, and in the event of his refusal it shall be transferred to the other co-sharers in the other thoke, and when all have refused or do not give the proper price, then a transfer may be made to another [*i.e.*, a stranger] and after that the right of alienation shall belong to no co-sharer."

There is nothing in the language of this stipulation to show that the formalities of the Muhammadan law were attached to the right of pre-emption, nor that the right, if it accrued, would be forfeited if it were asserted at any time within the period allowed by the law of limitation. But, while we cannot support the decree of the Court below on the ground on which it proceeded, we see other grounds which in our judgment justify us in affirming it.

It could not have been the intention of those who framed or accepted the stipulation, that no complete alienation should be made so long as there was a co-sharer in the village under a disability to make a binding contract ; and the language of the stipulation so far from supporting militates with the suggestion that there could have been any such intention. The condition was clearly to take effect at the time of the sale, and its language implies that the co-sharers in whose favour the condition was created were to be persons who were competent at the time to make a binding contract to accept or refuse the offer. The generality of the reservation of right to all the co-sharers of the several classes is controlled by other terms which imply that the option of purchase is to be exercised at the time of the sale, and that it is to be given to those who are competent to accept or refuse it. It is admitted that the plaintiff was at the time of the sale impugned a minor, and it is not alleged that there was at that time any person competent at that time to conclude a contract which would be binding on him.

It follows from the construction we put on the stipulation that the seller was not bound to make the offer to the plaintiff, and that the sales

(1) S. D. A. Rep. N. W. P., 1865, p. 97.

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cannot be invalidated by reason of the absence of proof of refusal on his part. We have assumed the stipulation in the record-of-rights arose out of contract, because such we believe to have been the more general origin of these stipulations; but assuming the clause in the record-of-rights to be a record of custom, we are still at liberty to collect its incidents from the terms in which it is recorded. Indeed, were the clause merely a record of custom, and [212] its language were ambiguous, a custom to be a good custom must be reasonable, and we could not hold a custom reasonable which allowed the validity of transfers of property to remain for an indefinite period in suspense

For the reasons we have stated we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

FULL BENCH.

PRESENT:

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

RATAN KUAR (*Defendant*) *v.* JIWAN SINGH (*Plaintiff*).

[22nd May 1876.]

1 A. 194.

1. Redemption—Burden of proof—Ownership—Evidence Act I of 1872, S. 110.

In a suit for redemption of properties in the possession of the defendant, who sets up a sale, the burden of proving the mortgage is on the plaintiff.

2. Partial relief on the footing of defendant's admission.

Where the plaintiff sues for redemption of a mortgage of the whole property for a small amount and fails to substantiate his averments, he cannot, in that suit, fall back on the admission of the defendant, who admits the mortgage of a portion only, but for a very much larger amount, and claim to redeem that portion.

[1—R., 19 A.W. N. 132; **2—R.**, 11 A. 438 (451), 18 A. 403 (406) = 16 A.W.N. 132.]

In a suit instituted on the 19th April, 1873, the plaintiffs, averring that their ancestor Tej Singh had mortgaged three villages to Kirat Singh and Moti Singh, the ancestors of the defendants, in 1842 for Rs. 2,500, sought to recover possession of 15 biswas of each village (deducting 5 biswas, the share of a heir who did not join in the suit), on the ground that the mortgage-debt had been satisfied from the usufruct. The defendants, admitting the proprietary title of the ancestor of the plaintiffs to the villages, alleged, as to 10 biswas of each village, that Tej Singh had sold them to their ancestors, in 1842, for Rs. 1,250, and as to the other 10 biswas of each village, that they were subsequently mortgaged to their ancestors by him for Rs. 14,000, borrowed by him from them for defending a suit arising out of the previous sale and for other purposes, which sum had not been satisfied from the usufruct. The first Court gave a decree for plaintiffs. The defendants preferred a special appeal to the High Court. They raised the plea of limitation and also contended that the onus was wrongly thrown on them by the first Court.

JUDGMENT ON SPECIAL APPEAL.

[196] STUART, C.J. AND OLDFIELD, J:—On the first ground of appeal we are of opinion that there is not such a clear adverse possession by the defendants, appellants, for 12 years, as will bar this claim.

Though the defendants assert their purchase to have been made in 1842, yet there is no very clear evidence of their possession under it till Tej Singh's death, for up to that time he continued to be recorded in the revenue records as proprietor, and there is no evidence of any acts of proprietorship on the part of defendants betokening possession. They have produced some dakhilas, or receipts for revenue, in their names for 1841, but these are prior to the alleged sale, and made by them as lessees, and there is no other material evidence, except some entries in certain papers, one copy of a khewat of 1268 Fasli or 1856 (No. 103 exhibit), where it is entered that Kirat Singh is in possession as purchaser, and similar entries in certain nikasis: these may be of use to support the sale, but not sufficient to support the averment of a possession under the sale adverse to the plaintiffs. We then come to the time of Tej Singh's death, 5th September, 1860, and find that, on the 21st October, the defendants, through their agent, Parshadi Lal, applied for mutation of names in their favour, and set up their title under sale and mortgage as now claimed, but the plaintiffs' ancestors at once disputed their title. The Deputy Collector found the plaintiffs were entitled to have their names recorded, but the Collector reversed this order, (1) and entered the names of the defendants' ancestors in the column of manager, or lambardar, and this order was affirmed on appeal to the Commissioner. Since the last order was passed the plaintiffs appear to have taken no steps against the defendants till the suit was brought, and from that time the possession held by defendants may properly be considered adverse to the plaintiffs, but not so from the time during which their title was in dispute in litigation, and 12 years have not run so as to bar this claim.

It has also been contended that three years' limitation will apply to this suit, but this is not so, as there was no such award by the revenue authorities in 1860 as is contemplated in the Limitation Act. We now take the last plea in appeal, as to the burden of proof. It is of the utmost importance in this case, as the **[197]** evidence on both sides is so unsatisfactory, and the cases of both parties so full of inconsistencies, that the case will be determined mainly by the determination of this point.

There is no dispute that Tej Singh, through whom plaintiffs claim, was originally owner, and, *prima facie*, the burden of proof to show the present proprietary or mortgage possession of defendants will be on them; but this burden can be shifted if the defendants show that they have ostensibly for a length of time been in possession under the titles they now set up, and we think that is the case here, and that the Subordinate Judge has wrongly put the onus on them.

It is shown that on Tej Singh's death in 1860 they set up the very same titles to the estates that they do now, and that they were held by the higher revenue authorities to be in possession under such titles (see the Collector's order) and their possession has ever since continued, that is, for very nearly 12 years. Under such circumstances, the plaintiffs can now only succeed by proving their averments that the defendants hold under a mortgage of the entire estates for Rs. 2,500 executed in 1842. (The learned Judges, holding that the plaintiffs failed to prove these averments, dismissed the suit.)

Application for a review of judgment on the ground that, as to the 10-biswa share in each village of which the defendants admitted they were mortgagees, no proof of their title was necessary, and, as to the remain-

(1) On 19th April 1861.

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ing shares, that the burden of proving the sale alleged by the defendants lay on them, was admitted by Stuart, C. J. [Oldfield, J. dissenting.]

JUDGMENT ON REVIEW.

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[197] STUART, C. J.—I have repeatedly and anxiously considered this case since the argument in review of our first judgment was addressed to us, and I have also had the advantage of perusing the opinion of my colleague, Mr. Justice Oldfield, but I cannot concur in his conclusion. The plaintiffs' ancestral and hereditary right is undoubted, it is admitted, while the defendants' story is, to my mind, very doubtful, if not suspicious, and on this broad view of the case I hold the burden of proof is on the defendants. The [198] facts are not the same as those in the Privy Council case referred to (1). Their clear actual possession for forty-four years was satisfactorily shown on the part of the defendants, and on the simple intelligible statement that they had held such possession as purchasers under a deed of sale to one of their ancestors; the plaintiffs, on the other hand, alleging that the defendants' possession had been that of usufructuary mortgagees. But whatever the origin of the possession, the fact of it for forty-four years was undoubted, and the burden of proof was therefore justly put on the party who alleged an hereditary title against the defendants.

Here the circumstances are not quite the same. The defendants show, indeed, or rather suggest, their ostensible possession since 1842, but I think we must take it as a fact that their possession from that year till 1860, when Tej Singh died, was the possession of mortgagees, and therefore was not adverse to the plaintiffs. But it was not till the 19th April, 1861, that their possession was recorded, so that the defendants can barely show 12 years of absolute or clearly adverse possession; in fact, the 12 years had not expired when the present suit was instituted. Then the defendants' plea of possession, such as it is, is accompanied by statements of a very doubtful, and even, as I have said, of a suspicious nature; and their suggestion respecting the sale to their ancestors of a 10-biswa share for Rs. 1,250 is scarcely credible, and is certainly inconsistent with their other statement that the other 10-biswa share had been mortgaged to them for Rs. 14,000. Generally, I agree with the Subordinate Judge in his view of the facts so far as we know them, and I consider the plaintiffs' statement the more reasonable of the two, and their hereditary title is undisputed. On the other hand, the defendants' account of the origin of their possession is so doubtful and even improbable, as respects both its character and duration, that it ought not, in my opinion, to be allowed to shift the burden of proof from their shoulders to those of the plaintiffs.

Therefore, holding that the burden of proof is on the defendants, I would affirm the judgment of the Subordinate Judge, in which I substantially concur, and dismiss the appeal with costs.

[199] OLDFIELD, J.—The plea of limitation in bar by adverse possession urged by the defendants has no weight, for the plaintiff's suit is to redeem a mortgage, and they can sue any time within 60 years. Long ostensible possession on the part of the defendants as owners would throw the burden of proving the mortgage on the plaintiffs; but it would not be adverse so as to bar the institution of the suit for redemption; and the plea of three years' limitation also fails, as there has been no award by the revenue authorities in 1860, such as is contemplated in the Limitation Act. But in my opinion the lower Court has wrongly placed the burden

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of proof on the defendants. The plaintiffs' ancestors are admittedly the original owners of the estate, but it is very clear that the defendants' ancestors have held possession at least since 1842 up to the present time; the plaintiffs admit so much, ascribing it to the mortgage. This possession the defendants ascribe to sale of half the estate and mortgage of the remainder, but however this may be, possession on their part from 1842 is clear, and since 1860, if not before, this possession by them has been openly held under the titles they now set up. Tej Singh died on 5th September, 1860, and defendants, through their agent, Parshadi Lal, applied for mutation of names in their favour, averring they had purchased half the estates, and become mortgagees of half in the same way as they contend in this suit; the plaintiffs' ancestor disputed their titles, but the Collector, on 19th April, 1861, recorded the defendants' names as being the parties in possession, and since then the plaintiffs have not taken any steps against defendants till this suit was instituted.

It appears to me that, in the face of this lengthened possession of the estates by defendants, the plaintiffs can only succeed by proving the mortgage which they sue to redeem, and the ruling of the Privy Council in *Valoji Kristnan Gopalar* v. *Nayana Chetti* (1). I think supports this view.

The defendants appealed to the Full Court against the judgment of Stuart, C. J., under cl. 10 of the Letters Patent, on the ground that the burden of proof should have been thrown on the plaintiffs; and that the plaintiffs failed to prove the mortgage under which they claimed.

JUDGMENT OF THE FULL COURT.

[200] PEARSON, J.— As regards the 10-biswa share which is said to have been sold by Tej Singh to Kirat Singh more than 30 years ago, and which is undeniably in the possession of the defendants, it appears to me that S. 110 of the Law of Evidence, (Act I of 1872) entirely supports the first ground of the appeal before us. It is therefore scarcely necessary to refer to the doctrine laid down by the Privy Council in the case to be found at p. 151, Vol. 10, Moore's Ind. App. (1). The law declares that "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." The plaintiffs are then clearly bound by the law to prove that the defendants are not the owners of the 10-biswa **[201]** share in their possession, and we have to consider whether they have discharged the burden thus imposed upon them. I hold that they have done so, being of opinion that the evidence adduced by the defendants in proof of the sale alleged by them is more weighty and trustworthy than that which the plaintiffs have brought forward to substantiate their assertion of a mortgage having been made of the three entire mahals in 1842 for Rs. 2,500. I am further of opinion that, although the suit as brought in respect of this portion of the claimed property is not barred by the law of limitation, the plaintiffs are nevertheless precluded from recovering possession of it by the fact that the defendants have held adverse possession of it for more than 12 years. For it appears in evidence that, on the 21st October, 1860, the defendants publicly asserted their title by purchase to a moiety of each of the mahals by applying to the Revenue Department for the recognition and registration of their title and possession, and in my judgment their possession must not be reckoned as adverse only

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from the 19th April, 1861, the date of the order passed on their application by the Collector in appeal, but at least from the date on which their title as purchasers was openly set up in the face of Tej Singh's heirs. From this point of view their possession had certainly become adverse to the latter more than 12 years before the date of the institution of the present suit.

It remains to deal with the remaining portion of the claim, in respect of the 5-biswa share of each of the three mahals admitted by the defendants to be held in mortgage by them in lieu of Rs. 14,000 and to be redeemable on payment of that amount. The allegation on which the suit was brought, that the entire mahals were mortgaged for Rs. 2,500, an allegation quite inconsistent with that made by the plaintiffs, or those whom they represent, in 1860, has broken down; and it appears to me that we should not be warranted by the evidence on the record in ruling that the 5-biswa share now in question was redeemable whenever Rs. 625—a fourth part of Rs. 2,500—had been recovered with interest from the usufruct, and has been accordingly redeemed. The plaintiffs must establish their right to re-entry, but they have failed to prove that they are entitled to re-entry, on any other terms than those stated by the defendants. I would therefore restore and **[202]** affirm the decision of the Bench, dated the 16th June, 1874, and decree this appeal with costs.

TURNER, J.—That the appellant and her predecessors in title have held possession of the property in suit for upwards of 12 years is virtually admitted by the respondents and is abundantly proved. It is shown that in 1860 they opposed the entry of the names of Tej Singh's heirs in the revenue registers, on the ground that they were in possession, and in April, 1861, the Collector allowed their objection and ordered their names to be entered. Although they did not ascribe the same date to the origin of their title, they virtually asserted the same title as that on which she now relies. She now claims one moiety of the property under a sale effected by Tej Singh in favour of Kirat Singh in 1842, and she alleges that legal proceedings having been instituted to contest the right of Tej Singh to sell the property, debts were incurred by Tej Singh to Kirat Singh, and that the other moiety of the estate was in consideration of these debts "made over in possession" to Kirat Singh. The phrase used respecting this last transaction is somewhat ambiguous both in the written statement filed by the appellant and in other proceedings, but the case was argued on the hypothesis that the alienation of the second moiety of the property was of the nature of a mortgage and not an absolute sale. In their petition filed in the Revenue Office on the 26th December, 1860, the heirs of Kirat Singh alleged they were in possession by virtue of sale and mortgage effected by Tej Singh in their favour. In their appeal to the Collector they alleged that in 1839 the estate was mortgaged and sold by Tej Singh to Kirat Singh and Moti Singh, their ancestors. This appears from the Collector's decision, dated the 20th February, 1861. Moreover, the witnesses they have produced in this suit were called to speak to a sale of one moiety of the property and to a mortgage of the other moiety. I see no sufficient ground for the suggestion, that, although the property was nominally mortgaged, it was not intended it should be redeemed.

The appellant asserts that whatever documents of title she possessed were lost when Kirat Singh's house was plundered in the mutiny, and the kanungo who appears to be impartial con-**[203]**firms her statement that the residence was destroyed in the manner stated by her. Now, inasmuch as possession of Kirat Singh and his heirs for so long a period has been

proved, the presumption that they were in possession as proprietors must be rebutted. In respect of one moiety it is rebutted by the admission and proof that their possession was that of mortgagees. But in respect of the other moiety which they claimed to hold as purchasers the respondents must adduce evidence to rebut the presumption arising out of possession or must fail. The circumstance that one moiety of the property is admittedly held under mortgage might lend corroboration to evidence, if there was any, that Kirat Singh's heirs held the entire property as mortgagees, but by itself it will not relieve the respondents from the burden of rebutting the presumption arising from the possession of Kirat Singh's heirs. No reliable evidence has been produced by them. The witnesses called by either party to speak to the contents of deeds executed so many years ago would in this respect be untrustworthy, even if it were proved that they were at the time made acquainted with the contents of the deeds which from the position in life of some of them is hardly probable. They may, or rather some of them may, have been present when the deeds were executed, and if they were present they may be able to recall the fact of the execution of the deeds, but it would be unsafe to accept their testimony beyond this point.

Putting aside the parol evidence, there remains the circumstance that Tej Singh's name was retained in the revenue registers as proprietor up to the time of his death. The appellant seeks to explain this by asserting that Tej Singh's title to the estate was disputed by one Daulat Singh, in the name of whose ancestor Tej Singh had purchased in *ismfurzi*, and that, in consequence of proceedings taken by Daulat Singh, the entry of Kirat Singh's name in respect of the 10-biswas purchased by him was postponed. That Tej Singh's title was in fact disputed by Daulat Singh is shown by the petition of Jiwan Singh, Himmat Singh and Mussammat Radha, when as the heirs of Tej Singh they applied in 1860 to have their names recorded in the registers. But to whatever cause the retention of Tej Singh's name may have been due, this circumstance would not by itself warrant the conclusion that the [204] possession of Kirat Singh's heirs was merely that of mortgagees. The claim then for one moiety of the property must be dismissed. The question arises whether the respondents, although they have failed to prove that the whole estate was mortgaged, should be allowed any relief in this suit? The circumstances are peculiar; the appellant admits that she holds one moiety of the property claimed by way of mortgage; ordinarily a deed would have been executed creating such an interest. Now she does not produce any mortgage-deed. She avers that large sums were expended in defending the sale of one moiety of the property and that other sums were advanced to the original proprietor, and that in consideration of these expenses and advances, which altogether are said to amount to a sum wholly disproportionate to the sum alleged to have been paid for one moiety of the property, the other moiety of the property was made over to Kirat Singh. That it was transferred to Kirat Singh by absolute sale is not asserted, and, as has been pointed out, in 1860 it was admitted that the title to a portion of the property was in virtue of mortgage, and, on the hypothesis that the mortgage was admitted, the case was argued at the bar.

The appellants do not state at what date this assignment was made. The sale of the one moiety is ascribed to the year 1842, the date assigned by the respondents to the mortgage of the entire village. If the assignment of the other moiety was made for the consideration alleged by the appellant, it must have taken place some years after the sale. In 1860 the dates ascribed to the sale and mortgage were the year 1839. There

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is some slight evidence in the revenue proceedings to show that Kirat Singh held a mortgage of the estate before 1842, and it is apparent from the circumstance that in 1860 the appellant alleged her title originated in 1839, that she is uncertain of the date on which the assignment of the second moiety was made. It is possible that a mortgage subsisted prior to 1842; that in 1842 that mortgage was paid off, and one moiety of the property sold to Kirat Singh: and it is not improbable that subsequently the second moiety was mortgaged; and assuming that the title to the second moiety is admittedly founded on a mortgage, I can see no good reason to debar the respondents from having an account taken in this suit of what may be due on the mortgage of the moiety of the estate and [205] of obtaining such relief as they may be found entitled to on the taking of the account. It is impossible to ascribe any date to this mortgage save that it occurred after the sale in 1842 and before 1860. If the respondents are not allowed to obtain relief in this suit, they may hereafter be met with the plea that they ought to have obtained relief in this suit. There are cases in which this Court has allowed mortgagors to recover a portion of the property claimed by them; there are cases in which a mortgagor has asserted the debt to be less than the mortgagee has proved it to be; and nevertheless the mortgagor has been allowed to proceed with his suit, and accounts have been taken and such relief granted as on taking the accounts he was shown to be entitled to. A claim for the whole surely includes a claim for a part, and if the plaintiff fails to prove his whole claim, he may nevertheless obtain such relief as falls fairly within the purview of his claim. Seeing that the parties to this suit are not the persons who were parties to the original transactions, and that whatever documentary evidence existed of those transactions is not now forthcoming, it appears inequitable to require the same correspondence of proofs and allegations which might have been required from persons who were themselves parties to the original transactions. If the respondents are entitled, as in my judgment they should be held to be, to obtain partial relief in this suit, I am of opinion that, in respect of the moiety of the property which is admittedly under mortgage, the burden of proof lay on the appellant. The respondents alleged the mortgage-debt was Rs. 2,500, and that it had been discharged from the usufruct. The appellant alleged the debt was Rs. 14,000, and that a large balance was still owing. She may yet have in her possession accounts to prove the sums advanced, and she must have accounts of the profits of the estate. In my judgment the suit should not be wholly dismissed, but issues should be remitted to ascertain the amount of the mortgage-debt on the moiety held in mortgage, and to ascertain the amount of profits received by the mortgagee.

STUART, C.J.—I think there is considerable force in the latter part of Mr. Justice Turner's judgment, and *pro tanto* I concur in the account and remand he suggests. But I consider that such account and remand might justly be extended to the whole property in suit; and generally, after giving the case the most careful consi-[206]deration, and hearing all that has been urged before the Full Bench, I am not satisfied that my first judgment was wrong. The question before us is simply on which of the parties the burden of proof is laid, and I remain of the opinion that it is on the defendants. Anything like adverse possession by them cannot, I think, be considered to have commenced till the 19th April, 1861, and 12 years had not elapsed from that date when the present suit was instituted. The presumptions therefore are all in favour of the plaintiffs, and the defendants must make out their case. I would affirm the judgment of the Division Bench.

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SPANKIE, J.—I am of opinion that the burden of proof in this case was on the plaintiffs. It is true that the ancestor of plaintiffs is admitted to have been the original owner of the property. But the defendants and their ancestors have held possession, as shown by Mr. Justice Oldfield, since 1842 up to the present time. This plaintiffs allow, but say that they hold as mortgagees. On the other hand, the defendants have held possession since 1860, and have set up a proprietary title to half the estate since 1860, and contend that they are mortgagees of the other half. Their title was disputed in 1861. But the Collector recorded their names as being in possession. Plaintiffs took no steps to establish their own title until this suit was instituted, in which they claim to have their right declared and full proprietary possession of 15-biswas by redemption of mortgage, asserting that the mortgage had been liquidated from the income of the property. They were bound to establish the mortgage, but they could not produce the deed said to have been executed so far back as 1842, and the parol evidence in support of it is suspicious and unreliable. On the other hand, though the defendants cannot produce a sale-deed, the fact of the sale is supported by the kanungo and by entries in the village papers and statement of proprietary charges for 1263 Fasli. The patwari, too, supports their statement. The witnesses generally are not better than those of plaintiffs. But it is for the former to establish their case, and a weak defence cannot set up a weak claim. I think that the circumstance that on Tej Singh's death, when application was made for mutation of names in favour of the predecessor of plaintiffs, any mortgage was denied, tells against the case of the plaintiffs; and if their statements now are correct the mortgage in 1842 **[207]** was but for a small term, and mutation of names was not considered necessary, as it was thought that the mortgage would be redeemed from the income in two or three years. Even no attempt has been made to get back the property until this suit was entered.

I think that the appeal must be admitted, and that the suit as brought was, in the first instance, properly dismissed on appeal. Whether, on the admission of defendants that they held as mortgagees of a portion of the property under a mortgage on which a large sum is still due to them, the plaintiff's can claim to redeem that portion after getting an account is another question. I do not think that they are entitled to ask for it in this suit, in which their claim as brought had not been established.

OLDFIELD, J.—I adhere to the view of this case which I have expressed at length in the previous judgments, and I would restore the judgment and decree of this Court, dated the 16th June, 1874, and dismiss the suit with costs in all Courts.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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SKINNER (*Plaintiff*) *v.* ORDE AND OTHERS (*Defendants*).

[29th May 1876.]

Act VIII of 1859, S. 308—Pauper suit—Institution of suit—Presentation of plaint—Limitation.

An application under S. 299 of the C.P.C., to sue *in forma pauperis*, can be deemed the plaint in the suit, when it is granted, and relates back to the date

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on which it was presented. But when it is virtually withdrawn and court-fee stamps required for the plaint are put in, the suit must be held to have been instituted on the date when the plaint-stamps were put in. And if this date be beyond the period of limitation prescribed, the suit will be barred.

JUDGMENT.

[231] The cause of action in this suit accrued to the plaintiff in August, 1861, when his father died; and the period during which the suit might legally be brought is 12 years. If the suit can be held to have been instituted on the 21st February, 1873, the date on which the application for permission to sue *in forma pauperis* was first presented to the Subordinate Judge of Meerut, it is clearly within time; and there can be no doubt that, had the application of the 21st February, 1873, been granted, the suit would rightly be deemed to have been instituted on that date. But that application never was granted, and was indeed virtually withdrawn on the 27th November, 1874, by the plaintiff's offer to pay the amount of the fee chargeable on the plaint under the Court Fees Act before the inquiry into his pauperism had been concluded; and his application was not numbered and registered and assumed to be the plaint in the suit under the provisions of S. 308, Act VIII of 1859, in consequence of proof of his pauperism, but in consequence of the payment by him of the proper fees. But there is no provision in the law which allows the application presented under S. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court Fees Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees; and we are therefore unable to rule that the lower Court has erred in declaring the present suit to have been instituted after the lapse of the period allowed by the law. We have no alternative but to dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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RAM AUTAR AND OTHERS (*Judgment-debtors*) *v.* AJUDHIA SINGH AND OTHERS (*Decree-holders*). [29th May 1876.]

1 A. 231.

Execution of decree—Limitation—Act IX of 1871, Sch. II, Art. 167.

An application for the partial execution of a joint decree is not an application according to law, and has not the effect of keeping the decree alive.

[Ap., 4 A. 72; F., 5 A. 27 = A.W.N. (1882), 140; R., 15 B. 242.]

In a suit by judgment-debtors in this case, against 126 defendants, for recovery of the value of certain property, the Court of first instance, on 30-5-1862, gave them a decree against 13 of the defendants, for a portion of the sum claimed, dismissing the suit against the rest. In an appeal to the Sudder Court by 8 of these 13 defendants as also by the plaintiffs (the said plaintiffs appealing against so much of the first Court's decision as was in favour of the defendants), that Court, dismissing the plaintiffs' appeal, reversed the decree against the defendants including those who had not appealed from the decree, and, by its decree of 31-3-1864,

awarded costs in the lower Court to certain defendants (among whom was Ajudhia Singh) separately, and to eight sets of defendants collectively, and costs in the Sudder Court to three sets. On 23-3-1867, execution of the decree was stayed pending the disposal of an appeal by the plaintiffs to the Privy Council. The decision of the Privy Council dated 11-2-1870 reversed the Sudder Court's decree so far as it reversed the first Court's decree and restored and affirmed that of the first Court. Ajudhia Singh, seeking to recover his costs in the Court of first instance and a fractional share of the costs in the Sudder Court awarded to his set of defendants, put in an application to the first Court on 7-9-1871 for enforcing the Sudder Court's decree by the arrest of the judgment-debtors. The Court directed notice to issue to the judgment-debtors on the 8th September and arrest was ordered on the 28th September. On the 7th November it directed that the application should be struck off owing to Ajudhia Singh's failure to deposit talabana. Similar application by him on 13-8-1874, shared the same fate. Ajudhia Singh and other decree-holders applied for execution of the decree on 20-5-1875. The judgment-debtors pleaded limitation.

JUDGMENT.

[234] STUART, C. J.—The application of the 7th September, 1871, prayed only for the partial execution of the decree and had not therefore the effect of keeping the decree alive for the other defendants. The same may be said of the application of the 13th August, 1874. The application of 1871 itself is before me, and it is difficult to understand how any contention to the contrary could have been expected to succeed. It recites previous applications by Ajudhia Singh in conjunction with other defendants, and also the judgment of the Privy Council, and it then proceeds :—" As the other persons do not join me in executing the decree, and in the decree the first Court's costs are separately entered in my name, while the costs of the Sudder Court, amounting to Rs. 969-12-0, are entered in my name and in those of the other persons collectively, who do not join in executing the decree, I apply for execution in respect of a 1-11th share, leaving out 10-11ths, the share of the said persons, and pray that it may be realized from the judgment-debtors." The application of 1874 appears to have been in similar form ; and terms more carefully and precisely restricted to the applicant's own share could scarcely have been used, and how, in the face of them, the Subordinate Judge could have issued his orders of the 8th and 28th September, 1871, is, to say the least of it, not very intelligible.

This decree is a joint decree, and no application for its partial execution could keep it alive for the defendants as a body; and Ajudhia Singh's applications of 1871 and 1874, having been confined to his own individual interest in it, in the very clear and unmistakeable terms to which I have adverted, could not be availed of so as to bring the present application within the three years. The order therefore recognizing and proceeding upon it cannot stand. The appeal must be allowed, and with costs.

PEARSON, J.—It appears that the execution of the decree was stayed in pursuance of this Court's order, dated 23rd March 1867, **[235]** in consequence of an appeal lying having been lodged in the Privy Council against the decree of the late Sudder Court, dated 31st March, 1864. The appeal was disposed of by the Privy Council's decree, dated 11th February, 1870.

If it be assumed that the application made by Ajudhia Singh alone on the 7th September, 1871, for the execution of a small part of the

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decree was within time, under Art. 167, Sch. ii, Act IX of 1871, as having been presented within three years from the date of the Privy Council's decree, it must, nevertheless, be held that, inasmuch as it prayed for the partial execution of a joint decree, it was not an application according to law and had not the effect of keeping the decree in force. The same remark applies to Ajudhia Singh's last application of 13th August, 1874.

The present application by Ajudhia Singh and others of the 20th May, 1875, is therefore beyond time. I would accordingly decree the appeal with costs, and reversing the lower Court's order disallow the application.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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PRIVY COUNCIL.

On Appeal from Oudh, Consolidated Appeals, and from the North-Western Provinces of Bengal.

HURPURSHAD AND OTHERS, *Appellants v.* SHEO DYAL AND OTHERS, *Respondents*;

26 W.R. 55 = 3 Suth. P.C. 304 = 3 I.A. 259 = 3 Saraswati's P.C.J. 611.

RAM SAHOY, *Appellant v.* SHEO DYAL AND OTHERS, *Respondents*;

BALMOKUND, *Appellant v.* SHEO DYAL AND OTHERS, *Respondents*;

RAM SAHOY, *Appellant v.* BALMOKOOND AND OTHERS, *Respondents.*

[30th May 1876.]

3 Suth. P.C. 304 = 26 W.R. 55 = 3 I.A. 259 = 3 Saraswati's P.C.J. 611.

1. *Practice—Private knowledge of Judge.*

A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts, as the means of knowledge will not then be capable of being tested.

2. *Conflicting evidence of witnesses—Conduct of parties.*

In case of conflicting evidence of witnesses who do not commend themselves by the manner in which they give their evidence, it is a safe rule to look to the conduct of the parties.

3. *New case—Calling fresh evidence, on an issue not proved by evidence originally adduced.*

It is always dangerous to allow parties to make a new case, and to call fresh evidence on an issue on which they have failed on the evidence originally adduced in support of it, and more especially is it so in the *Mofussil* Courts in India.

4. *Fresh evidence, rule* re.

The rule that a Court intending to call for fresh evidence should record its reasons for so doing, ought to be strictly adhered to.

5. *Fresh evidence—Adjournment.*

A Court should not adjourn a case for taking fresh evidence, and for allowing witnesses examined, to be re-called to amend their former evidence.

6. *Custom—Construction.*

A custom is a rule which, in a particular family or in a particular district, has, from long usage, obtained the force of law. It must be ancient, certain, reasonable, and being in derogation of the general rules of law, must be construed strictly.

7. *Hindu law—Special mode of transfer.*

No special mode of transfer is required by the Hindu law, even a verbal transfer is sufficient.

8. *Act I of 1869, Ss. 16—19.*

Ss. 16—19 of Act I of 1869 have no retrospective effect. They cannot be held to apply to a transfer made by a deed, will, or otherwise, before the passing of the Act.

9. *Ibid—Hindu Mitakshara law—Joint family—Oudh Proclamation, 1858—Confiscation.*

On the confiscation under Lord Canning's Proclamation of 1858, of property belonging to a joint Hindu family situate in Oudh, and on the subsequent re-grant of the same to one of the members of that family, *held* that it could scarcely be supposed that it was intended to injure any member of the loyal family, and by confiscation and re-grant to transfer the beneficial interest in the joint estate of the whole family from several members of it to a single member of the family for his own benefit.

10. *Ibid—Grant to one member of family—Effect.*

The grant of a *sanad* to, and a summary settlement in respect of family property not coming under Lord Canning's Proclamation with, only one member of the family does not affect the rights of the members of the joint Hindu family in the said property.

Property granted by the Government to one member of a joint Hindu family, as a reward for loyalty and for the support and assistance rendered to British officers, during the Mutiny of 1857, could not be the self-acquired property of that member only within the meaning of the Hindu Law, as such assistance and support could not have been rendered without issue of funds which must be presumed to be those of the joint-family.

11. *Ibid.*

Act I of 1869 conferred title in landed property and in consequence of the Act, the grantee must be deemed to have acquired a permanent heritable and transferable right in the estates which comprised the villages named in the lists attached to the agreements executed by him when the settlement was made, whether such villages were or were not previously part of family property. He had also power by will or by alienation in his life-time to transfer the estates which, by virtue of the Act, were not merely heritable but transferable.

12. *Ibid—S. 2—Hindu Wills.*

By S. 2 of Act I of 1869, it is declared that the word "will" means the legal declaration of the intention of the testator with respect to his property affected by this Act which he desires to be carried into effect after his death." On the construction of certain documents which were in the form of letters written in answer to enquiries made by the Government, *held* that those documents when read together constituted a will within the meaning of S. 2 of Act I of 1869. *Held* also that the declaration in those documents of the wish of the proprietor, acted upon as it was by him and by other members of the family in his life-time, was evidence sufficient to prove an alienation *inter vivos*, which in his life-time, transferred the property to the family to be held as joint family property.

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JUDGMENT.

[55] SIR BARNES PEACOCK. The first three of the above-mentioned appeals are from a decree of the Judicial Commissioner of Oudh, in a suit commenced in the Court of the Deputy Commissioner of Lucknow, in which the respondent, Sheo Dyal, was the plaintiff; and the fourth is from a decision of the High Court of Judicature for the North-Western Provinces, in a suit commenced in the Court of the Subordinate Judge of Cawnpore, in which the appellant, Ram Sahoy, was plaintiff.

[56] The former suit will hereafter be referred to as the Oudh suit, and the Record in the first three appeals as Record No. 1. The other suit will be referred to as the Cawnpore suit, and the Record in the appeal in that suit as Record No. 2.

The parties, both plaintiffs and defendants, were members of an undivided Hindoo family, of which Koonhoo Lall was the common ancestor. He left three sons, Chundun Lall, Moonnoo Lall, and Gunga Pershad.

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About the year 1832, Moonnoo separated from his two brothers, Chundun and Gunga Pershad, who continued undivided, lived in commensality, carried on business as bankers, and thereby acquired and amassed considerable property.

Chundun had five sons: 1. Chotay, who died in the lifetime of his father; 2. Gouree Shunkur; 3. Beharee Lall; 4. Kunhya Lall, the father of Sheo Dyal, the plaintiff in the Oudh suit; and 5. Jankee Pershad. Chundun died in 1854; Gunga Pershad died in Chundun's lifetime, having had three sons, Sheo Pershad, and Ram Sahoy, who survived him, and Ram Pershad, who died without issue in his father's lifetime. Sheo Pershad died without issue in 1863, leaving his brother Ram Sahoy, the plaintiff in the Cawnpore suit, his heir, him surviving.

Chotay Lall, the eldest son of Chundun, had three sons: 1. Balgobind, who died some years ago; 2. Balmokund; and 3. Banee Pershad, of whom the last two were defendants in both suits.

Gouree Shunkur, the second son of Chundun, also had three sons; Hurpurshad, Ramchurn, and Bisheshur Pershad, defendants in both suits, and appellants in the first appeal.

There were other descendants of Chundun through his sons Chotay Lall, Beharee Lall, and Jankee Pershad respectively, to whom it is not necessary to refer more particularly. They are shown so far as is necessary in the genealogical table set out in the case of the appellants in the first appeal (p. 4).

It appears from the above statement that the family consisted of two branches; the descendants of Chundun, and the descendants of Gunga Pershad.

Sheo Dyal, the plaintiff in the Oudh suit, which was commenced on the 14th December 1869, claimed as the representative of Kunhya Lall, one of the five sons of Chundun, one-fifth of the whole property in suit by excluding altogether Ram Sahoy, the sole descendant of Gunga Pershad (Record No 1, p. 2); whilst Ram Sahoy, who intervened in the Oudh suit, and was the plaintiff in the Cawnpore suit, which was commenced on the 21st December 1869, claimed, as the sole descendant of Gunga Pershad, one-half of all the property.

It was contended that Ram Sahoy had separated before the commencement of the suit, and had received twenty-seven villages and other property as his share. It was, however, considered by the lower Courts that that fact had not been proved. Their Lordships are of opinion that there is no sufficient evidence of the fact, and that the decision was correct. That point may be treated as having been disposed of. It was also considered by the lower Courts, and admitted by the learned Counsel for the appellants in the first appeal, that although Chundun was the active member of the family, and the property was acquired principally through his ability, energy, and exertions, no part of it could be considered as his "self-acquired property," that is to say, as having been acquired within the meaning of the Mitacshara, through his own exertions alone and without the use of any part of the family funds.

Their Lordships are of opinion that the above view is correct, and their judgment will proceed upon the basis that the family was an undivided Hindoo family, and that **[57]** no portion of the property was the self-acquired property of Chundun or of any other members of the family within the meaning of the Mitacshara.

The most important questions raised in the Oudh suit are what was the effect of Lord Canning's well-known Proclamation of March 1858, of the sunnud to Gouree Shunkur, of the summary settlements, of Act I

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of 1869, and of the documents called Gouree Shunkur's will, upon that portion of the property which was included in the above-mentioned sunnuds and summary settlements.

It was contended on behalf of the sons of Rajah Gouree Shunkur, the appellants in the first appeal, that all the estates included in the sunnud and summary settlements, whether previously joint property of the family or not, became the separate self-acquired property of Rajah Gouree Shunkur, that he was the sole malgoozar thereof, and that he and his sons were the sole beneficial owners of it; that he had no power to transfer it by will or by alienation *inter vivos*; and as to the twenty-seven villages, it was stated that although in April 1858, the summary settlement with regard to them was made with Kunhya Lall (p. 211), there was afterwards a mutation of them into the name of Rajah Gouree Shunkur (395, l. 45).

It was also stated on their behalf that many, but without specifying which, of the villages included in the sunnud and summary settlements were never part of the joint family property.

By the 8th paragraph of the proclamation it was declared amongst other things that Chundun Lall, zemindar of Mourawan, and five other persons therein mentioned, were thenceforward the sole hereditary proprietors of the lands which they held when Oudh came under British rule; and it was further declared by the 9th paragraph that, with those exceptions, the proprietary right in the soil of the province was confiscated to the British Government (Record No 1, p. 12.)

It was held by the Judicial Commissioner, in his judgment before remand that the words Chundun Lall in that paragraph (probably the words used were Chondi Lall, as stated by the Judicial Commissioner, Record 1, p. 140)—were used as the generic name of the undivided Hindoo family (*id.*, p. 142, l. 15), and that the title of the constituent members of that family, as it existed in 1858, to whatever landed estates were held by them or their agents, directly or indirectly, on the 13th February 1856 (the date of the annexation of Oudh), was maintained to them, and was not conferred upon Rajah Gouree Shunkur, notwithstanding any wording of the sunnud, or the fact of his executing a kubooleut for the estates between the 1st April 1858, and the 10th October 1859, but that the remaining portions of the estate rested on a different basis (*id.*, p. 142, l. 34; p. 381, l. 11). As to those portions he was of opinion that they "must be held to have been *primâ facie* the sole property of Rajah Gouree Shunkur, and that as a consequence of this (confirmed by S. 4, Act I of 1869), he had power to alienate it by act *inter vivos* or to bequeath the whole or any part of it" (p. 142, lines 42 and 48; p. 381, l. 28).

The former portion, he held, would follow the custom of the family, whilst the other portions would be regulated by the bequest of Rajah Gouree Shunkur, if he had made one, or, failing that, by Act I of 1869. "The succession," he adds, "to the personal property is independent of all special considerations, and must be regulated by Hindoo law and by family custom" (Record, No. 1, p. 143, l. 9). Again he says, "So far as concerns the ancestral estate of personal moveable property the will has no effect, for, over that, Rajah Gouree Shunkur had no testamentary power" (*id.*, 144, l. 19).

[58] The same views are expressed in the judgment under appeal (*id.*, 380, 381).

Their Lordships concur with the Judicial Commissioner that the 8th paragraph of the proclamation applied to that portion of the estates of Mourawan which belonged to the family at the time when Oudh came under British rule, notwithstanding Chundun's name was inserted in that

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paragraph. Chundun died in 1854, long before the Mutiny. He personally could not have been referred to in the 7th paragraph of the proclamation as one of those whom the Governor-General declared it to be his intention to reward for their steadfast allegiance at a time when the authority of Government was partially overborne, and who had proved it by the support and assistance which they had given to British officers. But Gouree Shunkur was one of those who had given support and assistance to Government, and not only Gouree Shunkur, but also Sheo Pershad and other members of the joint family. The gomashtas of the several banking firms of the family were also loyal, and rendered good service to Government (Record 1, p. 279, l. 10).

It can scarcely be supposed that the Governor-General intended to injure any member of this loyal family, and by confiscation and regrant to transfer the beneficial interest in the joint estates of the whole family from the several members of it to a single member of the family for his own sole benefit.

As regards, therefore, the estates which were exempted from confiscation, the sunnud and summary settlements were a mere grant by Government to one member of the family of property which belonged to the family jointly. They could not of themselves affect the rights of the family.

As regards that part of the property granted to Gouree Shunkur which, if any, was not previously part of the family estates, it cannot be held to have been the separate, self-acquired property of Gouree Shunkur within the meaning of Hindoo law. It was granted as a reward for loyalty and for the support and assistance rendered to British officers; such services as those referred to in Gouree Shunkur's petition (Record No. 1, 279) could not have been rendered without the use of funds which must be presumed to have been those of the joint family.

This point, however, is not very material, for even if some part of the property was self-acquired by Rajah Gouree Shunkur, he, according to their Lordships' views, hereafter stated, transferred it to the family.

With regard to Act I of 1869 the Judicial Commissioner held that it did not confiscate or confer title in landed estate (Record 1, p. 379, 1. 36). He says: "The preamble expressly recites that the title in taluquas has already been conferred: the Act declares what in the sight of Government are 'taluquas,' regulates the order of succession to such; and defines, and perhaps creates, certain special interests." Their Lordships, however, cannot concur with the Judicial Commissioner in his view that the Act did not confer title.

By S. 2 the word "taluqdar" is defined; it is declared to mean "any person whose name is entered in the first of the lists mentioned in S. 8." Raja Gouree Shunkur's name was entered in that list (Record No. 1. p. 122, 1. 3: *id.*, supplement, p. 3, No. 19, p. 9, No. 2), and s. 10 made the list conclusive evidence that he was a taluqdar within the meaning of the Act.

By S. 3 it was enacted that every taluqdar with whom a summary settlement of the Government revenue was made between the 1st April 1858 and the 10th October 1859, or to whom, before the passing of the Act and subsequently to the 1st April 1858, a taluqdari sunnud bad been granted, should be deemed to have **[59]** thereby acquired a permanent, heritable, and transferable right in the estates comprising the villages and lands named in the list attached to the agreement or kubooleut executed by such taluqdar when the settlement was made, subject to all the conditions affecting the taluqdar contained in the orders passed by the Governor-

General of India on the 10th and 19th October 1859, and republished in the first schedule thereto annexed, and subject also to all the conditions contained in the sunnud under which the estate was held.

Section 4 is as follows :—

"Every person whose lands the proclamation issued in Oudh in the month of March 1858, by order of the Governor-General of India, specially exempted from confiscation, and whose names are contained in the second schedule hereto annexed, shall be deemed to posses in the lands for which such person executed a kubooleut between the 1st day of April 1858 and the 1st day of April 1860, *the same right and title which he would have possessed thereto if he had acquired the same in the manner mentioned in S. 3; and he shall be deemed to hold the same subject to all the conditions affecting taluqdars which are referred to in the said Section, and to be a taluqdar for all the purposes of this Act.*"

Gouree Shunker's name was not contained in the 2nd schedule annexed to the Act, but Chundun's was.

Summary settlements were made with Gouree Shunkur between the dates specified in S. 3; and a taluqdari sunnud was granted to him before the passing of the Act, and subsequently to the 1st April 1858, *viz.*, on the 11th December 1859, by which the Government bound itself to maintain him and his heirs as sole proprietors of the estate (Record No. 1, p. 21.)

Chundun did not enter into a kubooleut for the lands to which the suit relates, but Gouree Shunker did. It therefore appears to their Lordships that Gouree Shunkur came within S. 3 of the Act. If he did not he came within S. 4. It makes no difference, however, in the result which is the Section within which the case falls, for both Sections confer the same right and title.

Their Lordships are consequently of opinion that Gouree Shunkur must, in consequence of the Act, be deemed to have *acquired a permanent heritable and transferable right* in the estates to which the suit relates, being those which comprised the villages named in the lists attached to the agreements, or kubooleuts executed by him when the settlements of the different portions of the estates were made; and this, as regards both the villages which were, and those, if any, which were not, previously part of the family property.

They are, however, also of opinion that Gouree Shunkur had power by will or by alienation in his lifetime to transfer the estates which, by virtue of the Act, were not merely heritable but transferable.

By S. 11 it was enacted that, subject to the provisions of the Act, and to all the conditions under which the estate was conferred by the British Government, every taluqdar and grantee, and every heir and legatee of a taluqdar and grantee, of sound mind and not a minor, should be competent to transfer the whole or any portion of his estate, or of his right and interest therein, during his lifetime, by sale, exchange, mortgage, lease, or gift, and to bequeath by his will to any person the whole or any portion of such estate, right, interest, etc.

The remainder of that Section, and Ss. 12 and 13, contain provisions relative to such transfers which do not apply to the present case.

Section 14 enacted that if any taluqdar or grantee shall *heretofore have transferred or bequeathed*, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer **[60]** or bequeath the whole or any portion of his estate, to another taluqdar or grantee, or to a person who would have succeeded according to the provisions of this Act to the estate, or to a portion thereof, if the transferor or testator had died without having

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made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same condition and to the same rules of succession as the transferor or testator.

Then comes S. 15. *which is very important*, and which enacts that—

"If any taluqdar or grantee *shall heretofore have transferred or bequeathed* to any person not being a taluqdar or grantee, the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transfer of, and the succession to, the property so transferred or bequeathed, *shall be regulated by the rules which would have governed the transfer of, and succession to, such property, if the transferor or legatee had bought the same from a person not being a taluqdar or grantee.*"

The next question is how and to what extent Rajah Gouree Shunkur exercised the power of alienation conferred by the Act.

All the Courts in the Oudh suit, as well as the Subordinate Judge of Cawnpore, have given effect to the documents called the will of Rajah Gouree Shunkur; but they put different constructions upon them.

The following is a translation of one of the documents, dated 7th February 1860. Record No. 1, page 28, l. 19:

"I, Rajah Gouree Shunkur, Taluqdar and Zemindar of Hurha, Targaon, etc., in the district of Oonao, who have received from the British Government the proprietary right of Hurha, Targaon, etc., in the district of Oonao, in perpetuity, have been requested by Government to submit an application on the subject of primogeniture, with a view that the Taluqah may not be split into pieces, as I would wish. Now, the custom that has been followed in my family, for generations past, is this--that the eldest member of the family continues to be the head, while the others remain obedient to him; but every one possesses a share in the Taluqah. Under the custom of the family the other brothers are at liberty to have their share separated, should they wish it. The head has no power, under the old custom, to alienate the estate without consulting every sharer. I, therefore, wish that the old custom of maintaining the share of each shareholder be preserved, in opposition to the one in accordance with which one member of the family is allowed to succeed."

The other documents applicable to property in other districts are similar in effect, though not in the identical words. (Record No. 1, page 28, l. 44, and page 29, and *id.*, p. 438, etc.)

Other material documents are those called the tabular statement and Chundun's Chit.

The document called the tabular statement, and the letter in which it was submitted, are at pages 30 and 31 (Record No. 1). The following are translations of the letter and tabular statement:—

"To the Tehsildar,

"Sir,

"I received your former letter, together with the form of a statement of succession, desiring me to fill in the columns, and also your latter communication, calling for the statement. As directed by you, the statement is herewith submitted, duly filled in.

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[61] "Pray make no objection to the entry, sons of Lallah Chotay Lall, and son of Lallah Jankee Pershad, deceased.

"The object desired is attainable by such an entry.

"Yours faithfully,

"(Signed) RAJAH GOUREE SHUNKUR,

"*Banker of Mourawan.*"

"*May* 13, 1860.

STATEMENT INCLOSED.

Name of Taluqa.	Number of Persons in the Family fit to succeed.	Jumma of the Estate.	Name of Persons in favor of Succession of one Member of the Family.	Name of persons against the Succession of one Member of the Family.
Jabroulee, etc.	Sons of Lalla Chundun Lall, deceased :— 1. Son of Lallah Chotay Lall, deceased ; 2. Rajah Gouree Shunkur ; 3. Lallah Beharee Lall ; 4. Lallah Kunhya Lall ; 5. Son of Lalla Jankee Prosad. Sons of Lalla Gunga Prosad, deceased :— 1. Lallah Shiva Prosad ; 2. Lallah Ram Sahoy.			Rajah Gouree Shunkur.

"*Remarks.*—The following rule has prevailed with regard to succession in the family of Rajah Gouree Shunkur :—The eldest son in the family is regarded as the head, with the consent of all the sharers, and the others remain subject to him ; but all the sharers retain their shares, and in case of disagreement between them, each sharer is at liberty to have his share separated."

The translation of Chundun's Chit is at page 10 (Record No. 1). It is as follows :—

"Let documents be drawn out, under the instructions herein conveyed, and then you will be at liberty to live together or separate from each other. Each sharer will take his share, half in money, and half in gold, silver, and debts due from parties. Any member of the family may take me to live with him, or all the members may manage it, so that they may divide among themselves the expenses which may be incurred on account of the necessaries of my life.

"My brother Gunga Prosad	...	...	20,000
"Chotay Lall will get double share		...	30,000
"Gouree Shunkur ...	..	...	15,000
"Beharee Lall ...	...	...	15,000
"Kunhia Lall ...	...	...	15,000
"Jankee Prosad ...	...	...	15,000

"All the females and children should certainly go to the Ganges and bathe there. They may go either to Nujuf Gurh or Cawnpore, or Bruhmawart.

"Any members wishing to live together may do so, while others may live separate, and pursue their occupation. Each member will supply his own family with food, clothing, and jewels. Marriages, etc., should be celebrated after consultation with all the members.

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"Koonwar Soodee, 10th 1892 Sumbut, or 1243 Fuslee."

In the Cawnpore suit the High Court held that none of the documents amounted to a will.

They said, "We have no hesitation in assenting to the contention that neither the reply as to the custom of primogeniture, nor the tabular statement which followed it, can be regarded as testamentary. They contain no devise or bequest, nor any language from which a devise or bequest can be inferred." And again: "It cannot be supposed that in replying to the enquiries made by the Deputy Commissioner the taluqdars of Oudh set themselves to make their wills. It appears to us that the Rajah Gouree Shunkur intended no more than to inform the authorities of the custom of inheritance prevailing in the family of which he was a member, and to indicate the persons interested as sharers of the family property. *Moreover, whatever may have been the power of disposal which the Rajah possessed over the property in Oudh, which point it is not necessary for us to determine*, he neither had, nor does it appear that he assumed to have, any power to dispose of the property in suit," that is, the property in the **[62]** North-Western Provinces. These remarks were very appropriate in the case before the High Court in the Cawnpore case. It is clear that the documents had no reference to property in the North-Western Provinces, and that they did not contain a bequest or testamentary disposition of any part of such property. But with regard to that part of the property in Oudh, to which they related, the case is very different. That which was not a will in the ordinary sense of the word, might, in their Lordship's opinion, have amounted to a will within the definition of Act I of 1869. By S. 2 of that Act it is declared that the word "will" means "the legal declaration of the intention of the testator with respect to his property *affected by this Act*, which he desires to be carried into effect after his death." It appears to their Lordships that the document of the 14th February 1860, and the other documents, which were very similar, did declare the intention and wishes of Gouree Shunkur, which he wished to be carried into effect after his death with respect to all the estates which the Government had assumed to confer upon him by the sunnud, etc., including that part which was ancestral, as well as that which was granted to him for the first time. Gouree Shunkur, as an honest and just man, and as a conscientious Hindoo, did not wish that after his death the property which belonged to the family jointly should pass to his eldest son as his heir and continue to descend according to the rules of primogeniture. He wished things to go on as before, and that that which had been joint family property should continue joint family property.

It appears from the judgment of the Judicial Commissioner, that documents, such as those which have been called the will of Rajah Gouree Shunkur, have been treated and spoken of by the taluqdars of Oudh as their wills.

He says, Record No. 1, p. 381, l. 38:—

"In ordinary cases this could hardly be construed as a 'will,' for there is no direct allusion to the death of the executor, nor can it be said that there is a distinct direction as to the devolution of his property after his death.

"But in Oudh it is a matter of notoriety that the letter to which these documents are answers were expressly intended to elicit and register the wishes of each taluqdar as to the descent of his landed estate after his death, and the replies are to this day spoken of by taluqdars as their will *when no other has been made.*

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"Its form is immaterial *as it was made prior to the passing of Act I of 1869*, and the power of Hindoos to make even nuncupatory wills has been decided in repeated judgments submitted by the Lords of the Privy Council.

"I find that this document correctly described the intention of the Rajah in respect to the devolution of his taluqa after his death, and that it is correctly described as a 'will'."

Their Lordships concur in this view. They go further, however, and are of opinion that the declaration in those documents of the wish of Gouree Shunkur, acted upon as it was by him and by the other members of the family in his life-time, and coupled with the tabular statement, was evidence sufficient to prove an alienation *inter vivos*, which in Gouree Shunkur's lifetime transferred the property to the family to be held by them as joint family property. No evidence was given to show that the rents and profits of the estate did not continue, even during the life of Gouree Shunkur, to be brought, like the other assets of the family, to the family treasury, for the use of the undivided family. In the Cawnpore case, Mohun Lall, one of the sons of Chotay, said, "Every one used to take out of the **[63]** profits as much as he required." (Record No. 2, p. 145.) In the tabular statement sent in May 1860 Rajah Gouree Shunkur entered his own name not alone, but with the other members of the family, as the persons fit to succeed: he could not have intended to devise to himself by a will or codicil—he clearly meant, by entering his own name as one of the sharers, to express his wish and intention that the estates should be held jointly during his own life as well as after his death. (Record No. 1, pp. 30, 31.)

Their Lordships are of opinion that the transfer of the property to the joint family was complete in the lifetime of Gouree Shunkur, and that it was acted upon in his lifetime as well as after his death. Beharee Lall, and Kunhya Lall, and the other members of the family succeeded to the estates, not by inheritance, for they were not Gouree Shunkur's heirs, but by survivorship, and Beharee Lall and Kunhya Lall respectively became managers, according to the custom of the family, and as they would have done if no change had been effected by Lord Canning's Proclamation, etc. The beneficial interest continued in all the surviving members of the joint family.

In his petition, dated 28th June 1867, Rajah Beharee Lall stated that all the present members of the family acquiesced and consented that the tabular statement (in one part of the petition called a "testament," and in another "an instrument"), which was filed during Rajah Gouree Shunkur's incumbency, was binding and effectual. (Record No. 1, p. 323.)

No special mode of transfer is required by the Hindu law, even a verbal transfer is sufficient.

It may be urged that S. 16 of the Act enacts that no transfer of any estate, or of any portion thereof, or of any interest therein, made by a taluqdar or grantee, or by his heir or legatee, *under the provisions of this Act*, shall be valid unless made by an instrument in writing signed by the transferor and attested by two or more witnesses. But that section was not intended to be retrospective or to affect transfers made previously to the passing of the Act. Ss. 14 and 15 speak of transfers "heretofore made," and it never could have been the intention of the legislature to render void sales or transfers made before the passing of the Act, by one taluqdar to another taluqdar under S. 14, or by a taluqdar to any other person under S. 15, if not made by writing signed by the transferor in the presence of

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two or more witnesses. If Gouree Shunkur had in his lifetime sold the estate and conveyed it by deed to another talukdar, Act I of 1869, passed after Gource's death, would not have rendered the sale void. Ss. 17 and 18 are clearly not retrospective, and S. 19 applies only to future cases, and it provides expressly that nothing shall affect wills executed before the passing of this Act. Section 16 applies to transfers, and S. 19 to wills, but both Sections use the words "*made under the provisions of the Act;*" they cannot be held to apply to a transfer made by deed, will, or otherwise, nine years before the Act was passed.

For the reasons above stated, their Lordships are of opinion that the claim of the sons of Rajah Gouree Shunkur to exclude the other branches of the joint family from any share in the taluqdari estate cannot be supported, and that the conclusion of the Judicial Commissioner in his first judgment to the effect that the same law of succession must be applied to the entire landed estate, and to the moveable property, is correct. It is hardly necessary to remark that Ram Sahoy, if he seeks to take the benefit of the ruling must bring into the common stock the taluqdari property which was ostensibly granted to his brother, Sheo Pershad, or which stands in the name of Sheo Pershad or of himself.

[64] The next question is, what is the rule of succession to be applied.

Upon the first hearing before the Deputy Commissioner, he rejected the claim of Ram Sahoy altogether, and awarded to the plaintiff one-fifth share of all the property as that to which he was entitled under the will of Rajah Gouree Shunkur. Upon appeal the Commissioner modified that decree, and putting a different construction upon the so-called will, awarded to the plaintiff a one-seventh share of all the property, moveable and immoveable.

Upon special appeal to the Judicial Commissioner he remanded the case for the trial of certain issues of fact, of which the only important ones to be considered are the 6th and 7th. They are as follows:—

"6. What is the measure of the share of each party. In the personal property? In the estate now found to be ancestral? In the acquired estates?

"7. What is the family custom as to succession?"—(Record No. 1, p. 145.)

Under those issues fresh evidence was given as to Chundun's chit, which had been found by the Deputy Commissioner not to have been proved.

It is always dangerous to allow parties to make a new case, and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially is it so in the Mofussil Courts in India. But the parties not only gave fresh evidence upon the issue as to Chundun's chit, but they were allowed to set up an entirely new case, and to enter into evidence to prove that Ram Sahoy and other members of the family had actually signed copies of the letter, and had agreed to be bound to take, upon partition of the immoveable estate, shares corresponding in extent with those specified in Chundun's chit, as to the Rs. 1,10,000 therein mentioned. That was a new case altogether, which had never been suggested or raised by any of the parties in either of the lower Courts in Oudh, or even before the Judicial Commissioner on appeal, and in support of that case witnesses, who had been examined upon the first trial, were examined *de novo*, and materially altered and added to their former evidence.

As the ultimate decision of the Judicial Commissioner, after the remand, turned upon Chundun's chit, their Lordships will proceed to

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consider the evidence given with reference to that document. Before doing so, however, it will be well to go back and refer with more particularity to the proceedings in the Oudh suit.

The plaintiff claimed one-fifth of the whole property, moveable and immoveable, basing his claim on the will of Gouree Shunkur.

Hurpurshad claimed to be entitled, as the eldest son of Gouree Shunkur, to succeed to the whole of the Mourawan estate (Record No. 1, p. 75, l. 20), whilst the other sons of Gouree Shunkur contended that the wishes of Gouree, as expressed by the document (in one place called by them a will, and in another a deed), where that the property should be divided amongst all of his sons (*id.* p. 76, l, 9 and 11). The only parties in the Oudh suit who relied upon the paper called Chundun's chit, were Rugburdyal, Mohun Lall, Ram Dyal, and Kashee Pershad, grandsons of Chotay Lall, and great-grandsons of Chundun, and Balmokund and Banee Pershad, sons of Chotay and grandsons of Chundun. They said that the talooka could not, under the will of Beharee Lall, be broken up (p. 77, l. 12), and they set up Chundun's chit merely as to the moveable property, houses, and gardens. They never stated or alleged that any of the members of the famliy had signed copies of it, or had assented to, or agreed to be bound by it. It was contrary to their case that it was intended to apply to any part of the immoveable **[65]** estate. Their pleader, Kali Pershad, stated in the fifth ground of their defence as follows:—

"According to a letter of Lalla Chundun Lall, Chotay Lall was entitled to one-third of the moveable property, houses, and gardens. Plaintiff is therefore entitled to one-sixth." (Record No. 1, p. 77, l. 13.) This was by putting Ram Sahoy out of the case altogether, and claiming to divide the moveables amongst the five sons of Chundun and their descendants, and giving Chotay a double share under Chundun's chit. In this way they reduced the plaintiff's share in the moveable property from a fifth to a sixth, and set up a claim for Chotay's descendants in the moveables, houses, and gardens, to two-sixths or one-third, being a double share. Balmokund, by the same pleader, stated that he, and not the sons of Gouree Shunkur, was entitled to succession, meaning, no doubt, that he was entitled to the whole of the immoveable estate as talookdar. (Record No. 1., p. 77, l. 44.) That claim, however, has since been abandoned.

Ram Sahoy, the descendant of Gunga Pershad, contended that the plaintiff, as representing one of the five sons of Chundun, was entitled to a one-tenth share, that is to say, to one-fifth of a half, only, he himself claimed the other half, as representing Gunga Pershad's branch of the family. He was not originally made a defendant in the Oudh suit, but he intervened and was allowed by the Deputy Commissioner to contest the plaintiff's claim only so far at it related to a share in the twenty-seven villages which stood in his name, leaving him the option of making good by a separate suit any further claim he might have. (Record No. 1. p. 86, l. 41.)

The only issue in the Oudh suit in the Court of the Deputy-Commissioner which raised any question as to Chundun's chit was the 11th (Record No. 1, page 87), and this had reference to the moveable property only. The issue was as follows:—

"Are the descendants of Chotay Lall entitled to one-third of the moveable property, houses, and gardens?" and the onus of this issue was stated to be on the descendants of Chotay Lall.

Upon that issue the Deputy-Commissioner found that the alleged chit was not genuine, and very properly so upon the evidence then before him, for the original had been withdrawn and was not produced. It has

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already been stated that the Deputy-Commissioner in his judgment before remand awarded the plaintiff one-fifth of the property, and that upon appeal by Ram Sahoy to the Commissioner that decree was modified and one-seventh awarded to the plaintiff.

The judgment of the Commissioner was delivered on the 7th May 1870, in Ram Sahoy's appeal only. On the 6th May, only the day before the Commissioner gave judgment in Ram Sahoy's appeal (Record No. 1, page 120, l. 26), the defendant Balmokund and other descendants of Chotay, including Mohun Lall, presented another appeal (*Id.* 108), and on the 12th May 1870, five days after the judgment of the Commissioner, the defendants Ramchurn and others preferred a third appeal (Record, page 118), both of the last two appeals being against the decision of the Deputy-Commissioner of the 28th March 1870. The appeals appear to have been out of date (Act VIII of 1859, S. 333) unless there was great delay in granting a copy of the decree appealed against. Be this, however, as it may, the appeal of Balmokund and others was admitted, and judgment was pronounced upon it by the Commissioner, who upheld the judgment he had given on Ram Sahoy's appeal.

One of the grounds of appeal by Balmokund and other descendants of Chotay, **[66]** including Mohun Lall, to the Commissioner from the decision of the Deputy-Commissioner was, not that upon the evidence the Deputy-Commissioner ought to have found in favor of Chundun's chit, but that they had no opportunity of proving Chundun's chit put in evidence by them on the first hearing of the suit. (Record No. 1, p. 109, l. 34, and p. 121, l. 21.)

The Commissioner expressed no opinion upon the point though he stated generally that nothing had been advanced to shake the propriety of his decree in the other appeal, which in fact gave no effect to Chundun's chit.

From that decision a special appeal was preferred to the Judicial Commissioner by Balmokund, Mohun Lall, and others, in which they set up a ground of appeal as regards Chundun's chit similar to that which had been stated in their appeal to the Commissioner (Record No. 1, p. 136, l. 4); but they still claimed in their appeal the right for Balmokund, as the eldest member of Chundun's family, to succeed to the whole of the immoveable estate (*Id.* p. 135, l. 37). With regard to the custom of the family and Chundun's chit, they said, "The appellants have had no opportunity to produce evidence *with reference to the custom of the family*, the will of Rajah Beharee Lall, *and the writing of Chundun, and to file the latter*" (Record No. 1, p. 136, l. 4). The Judicial Commissioner expressed no opinion with reference to that ground of appeal, though he ought to have done so. If he had expressed a judgment upon the point, he ought to have held on special appeal that, as a matter of law, there was nothing in the objection. The appellants had not, nor had any one of the parties to the suit, set up a custom in the family with regard to the extent of shares to which brothers and the descendants of deceased brothers were entitled on partition of immoveable estate. They had every opportunity to do so if they wished, and to prove it if they could. With regard to Chundun's chit, they not only had an opportunity of filing it, but they actually did file it in the Court of the Deputy-Commissioner, but they afterwards withdrew it before the hearing (Record 1, p. 96, l. 15); and they also gave such evidence as they thought fit respecting it, but did not produce the original.

Sheo Churn, on the first trial before the Deputy-Commissioner, stated that two copies of the letter, that is, Chundun's chit, had been made and

signed by Hurpurshad, Beharee Lall, Ram Narain, Kunhya Lall, and Madho Pershad, and he afterwards added, and by Baboo Ram Sahoy (*Id.* p. 84).—

Mungul Singh said (*Id.* p. 84) :—

"I was sitting near the Baradurree one morning in Magh, 1275 F., Raja Beharee Lall, Ram Churn, Beni Pershad, Mohun Lall, Hurpurshad, Ram Sahoy were there; Balmokund was having his hair dressed at a little distance. They all agreed to abide by Lalla Chundun Lall's letter, and went away. A Hindee chit was written (he does not say a copy of Chundun's chit was made) by Raja Beharee Lall, and Kunhya Lall, Ram Sahoy, Beni Pershad, Hurpurshad, Ram Churn, Madho Lall, signed it. I cannot write or read.

"*Cross-examination.*—Hurpurshad took this letter away. Beni Pershad took the original of Chundun Lall. Ram Sahoy took away another. I was there by chance. I never was sent for before."

As regards the evidence given after the remand respecting Chundun's chit, their Lordships consider that the Deputy-Commissioner was correct in stating that, with the exception of the testimony of Beni Pershad and Deenanath, the additional evidence (*Id.* p. 351 to 357), merely goes to show the existence of the document (*Id.* p. 373, l. 3). That fact is now admitted. Deenanath's evidence is at p. 358.

[67] He says at l. 17: "I have seen with Beni Pershad and with Hurpurshad a chit purporting to be written by Chundun Lall a year before I entered his service. I saw the letter during Chundun's life, and he spoke to me about it, and said he wished Gunga Pershad's sons to get Rs. 20,000, Chotay Lall's Rs. 30,000; and the others Rs. 15,000 each" (Oudh Record p. 358, l. 18).

This shows that Chundun's intention when he wrote the document was that the several members of the family should each receive the particular amount set opposite to his name. Chundun, certainly, according to that evidence, does not appear at that time to have inserted the amounts as expressing the proportions in which the property of the family was divisible by custom or was at all times in future to be divided if partition should take place. Deenanath, however, added that the conversation was casual, and in answer to the Court, said, "In the conversation above described, I understood from Chundun Lall that he meant the whole property to be divided amongst the kinsmen in those proportions; the word, 'Ursalha' was used by him. The conversation arose at the time of Golam Ali Khan driving the family across the Ganges in 1255 Fuslee." That was about the year 1848, and the conversation applied to the property as it existed at that time.

The statement as to what the witness understood from Chundun in 1848 to be his meaning is too loose and unsatisfactory to be acted upon; it was never mentioned, or even alluded to either in his examination or cross-examination at the first trial; is quite at variance with the statement in his examination in chief that Chundun had told him that he wished Gunga Pershad's sons to get Rs. 20,000, Chotay Lall's Rs. 30,000, and the others Rs. 15,000 each, coupled with his statement in cross-examination that Chundun's property consisted of Rs. 400,000 or Rs. 500,000 when the paper was written.

The Deputy-Commissioner in his judgment, referring to this statement of Deenanath, says:—"This evidence is not sufficient to justify the Court in attaching to the document a meaning different from that on the face of it," and their Lordships entirely agree with him.

Deenanath did not, on his examination after remand in the Oudh

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suit, speak to the fact of copies having been made or signed by other members of the family. His evidence was given on the 19th August, and it will be seen that, when examined before the Subordinate Judge in the Cawnpore suit on the 10th March 1870, he swore not only that copies had been made and signed, but that after finishing the copy the following sentence was added thereto: "Every one should divide and take his share, according to the letter of Lalla Sahib." (Record No. 2, p. 148.) He is the only witness who spoke to that fact. Beni Pershad, one of the sons of Chotay, who was interested in acquiring a double share for his branch of the family, said:—"Two copies of the letter were made by Beharee; one copy was given to Ram Sahoy, and the other to the descendants of Chundun;" but he did not state that any sentence was added thereto, or that the copies were signed by any of the members of the family, though he is one of the persons who was said by Mungul Singh to have signed them. He went on:—"The chit of Chundun should regulate the partition of the property of every description" (368, line 28). But this was mere matter of opinion. He did not at that time state that any agreement to the effect was ever entered into by the family, and it is quite at variance with the defence which he had set up.

The Deputy-Commissioner, in his judgment on remand, found that there was no ascertained custom as to partition (Record No. 1, p. 369, line 5), and putting Chundun's chit out of the question their Lordships [68] are of opinion that that finding was correct.

With respect to Chundun's chit, the Deputy-Commissioner, after giving his reasons in detail, and amongst others that the original document had not been produced, said:—"I am still of opinion that the proof of the genuineness of the document is insufficient; and even admitting its genuineness, I cannot set any value upon it." He said:—

"It has been found that Chundun Lall and Gunga Pershad were a joint undivided family, and hence Chundun Lall had no legal power to deal with more than his own share, *i.e.*, one-half of the joint property.

"For these reasons I set aside altogether *the so-called writing of Chundun Lall.* It has been found above that no ascertained family custom respecting partition has been established, and I find, in consequence, on the issue, that the measure of the share of each party *in the personal property* is Hindoo law, under which *Baboo Ram Sahoy will take one-half* ($\frac{5}{10}$), *and the sons of Chundun Lall, or their representatives*, each one-tenth ($\frac{1}{10}$). In the ancestral estate, and that acquired up to the 14th February 1856, I find that the measure of the share of each party is also Hindoo law, and that under it Baboo Ram Sahoy will take one-half, and the sons of Chundun Lall, or their representatives, each one-tenth. I find that in the acquired estate of Baboo Sheo Pershad, *i.e.*, Bunthra taluqa, Baboo Ram Sahoy is entitled to the sole ownership, the measure of his share being Act I of 1869, and in the acquired estate or 'grant' of Gouree Shunkur, as previously explained, I find that the measure of the share of each of the parties is the will of Rajah Gouree Shunkur, under which the sons of Chundun Lall, or their representatives, and Baboo Ram Sahoy, will each take one-sixth."

The finding of the Deputy Commissioner, taken on remand, afterwards went before the Judicial Commissioner. He found that Chundun's chit was genuine, not that all or any of the parties had signed a copy or copies of it, or had agreed to be bound by it; but he considered that the document set forth the custom under which the ancestral estate had been held, and to which both Rajah Gouree Shunkur and Baboo Sheo Pershad in their wills, and Rajah Beharee Lall, in his petition, alluded.

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The following is an extract from his judgment, p. 384, l. 23, Record 1 :—

"The Court of First Instance would apply to the ordinary Hindoo law, but it appears to me that such a ruling would not only be in direct contravention of the repeated declaration of this family for many years, that the joint estate was subject to family custom ; but in direct opposition to the expressed wishes of the two grantees, Rajah Gouree Shunkur and Baboo Sheo Pershad, in respect to the estates over which they respectively had a power of testamentary disposition.

"Had these latter intended that their grants should be divided according to Hindoo law, nothing could have been easier or more natural than for them to say so. But what they do say is, 'We have a custom under which we now hold family property, and by that custom we wish the succession to our acquired estate to be regulated.'

"I think it impossible for any member of the family to say that the division should be by law, rather than by family custom.

"The difficulty is to decide what is that custom.

"The two instances of separation in previous generations do not assist us, for they are evidently not regulated by a common law, but were friendly agreements, the amounts given off being determined amicably, and based probably on facts known to the parties concerned, and to no one else.

"It is hardly disputed that the greater portion of the property held prior to the **[69]** recent grants was acquired by Chundun Lall and his eldest son, Chotay Lall ; *and I myself can speak, from many years' experience, to the veneration in which the Burra Lalla (Chundun Lall) was held by the joint family, and to the fact that all agreed that though the family lived and hoped to continue as undivided, yet that Chundun Lall had made a division prior to his demise, which was preserved in the family archives, and recognized by them.*

"A paper, purporting to be a copy of the record of the division so made in Chundun Lall's own handwriting, has been produced in this suit, and it is admitted that it is a copy of the document filed in the Court of Cawnpore.

"Some ridicule has been cast upon this paper, and the Court of First Instance deemed it unnecessary to enquire into its genuineness or its validity.

"The ridicule was misplaced, for the points which, to the ignorant, appear ridiculous, are precisely those which prove the paper to be a genuine production of the patriarchal head of an undivided Hindoo family.

"In this Court there has been no real attempt to deny its genuineness, nor evidence offered to refute it, and as it has been found by the highest Appellate Court to be genuine in a suit between some of those parties in respect to properties held by them in the North-Western provinces, and not subject to the special law of Oudh, I think it unnecessary to remand this case again for trial of that issue, and, under my special power of review, I find that the document produced as Chundun Lall's is genuine.

"Finding that, I have no doubt but that that document sets forth the custom under which the ancestral estate has been held, and to which both Rajah Gouree Shunkur and Baboo Sheo Pershad in their wills, and Rajah Beharee Lall, in his petition, allude."

He then declared his finding on the several issues directed on the remand, and on the 6th and 7th. He said, on the 6th, "I find that the measure of the division of the personal property, the ancestral and the

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several acquired estates, including the Bunthra taluqu, is the custom of the family; and on the 6th, that the family custom is set forth in the writing of Lalla Chundun Lall, and that by it there falls of the entire estate divided into 22 portions, to the heirs of Gunga Pershad, 4 portions; to the heirs of Chotay Lall, 6 portions; to the heirs of Rajah Gouree Shunkur, 3 portions; to the heirs of Rajah Beharee Lall, 3 portions; to the heirs of Kunhya Lall, 3 portions; to the heirs of Jankee Pershad, 3 portions."

And he concludes thus:—

"I therefore find that plaintiff, Sheo Dyal, as the only son of Lalla Kunhya Lall, is entitled to a share equal to three out of twenty-two equal portions of the entire estate, and cancelling the decrees of the Commissioner of Lucknow, dated 7th May and 2nd June 1870 (as before), I amend, as above, the decree of the Deputy-Commissioner of Lucknow, dated 28th March 1870, said share to be enjoyed by said Sheo Dyal, subject to and in accordance with the will of Rajah Gouree Shunkur, deceased; and, considering the courteous and liberal manner in which the advocates of all parties have in this Court consented to the arrangement which enables the interests of all concerned to be determined in one judgment, I rule that when finally taxed in this Court all the costs in all the Courts in this case shall be costs against the estate."

The finding upon the 7th issue is altogether at variance with the cases set up by the several defendants in the suit, none of whom, as before observed, with the exception of the descendants of Chotay Lall, ever relied upon Chundun's chit, and they, only as regards the moveable property.

[70] The genuineness of the document is now admitted, but it does not of itself prove a custom.

A custom is a rule which in a particular family, or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly. But Chundun's chit did not allude to or prove a usage in the family, or profess to lay down a certain definite rule which could be applied to any other state of facts than that which existed at the time it was written. It was not, and could not be, acted upon or applied to all cases of partition amongst brothers or descendants of brothers. It was a mere proposal for the division of Rs. 110,000 amongst certain then existing members of the family. What general rule can be extracted from it? Is it that in all cases where there are two brothers, the eldest having five sons, shall take nothing (for that was the case as to Chundun, by his own chit), that his eldest son shall take six twenty-seconds or three-elevenths, the rest of his sons three twenty-seconds each, and his brother four twenty-seconds, and what is to be the case where there are more than two brothers or the descendants of more than two? Their Lordships are of opinion that Chundun's chit did not declare, was not intended to declare, and was not evidence of, a valid family custom. There was no evidence in the Oudh case of an agreement by which the parties bound themselves to act upon it on any future partition of the family property, moveable or immoveable. The Judicial Commissioner did not rest his judgment upon the fact that an agreement between the parties had been proved, but upon the fact that Chundun's chit set forth a custom under which the ancestral estates had been held, and to which he stated Rajah Gouree Shunkur by his will alluded. He referred to his own experience with regard to the veneration in which Chundun was held, and to his knowledge that the family had recognized a division which Chundun, prior to his demise, had made.

It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment as depending upon his own knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness. But even if the Commissioner's statement of facts from his own knowledge be taken as evidence, Chundun's chit did not establish a custom as to the extent of shares upon partition, especially as regards immoveable property. As to such property the terms of it were not applicable. It expressly says, "Each sharer will take his share half in money and half in gold, silver, and debts due," and if the translation in the Cawnpore case is to be relied upon, it says, "half the estate consists of cash, and the other half of silver, gold, and debts" (Record 2, p. 94); which shows that it was intended to apply only to property of that description.

The Judicial Commissioner not only found that Chundun's chit set forth the custom as to the shares in which the family property was divisible, but he interpreted the documents called Gouree Shunkur's will, and the tabular statement, as referring to a family custom by which the extent of the shares of the different members of the family was regulated. Their Lordships do not put that construction upon those documents. No such custom was set up by any of the parties to the suit in answer to the plaintiff's claim. [71] The custom referred to in the documents called a will was merely that "the eldest member of the family continues to be the head"; "that every one possesses a share; that the other brothers are at liberty to have their shares separated if they wish it; that the head has no power to alienate without consulting every shareholder;" and a wish was expressed that the old custom of maintaining the share of each shareholder should be preserved in opposition to the rule of primogeniture. But there is no allusion to any custom under which the different members of the family were entitled upon partition to shares other than those provided by the rules of the Mitacshara.

Deenanath, in his evidence, says, "The custom of the family was that the eldest member had the direction." Gouree Shunkur did not state in the tabular statement, any more than in the documents called a will, that there was a custom as to the extent of the shares to which the several members were entitled upon partition. In the tabular statement he divides the members of the family fit to succeed under two heads, "the sons of Chundun" and "the sons of Gunga Pershad." He does not number them from one to seven; but he numbers Chundun's sons from one to five under one heading, and Gunga's sons one and two under the other; he puts himself down as one of the five, and inserts grandsons in the place of deceased sons, thus: "The sons of Chotay Lall, deceased," and "the son of Lalla Jankee Pershad, deceased." He does not state that Chotay's sons will take two shares, but puts them down as representing their father as one of the sons of Chundun; and he also puts down Jankee Pershad's only son as representing his father, as another of the sons of Chundun.

The entry is as follows:—

Sons of Lalla Chundun Lall, deceased:

1. Sons of Lalla Chotay Lall, deceased.
2. Rajah Gouree Shunkur.

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3. Lalla Beharee Lall.
4. Lalla Kunhya Lall.
5. Son of Lalla Jankee Pershad.

Sons of Lalla Gunga Pershad, deceased:

1. Lalla Shiva Pershad.
2. Lalla Ram Sahoy.

See also tabular statement, Record No. 1, p. 71, in which the words "descendants of Chotay Lall" are used instead of the words "sons of Chotay Lall."

Their Lordships consider that the proper interpretation of that document is that Gouree Shunkur considered, represented, declared, that it was his wish and intention that the property should be divisible *per stirpes*, and that is clearly the mode in which, in the absence of a family custom, the property being joint, would have been divisible under the Mitacshara. See the "Mitacshara" on Inheritance, Ch. 1, S. 5, Par. 12.

It is not likely that Gouree Shunkur, who had had the sunnud granted to him, and been allowed to engage for the Government revenue, intended to say, and it is clear that he did not say, that it was his wish that his nephews, Chotay's sons, as representing their father, were entitled, by custom or otherwise, to a share double the amount of that to which he himself was entitled. He certainly did not refer to Chundun's chit, and he could not have referred to the copies which are alleged to have been made and signed after his death.

The Judicial Commissioner's judgment as to what was the nature and extent of the custom is founded entirely on Chundun's chit. The custom spoken of by Rajah Gouree Shunkur in the documents called his will, is a custom said to have existed in his family for generations past. There certainly was no evidence of any partition in the family in which the property had been divided in the proportions specified in that [72] document. The evidence, such as it was, was all the other way. It showed, so far as it went, that upon the partition between Chundun and Gunga Pershad and Moonnoo each took one-third. See Runjeet Singh's evidence (Record No. 1, p. 352, l. 7; *Id.*, l. 20, p. 353). Ram Sahoy swore that Rajah Beharee Lall told him that the documents showed that upon the separation of Moonnoo two-thirds of the property was reserved for Chundun and Gunga Pershad (Record No. 2. Supplement, p. 4). Deenanath, in his evidence, says, "when Jubboo separated, he got a 4-annas share, and Chundun 12 annas of joint property. I have often heard this. When Moonnoo separated, out of 4 annas he got 1 anna 3 pie; Gunga, 1 anna 3 pie; and Chundun, 1 anna 6 pie. The 12 annas was not divided, it was left to meet expenses of the business.

The evidence in the Oudh suit cannot be supplemented by that which was given in the Cawnpore suit in December 1870, long after the final decision of the Judicial Commissioner of October 1870 was pronounced.

Reliance was placed upon Ram Sahoy's letters as showing his own admission that he had no right to any share in the family estate. It cannot now be disputed that he is entitled to a share, though the extent to which he is entitled is a matter in dispute. Their Lordships agree with the view which the High Court took of those letters. They consider that, regard being had to the circumstances, an admission that he was not entitled to anything cannot be fairly drawn from them. He probably was under the impression at the time they were written that by virtue of Lord Canning's Proclamation, and the sunnud which had been issued, his

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beneficial interest as a sharer had been confiscated, and that Behari was the beneficial owner of the whole of Mourawan. The letters, if they amount to an admission at all, amount to an admission that he was not entitled to any portion of the Mourawan estates, they certainly cannot be evidence to show that he was entitled to only two-elevenths of it.

Their Lordships having decided that the property which was granted to Rajah Gouree Shunkur by sunnud, etc., was transferred by him to the family to be held as joint family property, the whole of the property in dispute in both the suits must be governed by the same rules. Their Lordships are of opinion that neither by custom, usage, contract, nor by any other means, has the property in dispute in the Oudh suit at any time become divisible upon partition in any other manner or in any other shares than according to the rules of the Mitacshara. They are of opinion that the finding of the Judicial Commissioner on the sixth and seventh issues, that the measure of division of the personal property, the ancestral and the several acquired estates, including the Bunthra estate, is the custom of the family, and that that family custom is set forth in the writing of Chundun Lall, and his decree founded upon that finding, are erroneous, and that the property must be divided according to the rules of the Mitacshara. There is not sufficient evidence to warrant a finding that Ram Sahoy was to take the Bunthra estate and the twenty-seven villages as his share of the property ; and their Lordships are of opinion that the twenty-seven villages must be held to form part of the joint family estate, and must accordingly be divided as part of it.

It was agreed at the hearing of the appeals that their Lordships should decide whether the Bunthra estate is part of the joint family property, and is divisible in the same manner as the Mourawan estate. They are of opinion that it is. Sheo Pershad to whom it was granted, having signed documents similar to those which were signed by Gouree Shunkur as to the Mourawan estates (Record No. 1, page 27, l. 30), Bunthra became part of the undivided family estate.

[73] With regard to the property which is the subject of the Cawnpore suit, their Lordships are of opinion that Chundun's chit does not apply to it ; and that it is not satisfactorily proved that the members of the family ever agreed that, upon partition, it should be divided in the proportions specified in Chundun's chit with respect to the Rs. 110,000, therein mentioned.

Beni Pershad's evidence in the Cawnpore suit, given on the 19th December 1870 (Supplemental Record in that suit, page 2), is very different from that which he had previously given on the 23rd August 1870, in the Oudh suit after the remand.

He was greatly interested in the result as one of the descendants of Chotay Lall, and his evidence in the Cawnpore suit was given after the last judgment of the Judicial Commissioner had been pronounced on the 29th October in that year.

He then stated for the first time that copies of Chundun's chit were signed by six members of the family, that is to say by the eldest son of each stock.

But even that would fall short of proving that they had agreed that upon any future partition of immoveable property, their shares should be adjusted in the same proportions as those in which the Rs. 110,000 mentioned in Chundun's chit were to be divided. None of the witnesses corroborated the evidence of Deenanath given in the Cawnpore suit (Record No. 2, page 148), that an additional sentence was added to the copies of Chundun's chit which the parties are said to have signed.

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Chundun's chit had reference only to moveable property, and, without some addition, could not be applied to the partition of immoveable property.

Beni Pershad went on to say that the signed copies were delivered, one to Hurpurshad, and one to Ram Sahoy (Supp. Record Cawnpore case, p. 2. l. 18), the persons above all others whom it was necessary to bind by them. The story is most improbable. Ram Sahoy (Record No. 2, Supplement, page 4) swore that an arrangement was come to by which Bunthra and other property was to be taken by him as his share, and in this he was corroborated by Beni Pershad. The latter, after stating that copies of Chundun's chit were signed, said, "After this Ram Sahoy got the 27 villages in Oudh, and took the profits. Ram Sahoy took the 27 villages in accordance with the arrangement. The chitta on account of the whole estate was not made up, but these villages were given to Ram Sahoy to receive the full profits, while the remaining villages continued to be attached to the Koothee at Oonao (*Id.* Supplement Record, page 2, l. 25, etc.).

Further he, said Rajah Beharee, did not sign the paper which I have deposed was drawn up in his lifetime, he wrote the copies and his son signed it. (*Id.* p. 3, l. 1.)

Again "at the meeting of the family at which the document executed by all of us was prepared, there was no mention made of any other paper but the document of Chundun."

Hurpurshad denied that a copy of Chundun's chit was signed by the family. (Record No. 2, page 180.)

Ram Narayan said he did not know whether he had ever signed such a paper. He said, "If I see the paper I can say," but none was produced.

Mohun Lall who was interested in obtaining a double share for the descendants of Chotay, of whom he was one, on his first examination before the Subordinate Judge (Record No. 2, page 143), did not corroborate the other witnesses as to the delivery of the signed copies to Hurpurshad, and Ram Sahoy respectively, but he corroborated Ram Sahoy and Ram Pershad as to an agreement having been come to by which Ram Sahoy was to take the 27 villages, etc., in lieu of his share. **[74]** He said in his evidence, taken 18th March 1870 (Record No. 2, page 146, line 3), "About two and a half or three years ago Rajah Beharee Lall, Hurpurshad, and Ram Pershad were looking at the document—*i.e.*, Chundun's chit—and I was present there," but he does not say that copies were made or signed by any of the family.

Deenanath in his first deposition in the Cawnpore suit (Record No. 2, page 148), said the copies were signed in 1274 Fuslee, which would be about the time above mentioned by Mohun Lall. In his deposition in the Oudh suit after remand (Record No. 1, page 358) he speaks of the chit, and not of the copies. In his examination before the High Court after adjournment, he said the copies were made in 1275 Fuslee.

Mohun Lall in his deposition taken on the 7th December, 1870, after the adjournment, says, "I first saw it about three years ago," that would be in 1867.

Further, in his first examination in the Cawnpore suit, Mohun Lall, speaking of Chundun's chit, said (Record No. 2, p. 143, l. 29) :—"It is in the handwriting of Chundun;" and he went on—"*Subsequently in the time of Rajah Beharee Lall a partition deed was executed by the members of the family, and signed by all of them.* Rajah Kunhya Lall, Baboo Ram Sahoy, Lalla Balmokund, Madho Pershad, Hurpurshad, and Ram Narayan

attached their signatures to the document. It is probably with some of the members of the family " [here some of the words are omitted, probably " it was agreed that the family"] "should divide the property according to the directions of Lalla Chundun Lall, contained therein." Here he speaks of a deed of partition, which was probably with some of the members of the family. He could not refer to the copies of Chundun's chit which, in his examination after adjournment by the High Court he said were given, one to Hurpurshad and one to Ram Sahoy (Record No. 2, p. 182). He proceeded :—" Leaving out the property in Oudh, the plaintiff, that is Ram Sahoy, *is entitled to those estates which are situate in Cawnpore and Futtehpore districts*, and in respect of which his name is entered in the register. I mean, that the plaintiff's share is equal to all the estates in respect of which his name has been recorded in conformity with the letter executed by Lalla Chundun Lall. The plaintiff's share in the firm is, in my opinion, equal to two-elevenths, according to the letter referred to above ", etc. Again he says (p. 144):—" in the petition of Rajah Beharee Lall, bearing order dated the 14th January, 1868, which was presented to the Deputy Commissioner of Oonao, it is stated that the entry of the names should be effected in conformity with the memorandum of Lalla Chundun Lall. The memorandum referred to therein is the document marked C (Chundun's chit), and *the Razeenamah of Agreement mentioned therein is the Agreement of which I have spoken above.* It was in conformity with this petition of Beharee Lall, that is, in compliance with the provisions contained therein, that the plaintiff caused his name to be entered in column 9 of the Revenue Register of the district of Oonao in respect of the twenty-seven villages."

The High Court, in their first judgment, speaking of the agreement mentioned in the petition of Beharee Lall of the 9th February 1868, say :—

"There is other evidence to show that such an agreement was made. Mohun Lall deposed that a deed of agreement was drawn up in the lifetime of Beharee Lall, and signed by the members of the family, including the plaintiff. Deenanath, the head gomashta of the firm at Mourawan, states that Beharee Lall sent to Hurpurshad, who had the key of the cash room, for the paper drawn up by Chundun Lall in October 1835, and had a copy made of it which was signed by all, it [75] being agreed that a division of the property should be made in accordance with its provisions. Sheo Churn Lall states that the copy was made in his presence, and signed by all the members of the family. Shunkur Buksh deposes that he heard from the plaintiff that Beharee Lall had recently written a paper which was signed by all parties ; and Mahadeo deposes that the plaintiff informed him on two occasions that he would take his share in accordance with the paper written by Chundun Lall."

Again—

"It is much to be regretted that the Court of First Instance did not examine the plaintiff as to the making of the agreement to which the witness referred ; and if the Court had been satisfied that such an agreement was in fact made and reduced to writing, it should have called upon the parties to produce it, for it would have had a material bearing on the plea of the defendants, that the plaintiff had assented to the arrangement" (see Record No. 2, p. 178, l. 36 ; and p. 179).

Further they say :—

"There remains only the question,—Was the principle of division indicated in the paper written by Chundun Lall assented to by the plain-

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tiff, or those from whom he claims, or was there any other arrangement assented to, with respect to the division of the property, at variance with the ordinary rules which govern the partition of joint property? This issue was not distinctly raised in the Court below; and although there is some evidence on the record on which we might determine it, to enable us to do so satisfactorily, we deem it essential *that the agreement to which reference has been made by several witnesses as having been prepared in the lifetime of the Rajah Beharee Lall, should be called for, and, if it exists, be put in evidence.* At present we have only secondary evidence of its contents, and, although no objection was taken to its admission in the Court below, we hesitate to act upon it until we are assured that no better evidence exists. We, therefore, call upon the defendants to *produce the document to which we have referred, and to give proof of its identity with that spoken to by the witnesses*; and if the plaintiff desires to contradict the evidence of the execution of the document, which may be adduced by the defendants, he is at liberty to tender himself for examination."—(Record No. 2, p. 279, l. 21).

The evidence of Mohun Lall (Record 2, p. 143) and of Beni Pershad appears to refer to a document containing an arrangement by which Ram Sahoy was to take the twenty-seven villages, etc., and probably, according to Beni Pershad, Bunthra and other property as his share. The document may have referred in terms to Chundun's chit, and for these reasons copies of it may have been made and signed by the family for identification. If the parties intended that all the property should be divided in the proportions mentioned in Chundun's chit, it is improbable that they should have signed only copies of the chit when it referred to specific moveable and not to immoveable property. In their second judgment, delivered on the 21st August, 1871, the High Court say: "We adjourned this case in order to obtain the production of the copies of the document alleged to have been written by Lalla Chundun Lall in October 1835, which, as we observed in the former part of our judgment, was deposed to by several witnesses. We have, however, failed to obtain its production."

In their former judgment the Court stated that they adjourned for the production of the agreement spoken to by Mohun Lall, not merely for the production of the copies of Chundun's chit. The defendants did not produce the deed of agreement, nor either of the copies of Chundun's chit, which were said to **[76]** have been signed; nor did they sufficiently account for the non-production of them if they existed. The High Court did not find that it was out of the power of the defendants to produce the agreement or the alleged copies of Chundun's chit, and unless that was the case there was no excuse for Chotay's descendants not producing them if they existed. The issue as to whether a rule for partition of the joint family property, other than that provided by the Hindoo law was agreed upon, was entirely new. None of the defendants set up as a defence that a special rule for partition had ever been fixed by custom or agreement, or that any arrangement had ever been come to by the family to divide the property in the proportions fixed by Chundun's chit with reference to the Rs. 110,000 mentioned in it. Chotay Lall's descendants set up quite a different case, *viz.*, that the property was all Chundun's, and that Chundun had by his chit voluntarily assigned to Ram Sahoy a two-elevenths share in some of the property. Hurpurshad and others of the defendants also set up that, excluding the estates granted by Government, which belonged to those to whom they were granted, the descendants of

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Chundun were entitled to the whole of the property, and that the plaintiff, Ram Sahoy, had no right to any share in it. (See Record, No. 2, pp. 10, 11, 12.)

The High Court, although they had failed to obtain production of the copies of Chundun's chit, or the agreement spoken to by Mohun Lall, to which they alluded in their first judgment (Record No. 2, p. 178), allow several of the parties and other witnesses to be examined not merely for the purpose of accounting for the non-production, but as to the fact that such documents had been executed. It was the interest of Hurpurshad to show that Ram Sahoy was not entitled to a half share, and for that purpose to produce the document, if it ever existed and had been delivered to him. But he upon his oath denied it altogether.

The High Court remarked that they could not say that any of the witnesses gave their evidence in a manner which impressed them very favourably.

In a case of conflicting evidence of witnesses who do not commend themselves by the manner in which they give their evidence, it is a safe rule to look to the conduct of the parties. In the present case the High Court did not attach sufficient weight to the conduct of the parties, nor confine them to the defences set up by their written statements, but they suggested a rule for the partition of that of which the parties alleged that the plaintiff had no right to a share (Record No. 2, pp. 11, 12, etc.). They not only did that, but they allowed witnesses who had been examined before, to be recalled and examined *de novo*, and thereby enabled them to amend their former evidence. If all the heads of the several branches of the family, including Ram Sahoy, the plaintiff in the Cawnpore suit, Sheodyal, the plaintiff in the Oudh Suit, Hurpurshad, who claimed the whole of Mourawan, and Balmokund, who made a similar claim, had in 1868 agreed that the whole property, moveable and immoveable, should be divided in the same proportions as the Rs. 110,000 mentioned in Chundun's chit, their conduct in making claims and setting up defences such as they did in the Oudh case in 1869, and in the Cawnpore case in 1869 and 1870, and in endeavoring to exclude Ram Sahoy from any share in the property, was wholly inconsistent with the alleged agreement. If the Court intended to call for fresh evidence, they ought to have recorded their reasons for doing so. This is a rule laid down by Act VIII of 1859, and is one which this tribunal has frequently held ought to be strictly adhered to. But the Court did not adjourn the case for the purpose of taking further evidence **[77]** and allowing witnesses who had been examined to be recalled and to amend their former evidence, but simply for the production of a document, with liberty to call witnesses to prove its identity. Even this was a course which ought not to have been adopted. The case set up was entirely new, and there was no reason to give the parties an opportunity of producing a document upon which they had not relied in their claims or defences, and which, if they had relied upon it, they ought, according to the provisions of Act VIII of 1859, to have filed with their other exhibits, unless they could prove that the document was not in their possession.

Their Lordships are of opinion that the High Court was in error, after adjourning the case, as they did, for the production of a document, in allowing witnesses and several of the parties who were interested in the result, and had been previously examined, to be recalled, and to add to and vary the evidence which they had previously given, in order to prove a case which they had not set up.

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Their Lordships also think that the conclusion at which the High Court arrived upon the evidence, in the absence of the production of the documents for the production of which they had adjourned the case, was also erroneous.

Upon the whole, their Lordships are of opinion that there was no custom in the family nor any agreement proved which disentitled the several members of the family to receive, on partition of the joint family property, the shares to which they were entitled under the Mitacshara. According to that law, the property was divisible *per stirpes*. (*See* The Mitacshara on Inheritance, Chap. 1, S. 5, para. 12).

The plaintiff in the Cawnpore suit, as the sole descendant of Gunga Pershad, was consequently entitled to one-half, and the sons of Chundun and their descendants respectively each to the fifth of a half, or, in other words, to one tenth of the property in that suit, according to the rules of the Mitacshara.

Their Lordships are of opinion that the parties are entitled to those shares in all the property moveable and immoveable in both suits, and also in the twenty-seven villages and in the Bunthra estate; and they will humbly recommend Her Majesty to reverse the decrees of the Judicial Commissioner and of the High Court respectively, and to decree to Ram Sahoy, the plaintiff in the Cawnpore suit, one-half of the property in that suit, and to decree to Sheo Dyal, the plaintiff in the Oudh suit, a fifth of one-half, or, in other words, one-tenth of all the property in that suit, including the twenty-seven villages, and also to award and direct that the Bunthra estate be divided in the same proportions as the other property, that is to say, *per stirpes*, one-half to Ram Sahoy, and one-tenth to the descendants of each of the five sons of Chundun respectively, according to the rules of the Mitacshara.

Their Lordships will not interfere with the decree of the Judicial Commissioner so far as it relates to the costs in the Courts in Oudh. They are of opinion that they should be paid out of the property to which the Oudh suit relates. They are also of opinion that, under the circumstances, the costs in both the Courts in the North-West Provinces ought to be paid out of the property to which the Cawnpore suit relates.

They will therefore further humbly advise Her Majesty that the costs in all the Courts below, both in the Oudh suit and in the suit in the North-West Provinces, be ordered to be paid out of the property to which those suits respectively relate.

The costs of all the parties in these appeals will be taxed here, and must be paid out of the properties to which the suits respectively relate.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

PURAN MAL (*Defendant*) *v.* ALIKHAN (*Plaintiff*). [1st June 1876.]

1 A. 235.

1 A. 235.

Act VIII of 1859, S. 260—Execution of decree—Certified purchaser.

Where a judgment-creditor sued for a declaration that the certified purchaser of property in execution of his decree was merely a trustee for the judgment-debtor, that the purchase in his name was made with the intention of defeating

or delaying him in the execution of his decree, and that he was at liberty to apply for execution against the property as the property of his judgment-debtor; *held* that S. 260, Act VIII of 1859, was in no way a bar to the suit. (H.C.R., N.W.P., 1874, 265, *F.*)

[Ap., 21 C. 519, 18 A.461 ; **R.**, A.W.N. (1896), 151, 21 A. 29=A.W.N. (1898), 187, 26 A. 92].

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N.B.—This case is not reported in full in the I.L.R. Allahabad series as it merely follows the decision in *Sohun Lal* v. *Gya Parshad* (H. C.R. N.W.P. 1874, p. 265).

The facts of this latter case (*Sohun Lall* v. *Gya Parshad*) were as follows :—

In execution of a decree, held by them against Kunhya Lall, the plaintiffs attached a certain house as his property. The defendant claimed the house on the ground that he was the certified purchaser of it, and, with reference to S. 246 of the C.P.C., 1859, the property was released from attachment. The plaintiff brought a suit to bring the house to sale as the property of Kunhya Lall, the defendant being according to them only a servant and agent of their judgment-debtor who had purchased the house with his own money in the name of the defendant and had remained in proprietary possession of the same ever since the purchase. The defendant claimed that he was in possession as owner, having purchased it in execution of a decree against the said Kunhya Lall, and contended that, as he was the certified purchaser, the suit as against him was barred by S. 260 of the C.P.C., 1859. Two issues were framed (i) whether Kunhya Lall or the defendant was the actual owner of the house and in possession ; and (2) whether or not the suit was barred by S. 260. On the first issue it was found that Kunhya Lall was in possession of the property as owner at the time of the attachment and was the real purchaser in execution of the decree. On the second issue, the Munsiff held that the suit was not barred by S. 260 of the C.P. Code.

On appeal, the District Judge decided against the defendant, who now appealed to the High Court (Stuart, C.J., and Brodhurst, J.) who gave the following

JUDGMENTS.

BRODHURST, J.—The Court of first instance has, for forcible reasons given in its judgment, found that the real purchaser and present owner of the house in suit is not Sohun Lall, but his employer, Kunhya Lall, the judgment-debtor, and that under certain rulings of the Calcutta High Court the provisions of S. 260, Act VIII of 1859, do not apply to cases such as the present in which a decree-holder sues to have sold property belonging to his judgment-debtor, but cases between the certified purchaser and the beneficial owner. This judgment has been confirmed by the lower appellate Court, and all that now remains to be considered in a special appeal is whether the view of the law taken by the lower Courts can be maintained or not. In my opinion the said judgments on this point are in accordance both with justice and with rulings of some of the High Courts, that the case decided by the Privy Council and referred to by the learned counsel for the appellant (1) is not similar to the present one, and that as observed by their lordships in their judgment—" the Code had certainly not for its object the desire to confer a benefit on fraudulent benamidars." Concurring in this opinion, I hold that S. 260 of the Code does not apply to a case such as the one now under appeal, for, if it did, it would cause great injustice by allowing the judgment-debtor to retain in possession of property which in equity ought to be given up to the decree-holder and, as shown above, such a procedure would be opposed to the object of the Code. With reference, therefore, to the above remarks, I would dismiss the appeal with costs.

STUART, C.J.—I concur in Mr. Justice Brodhurst's opinion. On principle, as well as on the authorities, I am clear that such is the true reading of S. 260 of Act VIII of 1859. The appeal is dismissed with costs.

(1) 10 B.L.R. 164.

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FULL BENCH.

1 A. 236 = 1 Ind. Jur. 100.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

AKHE RAM (*Plaintiff*) *v.* NAND KISHORE (*Defendant*). [1st June 1876.]

1 A. 236 = 1 Ind. Jur. 100.

Act XX of 1866, S. 53—Hypothecation—Mortgage—Sale in execution.

1. A decree in a suit on a bond under S. 53 of Act XX of 1866, can properly only be a decree for money, and not for enforcing any lien against property hypothecated in the bond.

2. Where it appears, on the face of the decree, that although it professed to declare the lien, it was passed under the special provisions of S. 53 of Act XX of 1866, it could only be held valid as a money decree.

3. A purchaser of immoveable property at auction in execution of a money decree acquires merely the rights and interests which the judgment-debtor had at the time of sale.

[F., 1 A. 240].

TURNER and SPANKIE, JJ. referred the following question to the Full Bench, *viz* :—

"Whether or not when property hypothecated in a bond is sold at auction in execution of a decree passed on the bond under the special provisions of S. 53, Act XX of 1866, the purchaser acquires merely the rights and interests of the judgment-debtor remaining at the time of the sale or can claim in virtue of the lien to defeat a second mortgagee."

OPINIONS OF THE FULL BENCH.

[237] STUART, C. J.—My answer to this reference is, that a decree passed under S. 53, Act XX of 1866, is and can only be a mere money-decree, and that a sale in execution of such a decree can only give the purchaser the rights and interests of the judgment-debtor in the property hypothecated, and that such purchaser **[238]** cannot claim in virtue of his lien to defeat a second mortgagee. I hold this opinion so clearly, and it is suggested to my mind so simply and directly by what I consider to be the true meaning of S. 53 of Act XX of 1866, and by the relative position of the two bond-holders, that I think it unnecessary to support it by any argument or by any reference to authorities. The Calcutta and Madras cases referred to at the hearing (1) do not, in my opinion, apply.

PEARSON, J.—S. 53, Act XX of 1866, distinctly states the nature of the decree which may be given to a petitioner on production in Court of the obligation and the record of agreement mentioned in the preceding section. He shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) up to the date of the decree. The decree can be only a decree for money; and the purchaser of any immoveable property sold in execution thereof under S. 259, Act VIII of 1859, could only be held to have purchased the right, title, and interest of the judgment-debtor in the property sold.

In the case out of which the reference has arisen, it appears that the

(1) *Moomtazoodeen Mahomed* v. *Rajcoomar Dass*, 14 B.L.R. 408 = 23 W.R. 197; *Ramu Naikan* v. *Subbaraya Mudali*, 7 M. H. C. R. 229.

decree which was given to Mathra Das and Mulchand, under S. 53 of the Act above named, was in its terms against the property hypothecated in the bond executed by Mr. Gardner in their favour on the 9th December 1867, as well as against him; but I concur in the opinion expressed by the Subordinate Judge that so much of the decree as declares the property liable must be regarded as null and void for want of jurisdiction.

The plaintiff in the case purchased the property at auction on the 20th December 1873, subject to the lien which had been created in the defendant's favour* by the instrument of the 5th January 1870, and cannot in my opinion derive any benefit from the circumstance that, under the bond of the 9th December 1867, Mathra Das and Mulchand possessed a lien which would have taken precedence of that possessed by the defendant under the instrument of the 5th January 1870, had it been a question which of the two liens should prevail over the other; but there is no such question. The debt **[239]** secured by the earliest lien is understood to have been realized by Mathra Das and Mulchand; at all events they are not trying to enforce the lien, if it has not been altogether extinguished with the debt which it was intended to secure. The plaintiff as auction purchaser of Mr. Gardner's rights and interests could not acquire by the purchase of them the lien which belonged to Mathra Das and Mulchand, nor indeed were those rights and interests, being sold in execution of what must be regarded as a mere money-decree, sold in virtue and pursuance of that lien. He cannot therefore in virtue thereof successfully resist the defendant's claim to enforce his lien under the instrument of the 5th January 1870.

TURNER, J.—The provisions of S. 53, Act XX of 1866, were intended to apply to personal obligations for the payment of money, and where such an obligation was found combined with an hypothecation of property as collateral security, the creditor was entitled to obtain a summary decree on the personal obligation only. A decree duly passed under the provisions of the Act would be what is known in these provinces as a mere money-decree, and where it appears on the face of the decree that, although it professed to declare the lien, it was passed under the special provisions of S. 53, it could only be held valid as a money-decree, and if the holder of such a decree attached and sold the hypothecated property, for the reasons given in my judgment in *Khub Chund* v. *Kalian Das* (1), I am of opinion nothing would pass under the sale but the rights remaining in the judgment-debtor at the time of the sale.

SPANKIE, J.—I would say, in reply to this reference, that with regard to the provisions of S. 53, Act XX of 1866, the decree could only have been for money, and the purchaser at the execution sale could only acquire the rights and interests of the judgment-debtor remaining at the time of the sale, and could not claim by the virtue of the lien to defeat a second mortgagee.

OLDFIELD, J.—A decree made under S. 53, Act XX of 1866, on a bond can properly only be a decree for the recovery of money, and not for enforcing any lien against property hypothecated in the bond; and the general practice under a course of **[240]** rulings of this Court has been to hold that a purchaser at auction in execution of a mere money-decree acquires merely the rights and interests which the judgment-debtor had at the time of the sale, and cannot benefit by any lien that the decree-holder may have had under the bond. On the principle of *stare decisis*, I would reply to that effect to this reference.

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* By Mr. Gardner.

(1) 1 A. 240.

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PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

KHUB CHAND (*Defendant*) *v.* KALIAN DAS (*Plaintiff*).

[9th June 1876.]

1 A. 240.

1. *Money decree—Auction purchaser.*

An auction purchaser at a sale in execution of a mere money decree acquires only the rights existing in his judgment-debtor at the time of sale.

2. *Hypothecation—Subsequent mortgage.*

Where the holder of a hypothecation bond obtains only a money decree, and in execution of it attaches, brings to sale and purchases the hypothecated property, he cannot successfully resist the claim of the holder of a subsequent mortgage created previous to the attachment and sale, to foreclose the same. (14 B.L.R. 408=23 W.R. 187 and 7 M.H.C.R. 229, *dissented from*).

3. *Prior simple mortgage—Condition against alienation.*

The holder of a money decree, obtained on a hypothecation bond, who purchases the hypothecated property in execution of that decree, cannot urge, against the holder of a subsequent mortgage created prior to the attachment and sale, a condition against alienation contained in his bond. (H. C. R., N. W. P., 1873, p. 91, *impugned*).

Observations of Turner, J. on the nature and incidents of a simple mortgage, and the rights of subsequent incumbrancers.

[1 & 2—Ap., 1 A. 433, 1 A. 236; **Not F.**, 4 B. 57, 22 C. 33 (44); **F.**, A.W.N. (1881) 127, 4 A. 518, 29 C. 537; **D.**, 6 A.W.N. 18, 9 C.L.R. 369; **1—R.**, 8 A. 324 (339); **1 & 3—R.**, 7 C. 677 (683); **2—Ap.**, 1 A. 433 (435); **2—R.**, 10 A. 520=8 A.W.N. 210; **2 & 4—R.**, 7 B. 146 (150); **3—R.**, 13 A. 452 (443) (**F.B.**).]

Khub Chand, the defendant in the present suit, sued in 1868 on a bond of 1865—executed by the owners of the property in suit for the payment of money personally to him, in which they hypothecated the property as collateral security for such payment, stipulating to make no transfer of it until payment—and obtained a decree on the personal obligation. Plaintiff got a mortgage of the property in March 1869. Subsequent to this Khub Chand attached it in execution of his decree, brought it to sale on November 1871 and purchased it himself. The plaintiff's suit after this to foreclose his mortgage was decreed by the lower Courts.

On special appeal to the High Court by the defendant, the Court (Turner and Oldfield, JJ.) referred the case to the Full Bench, the order of reference being as follows:—

[241] The plaintiff has brought this suit to obtain possession of property by foreclosure of a mortgage under a deed dated the 28th March 1869, executed by one Sukh Lall, and, *inter alia*, to have declared null and void the right of the defendant Khub Chand to the mortgaged property as purchaser at an auction-sale on the 20th November 1871, of the rights and interests of Sukh Lal and Akhe under a money-decree obtained by him apparently in 1868 against them on their bond dated the 10th July 1865.

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It appears that the bond in favor of Khub Chand hypothecated the property, and contained a stipulation on the part of the obligors that they would not make transfers of the property hypothecated, and Khub Chand has contended, amongst other pleas, that the mortgage under which the plaintiff claims is in contravention of this stipulation and therefore in defraud of his rights, and that his purchase must be held free of the plaintiff's claim.

Khub Chand also pleaded that the plaintiff was in collusion with Sukh Lal to defraud him, but the lower Courts have decided that the plaintiff's mortgage is a *bonâ fide* transaction so far as the plaintiff is concerned.

The question which arises, and which we refer to a Full Bench is this, whether, under the circumstances stated, Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, or whether he has, in **[242]** consideration of his bond, a further right, and can successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865.

Amongst other decisions bearing more or less on the question, we notice the following of this Court:—*Rajah Ram* v. *Baine Madho* (1); *Lahan Bibi* v. *Gouri Parshad* (2); *Sheobart Lal* v. *Ramnandan Lal* (3); *Kulwant Sahu* v. *Ragho Nath* (4); *Oomrao Singh* v. *Shimbhoo Nath* (5); also of the Calcutta Court—*Momtozooddeen Mahomed* v. *Rajcoomar Dass* (6); and of the Madras Court—*Ramu Naikan* v. *Subbaraya Mudali* (7).

OPINIONS OF THE FULL BENCH.

STUART, C.J.—My answer in this reference is that, under the circumstances stated, Khub Chand's purchase cannot prevail against or be held free of the plaintiff's claim, but that the plaintiff is entitled to a decree against the property under his foreclosure suit. Khub Chand's decree was merely a money-decree, and the condition in his bond against alienation to others was merely personal to him and Sukh Lal, and although it might give Khub Chand a claim for **[243]** damages against his debtor, it could in no way affect the right of a subsequent mortgagee in enforcing his lien. No other or further right can be allowed to Khub Chand, and he therefore cannot be permitted to contest the plaintiff's claim.

PEARSON, J.—The rights and interests of his judgment-debtors were sold, not in virtue and pursuance of the lien created by the instrument of the 10th July 1865, but in execution of the decree of 1868, which was merely a money-decree, and were purchased by Khub Chand subject to the rights which had been acquired by the plaintiff under the instrument of the 28th March 1869. The stipulation in the earlier instrument, by which the mortgagor was precluded from alienating the property hypothecated for the purpose of securing the debt while the debt should remain unpaid, was only intended to preserve and fortify the lien which the hypothecation

(1) H.C.R., N.W.P., 1873, p. 81.
(2) Unreported.
(3) Unreported.
(4) Unreported.
(5) H.C.R., N.W.P., 1870, p. 38.
(6) 14 B.L.R., 408=23 W.R. 187.
(7) 7 M. H.C.R., 229.

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created and cannot be enforced apart from that lien. Khub Chand has never enforced that lien; he contented himself with a money-decree and chose to buy himself the rights and interests remaining to his debtors in the property at the time of the auction-sale. The rights and interests which they had conveyed to the plaintiff by the instrument of the 28th March 1869, were not affected by that sale; and so long as Khub Chand abstains from enforcing his prior lien, he cannot plead the stipulation in the instrument executed in his favour as invalidating the transfer subsequently made to the plaintiff. That stipulation does not place him on the footing of a purchaser in virtue of the lien to which the stipulation is attached. On the contrary, the position which he holds at present is no better than would be that of any stranger who might have purchased the property which he purchased in execution of his own decree. It cannot be pretended that any stranger so purchasing it could have claimed to be protected in the purchase by reason of the stipulation in the bond. The sale did not carry with it the lien which belonged to the bond holder, but only disposed of such rights and interests as still belonged to the bond-debtors. The foregoing remarks embody the opinion which I desire to express in answer to the question referred to the Full Bench.

TURNER, J.—To determine the question raised in this reference it is necessary to consider the nature and incidents of a simple mortgage. A simple mortgage cannot be better defined than in **[244]** the terms adopted by Mr. Justice Macpherson in his work on mortgages. It is an arrangement by which the borrower, binding himself personally for the repayment of a loan, pledges his land as a collateral security. It comprises then two contracts, a personal obligation on the part of the mortgagor to pay the debt, and a contract empowering the mortgagee to have recourse to the property pledged as a collateral security. The pledge does not directly confer on the mortgagee the power of sale. In order to make his security available he must obtain an order of a Civil Court directing a sale. The mortgagee, in the case of a simple mortgage, has, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation.

He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only he obtains what is known as a money-decree; if he sues on the contract of hypothecation, he obtains only an order for the sale of the property.

Notwithstanding the pledge the mortgagor remains the owner of the property, and may deal with it in any manner he pleases not inconsistent with the condition of the mortgage. Subject to the charge created by the mortgage, he may aliene his property in part or wholly.

Such being the nature and incidents of a simple mortgage, I proceed to consider whether there is any, and if any what distinction between the interest which passes to a purchaser of the mortgaged property if it be sold under a decree pronounced in a suit brought to enforce the charge and ordering the sale, and the interest which passes to a purchaser if the mortgaged property be sold under a money-decree obtained on the personal obligation.

It appears to me there is a great difference in the two suits and a great difference in the operation of the decrees which can be obtained in the two suits. If the holder of a simple mortgage elects to enforce his pledge and that pledge be, as it usually is, a pledge of immoveable property, he must bring the suit in the district in which the property is situated, and

if he sues solely on the contract of hypothecation, he can obtain only a decree ordering the sale of [245] the pledge; he cannot have recourse to the other property of the judgment-debtor. But the sale will pass not merely the rights of the judgment-debtor existing at the time of the sale, but the rights of the judgment-debtor existing at the date of the pledge and will be binding on all persons who are parties to the suit. To a suit then to enforce the hypothecation it is advisable for the creditor, though it is not incumbent on him, to make all subsequent encumbrancers parties, and if such encumbrancers apply to be made parties, the Court should admit them under S. 73, Act VIII of 1859, and I may add, although it is not the custom in these Provinces, that in passing a decree in such a suit to which subsequent encumbrancers are made parties, the Court ought to give subsequent encumbrancers an opportunity to come in and redeem the prior encumbrance.

Of course such subsequent encumbrancers, if they are not made parties, might at any time before sale come in and redeem and they will not be bound by the decree, but if they do not redeem and a sale takes place, their liens will be defeated unless they can show something more than the existence of the subsequent encumbrances, some fraud or collusion which entitled them to defeat the first encumbrance or to have it post-poned to their own.

It appears to me doubtful whether it is necessary for the holder of a decree ordering a sale for the enforcement of a lien to proceed in execution by attachment and order for sale. If the decree is properly drawn up he has already obtained an order for sale. The Procedure Code is, I think, defective in that it contains no special provision for the execution of such decrees. They do not fall under Ss. 199, 200, 201, or 202, and the provi-sions of S. 232 appear to apply to such decrees as are mentioned in S. 201. In practice no doubt such decrees have been in default of special provisions executed in the same manner as money-decrees.

On the other hand, if the holder of a simple mortgage puts in suit merely the personal obligation of the mortgagor, he need not necessarily sue in the district in which the property which is the subject of collateral security may be situated. To such a suit subsequent encumbrancers would not properly be made parties: the decree would be a mere money-decree conferring on the decree-[246]holder the right to obtain its satisfaction by levying the amount for any property of the judgment-debtor. He is not confined to the estate under mortgage. He must proceed by attach-ment and sale, and what he attaches and sells is the property of the judgment-debtor, that is to say, the rights and interests of the judgment-debtor, subsisting at the time of the sale—*Mahomed Buksh* v. *Mahomed Hossein* (1). Such property passes by the sale as the judgment-debtor could convey by private sale.

In *Syed Nadir Hossein* v. *Pearoo Thovildarinee* (2)—Mr. Justice Pontifex has ruled that sale of the mortgaged property under a money-decree passes with it the lien; and in *Momtazooddeen Mahomed* v. *Raj-coomar Dass* (3), the majority of the Court declared that, where a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property it becomes absolutely vested in the purchaser. The reasons on which these

(1) H. C. R., N. W. P., 1868, p. 171.
(2) 14 B. L. R., 425 note.
(3) 14 B. L. R., 408=23 W.R., 187.

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rulings proceed I understand to be the following—the mere taking of a money-decree does not destroy the lien, and it continues an incident to the debt when it passes from a contract-debt into a judgment-debt—as the creditor cannot sell the property and retain the lien, it must continue in existence so far as is necessary for the protection of the purchaser. It cannot be doubted that the mere taking of a money-decree does not destroy the lien, and that it continues a collateral security for the debt when it has merged in a judgment-debt, but I fail to see on what ground it can be held that the collateral security has passed by the sale or continues in existence to protect the purchaser. The mortgagee has not in the case supposed elected to avail himself of the collateral security. The lien subsists nevertheless until the debt is discharged, when the object for which it was created fails, and it ceases.

We have not now to consider whether the holder of a simple mortgage, if he proceeds on the personal undertaking, and obtaining a money-decree, brings to sale the mortgaged property, can after-[247]wards sue the auction-purchaser to enforce his lien for any sum that may not have been satisfied by the sale in execution of the money-decree. In such a case it may be that, unless he gives notice at the sale of his intention to retain the lien, it would be held he had waived it. We have to consider whether the interests of third parties and the liens of intermediate incumbrancers can be defeated by a sale of the mortgaged property under a mere money-decree. In *Ramu Naikan* v. *Subbaroya Mudali* (1), it was held that the purchaser under a money-decree could avail himself of the lien of the original encumbrancer as a shield and so defeat subsequent encumbrancers, and doubtless this ruling is supported by the dicta of the High Court of Calcutta to which I have referred, namely, that the collateral security passes to the auction-purchaser. The Calcutta High Court allowed that the fact that property is mortgaged to one is no bar to the mortgage or sale of the equity or right of redemption to another. Let it be assumed that the mortgagor sells his interest absolutely, then if the mortgagee sues on the personal undertaking only he must sue the original mortgagor, he cannot implead the purchaser, and if he obtains a decree he can enforce it only against the property of the mortgagor who *ex hypothesi* has no interest left in the mortgaged property, and if, instead of selling the mortgaged property he sells the property of the mortgagor, no interest in the collateral security can pass by such a sale to the purchaser.

In the case now before the Court the mortgagor, instead of making a transfer of the whole of his interest in the property pledged, aliened it in part by the creation of a subsequent encumbrance in the nature of a conditional mortgage. He thereby conferred on the conditional mortgagee the right to redeem the first mortgage at whatever time it could have been redeemed by the mortgagor, and the right in the event of default being made in payment of the debt due to him to foreclose and hold the property subject to the first encumbrance. The estate of the second encumbrancer having been created before the attachment and sale in execution of the money-decree cannot be destroyed by the sale, for in my judgment the original[248]mortgagor did not take the steps necessary to entitle him to enforce his collateral security, and the sale in execution of his decree on the personal obligation passed only the rights and interests of the mortgagor subsisting at the time of the sale, and those rights in the mortgaged property were then burdened with the charge created in favour of the conditional mortgagee.

(1) 7 Mad. H.C.R., 229.

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It remains to be considered whether an auction-purchaser in execution of a money-decree can avail himself of a condition in the mortgage-deed prohibiting alienation. I was a party to the decision of this Court in the case of *Rajah Ram* v. *Baince Madho* (1), in which it was held that the existence of such a condition enabled the auction-purchaser to resist the claim of a second encumbrancer. On fuller consideration I am not prepared to support that ruling. The condition is attached to the charge and not to the personal obligation of the mortgagor, and if the first mortgagee, who can only enforce the charge by suit, elects to abstain from pursuing that remedy and sues on the personal obligation only, I am of opinion that the auction-purchaser cannot plead the condition attached to the lien any more than he can plead the lien. I would reply that Khub Chand, having purchased under a mere money-decree the interest at the time of sale remaining in the judgment-debtor, stands in the place of the judgment-debtor in respect of the interest he acquired by the purchase, and that he cannot resist the claim of the plaintiff to obtain possession of the property.

SPANKIE, J.—On the case stated to us I should say that Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, and that he has not, in consideration of his bond, a further right, and cannot successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865. It seems to me that we have decided a very similar point in Full Bench in the case of *Akhe Ram* v. *Nand Kishore* (2).

OLDFIELD, J.—Looking to the course of rulings by this Court on the question raised in this reference and the rule *stare decisis*, **[249]** I would reply to this reference that the auction-purchaser at a sale in execution of a mere money-decree acquires only the rights remaining in the judgment-debtor at the time of sale.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner and Mr. Justice Oldfield.

KARIM BAKSH AND ANOTHER (*Plaintiffs*) *v.* BUDHA (*Defendant*).

[9th June 1876.]

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1 A. 249.

Public thoroughfare—Suit to remove encroachment—Maintainability—Act X of 1872, S. 521.

A suit to remove an encroachment on a public road or thoroughfare cannot be maintained without an allegation of special injury.

[F., 10 A. 162, 10 A. 498 ; **Ap.**, 9 M. 463 ; **R.**, 10 A. 543 ; **D.**, 9 A. 434.]

In a suit for the removal of a portion of a "chabutra," as an encroachment on a certain road, the Court of first instance found that the road was not a public thoroughfare but the private property of the parties to the suit and other persons, and the lower appellate Court held, on the assumption that the road was a public thoroughfare, that, as the plaintiffs alleged no special damage, the suit was not maintainable.

The plaintiffs on special appeal to the High Court urged that the road was not a public thoroughfare, and that, even if it were, the lower appellate Court was wrong in holding that the suit was not maintainable.

(1) H. C. R., N. W. P., 1873, p. 81.

(2) 1 A. 236.

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1 A. 249.

JUDGMENT.

[250] If the road is a public thoroughfare, then, inasmuch as the plaintiffs alleged no special injury, the suit for the removal of the encroachment cannot be maintained—*Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (1); *Pyari Lal* v. *Rooke* (2); *Hira Chand Banerjee* v. *Shama Charan Chatterjee* (3). There is, it is true, a decision to the contrary —*Jina Ranchod* v. *Jodha Ghella* (4), but the weight of authority supports the view taken by the Judge, which accords with the English law on the subject and is based on principles well understood. But it must be determined whether the road in suit is a public thoroughfare.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner and Mr. Justice Oldfield.

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ZAIBULNISSA BIBI (*Defendant*) *v.* KULSUM BIBI (*Plaintiff*).

[16th June 1876.]

1 A. 250.

APPEL-LATE CIVIL.

Limitation—Act IX of 1871, S. 5-b—Appeal—Sufficient cause.

1. An error in the calculation of the time for presenting an appeal is not a sufficient cause for presenting it beyond time.

2. In admitting an appeal presented after time, the Court should record its reasons for being satisfied that there was sufficient cause for the delay.

1 A. 250. [R., 6 B. 304.]

On the 26th July, 1875, the date on which the Court of first instance dismissed the plaintiff's suit, the plaintiff applied for a copy of the Court's decree which was furnished to her on the 31st July. On the 31st August (one day beyond the period allowed by law) she presented her appeal to the lower appellate Court without assigning any cause for not presenting it within the period of limitation. The appellate Court excused the delay, admitted the appeal and gave the plaintiff a decree. The defendant appealed to the High Court. He objected that the lower appellate Court was not competent to admit the appeal after the period of limitation allowed by law without finding that the plaintiff had sufficient cause for not presenting it within such period.

JUDGMENT.

[251] We admit the validity of these objections. Assuming the Judge considered the excuse now alleged for the delay in the presentation of the appeal in the Court below (of which there is no proof), [252] we cannot hold that an error in the calculation of the time allowed was, under the circumstances, sufficient cause for the delay. We decree the appeal, and, reversing the order of the lower appellate Court, reject the appeal presented to the Judge on the ground that it was barred by limitation. The appellant will recover costs in this and the lower appellate Court from the respondent.

(1) 3 B.L.R., A.C., 295=12 W.R., 160.
(2) 3 B.L.R., A.C., 305; 3 B.L.R., App. 43=11 W.R., 434.
(3) 3 B.L.R., A.C., 351.
(4) 1 Bom. H.C.R., 1.

PRIVY COUNCIL.

PRESENT :

Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier.

On Appeal from the Court of the Judicial Commissioner, Oudh.

MIRZA MAHOMED AGA ALI KHAN BAHADOOR *v.* THE WIDOW OF BALMAKUND AND OTHERS.

[22nd June 1876.]

26 W.R. 82 = 3 Suth. P.C.J. 330 = 3 I.A. 241 = 3 Saraswati's P.C.J. 648.

1. *Act VIII of 1859, Ss. 201, 205, 206, 216, 236—Rights of decree-holder.*

Under the C.P.C., 1859, as well as the English Law, a judgment for moneys due on a debt does not vest in a judgment-creditor any portion of the property of his judgment-debtor. So a judgment-creditor cannot entertain a suit for the unsatisfied balance of his decree against a person alleged to have received the assets of his judgment-debtor after the latter's death.

2. *Ibid.—Possessor of right bound to adopt course prescribed by law for enforcing it.*

When the Legislature has prescribed a particular mode of enforcing a right by a decree, the possessor of that right is bound to follow the procedure prescribed and no other. The proper mode of enforcing a decree is that pointed out by the C.P.C., *viz.*, by execution and attachment and sale or by execution and attachment and the appointment of a Receiver under S. 243 (Act VIII of 1859) to collect the property.

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= 3 Suth. P.C.J. 330 = 3 I.A. 241 = 3 Saraswati's P.C.J. 648.

JUDGMENT.

SIR BARNES PEACOCK gave judgment as follows :—

[82] This is an action brought to recover Rs. 12,420, being the value of a one-seventh share of Jaidyal, a judgment-debtor, in the property left by Ishri Dass, his father. The allegation in the plaint is that this amount is due from the defendants, who hold the property. The claim is based on a decree which the plaintiff obtained in the Civil Court at Lucknow on the 20th November 1863, for Rs. 14,460, against the aforesaid Jaidyal, who died, leaving the decree against him unsatisfied; and the plaint alleges that that decree gives the plaintiff a right to institute the present suit. The plaint states that: "The property of the judgment-debtor being one-seventh share in the legacy of his father, Ishri Dass, is in possession of the defendants, his brothers. Bisheshoor Pershad, one of the brothers of the judgment-debtor, the defendant No. 5, realised the debts due to the saltpetre firm of his father to the amount of Rs. 14,280-6, and the plaintiff obtained a decree from the Civil Court of Lucknow on the 7th September 1866, for Rs. 2,040-0-10, equivalent to one-seventh share of the judgment-debtor, in the collections made by defendant No. 5, and recovered the amount of this decree. This decree was confirmed by the Judicial Commissioner on the 16th March 1867." The original judgment therefore was reduced from Rs. 14,460 to the amount sought to be recovered. The plaint proceeds: "The plaintiff now sues the defendants, who hold the property of the judgment-debtor in their possession, for that portion of the decree against Jaidyal which has not been satisfied, and prays that, after a due enquiry, adjustment of accounts, and the determination of the value of the legacy of Ishri Dass out of the share which may be found due to the deceased judgment-debtor, the amount claimed may be decreed to plaintiff with costs of the Court, and interest up to the date of realization." The defendants put in written statements; one of them stated that the plaintiff was not the legal representative of Jaidyal, and therefore could not sue, and the other said that there was

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26 W.R. 82 =3 Suth. P.C.J. 330 = 3 I.A. 241 = 3 Saraswati's P.C.J. 648.

no privity. The real question in this case is, whether the decree gave the plaintiff a right to institute the present suit; in other words, whether a judgment-creditor has by virtue of the judgment, without execution, a right to the property of the judgment-debtor, whether it consists in lands, in moveable property, or in debts. The plaintiff contends that by virtue of this judgment he became entitled to the property of his judgment-debtor, and was entitled to recover it from the persons in whose hands it was.

The Civil Judge who tried the cause in the first instance dismissed the suit. Upon appeal to the Commissioner, he held that the suit was maintainable. and awarded to the plaintiff the amount claimed, on the ground [83] that certain books had not been produced, and that he was entitled in consequence, under S. 170 of Act VIII of 1859, to give a decree to the plaintiff for the full amount claimed.

The case afterwards went before the Judicial Commissioner, who reversed the decision of the Commissioner. He held that the decree of the Civil Judge in the instance was the correct one; and that the judgment which the plaintiff had recovered against Jaidyal did not vest in him the property of Jaidyal, or the value of it. Their Lordships are of opinion that the view taken by the Judicial Commissioner was correct, and that a judgment does not vest in a judgment-creditor any portion of the property of his judgment debtor. It gives him a right to have the judgment executed, but until execution, the property of the judgment-debtor does not vest in the judgment-creditor simply by virtue of the judgment. That is so according to the law of this country, and it is also the case under the Code of Civil Procedure, Act VIII of 1859, which is the law in force in India. By S. 206 it is enacted that no moneys which are payable under a decree are to pass into the hands of the judgment-creditor except through the intervention of the Court. It is expressly provided that "all moneys payable under a decree shall be paid into the Court whose duty it is to execute the decree, unless such Court or the Court which passed the decree shall otherwise direct." A judgment-debtor is not justified in paying the money to the judgment-creditor unless the Court makes an order to that effect; but he is bound to pay it into Court, so that there shall be no dispute afterwards as to whether the money has or has not been paid over to the judgment-creditor. Further, it is enacted that "no adjustment of a decree in part or in whole shall be recognised by the Court unless such adjustment be made through the Court or be certified to the Court by the person in whose favor the decree has been made or to whom it has been transferred." And it has been held upon that section that if a judgment-debtor chooses to pay the money otherwise than through the Court, he must take the risk of being compelled to pay it over again.

Now, if this suit could be maintained, how is the money to get into Court? If the judgment of the Commissioner be upheld, the plaintiff would be entitled to levy the amount against the defendants in the suit, and the money would never pass through the Court at all. Therefore, even looking at that Section of the Act alone, it would be clear that this suit cannot be maintained. But the Act provides (S. 201) that if "the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary." Therefore, the decree is to be satisfied, not by bringing an action against the debtors of the judgment-debtor, or those who hold his property, but it is to be enforced by the attachment and sale of the property of the judgment-debtor. Then the Act points out the mode in which the property is to be attached, and the different classes of property which are liable to be attached. By S. 205,

"the following property is liable to attachment and sale in execution of a decree, namely, lands, houses, goods, money, bank notes, cheques, bill of exchange, promissory notes, Government securities, bonds or other securities for money, debts, shares, and so on." It is not clear what the one-seventh of the legacy alleged to be in possession of the defendants was: whether it consisted of lands or of money. If it was land or money, it was liable to be attached under S. 205, and if it was a debt due from the defendants, to Jaidyal, it was also [84] liable to be attached. The Act having stated what property is liable to attachment, goes on specifically to point out the mode in which the property is to be attached. If it is land, it is to be attached in a particular manner; if it is goods, it is to be attached in another manner; if it is a debt, it is to be attached in the manner provided by S. 236. By S. 236, "Where the property shall consist of debts not being negotiable instruments, the attachment shall be made by a written order, prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever, until the further order of the Court." Having described the property liable to be attached, and the mode of attachment, the Act proceeds to point out how sales are to be conducted.

It has been pointed out by Mr. Leith in the argument that if an action such as this could be supported, all the provisions of the Code would be frustrated.

By S. 216 of the Act it is provided that "if an interval of more than one year shall have elapsed between the date of the decree and the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue a notice to the party against whom execution may be applied for, requiring him to show cause, within a limited period to be fixed by the Court, why the decree should not be executed against him."

Now the decree against Ishri Dass was obtained as far back as the 20th November 1863. If the plaintiff had applied for execution on the same date as that on which he commenced the suit, a much longer period than a year would have elapsed between the date of the decree and the date of the application for execution. Then it would have been necessary for the Court to issue a notice to the party against whom execution was applied for, requiring him to show cause, within a limited period to be fixed upon, why the decree should not be executed against him. It would have been necessary in this case, Jaidyal being dead, to have called upon some one who was his representative, to show cause why the judgment should not be executed, because after a year it would be presumed that the judgment might have been satisfied. But then there is the provision in S. 216, that "no such notice shall be necessary in consequence of an interval of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of the last order passed on any previous application for execution." It appears that an application was made for a certificate from the Court at Lucknow, in which the decree had been passed, to the Court at Sultanpore, for the purpose of having it executed. Many objections were made by the person against whom the execution was to issue, and Mr. Young, the Deputy Commissioner, on the 29th July 1868, made this order: "Judgment-creditor now says Jaidyal's claim consists of debts and land; on his making proper application these can be attached; but in the event of Balmakund declining to pay, I am clearly of opinion that the only way to compel him is by regular suit, and I shall then be ready to appoint a receiver. Judgment-creditor's applica-

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PRIVY COUNCIL.

26 W.R. 82 =3 Suth. P C.J. 330 = 3 I.A. 241 = 3 Saraswati's P.C.J. 648.

tion is refused, and case to be struck off the file of pending cases." That order was passed on the 29th July 1868, and it appears to be the last order that was passed upon an application for execution. This action was not commenced until the 25th April 1871, which was more than two years after that order had been passed. The plaintiff could not have obtained execution of this judgment if he had applied for execution without proceeding under S. 216, and having Jaidyal's [85] representative summoned to show cause why execution should not issue. Then can he commence this action, two years and more after that last order was passed, without calling upon any one representing Jaidyal to show cause why he should not levy this money? The presumption is, that after this period the debt has been satisfied. The plaintiff could not have executed the decree until he had given notice to some one representing Jaidyal to show cause why the execution should not issue; but if this action can be maintained, then, as Mr. Leith has very properly observed, the plaintiff would be enabled to enforce his decree behind the back of and without notice to the representatives of Jaidyal.

Their Lordships are clearly of opinion that in this case the decree did not vest in the plaintiff any right to the property for which he is suing, and consequently that he cannot maintain the suit. The Judicial Commissioner has very clearly laid that down in his judgment. He says at p. 139:—"This suit, as laid, is not a suit to establish the plaintiff's judgment-debtor's title to certain definite property previously attached, but is preferred on the assumption that the plaintiff, by virtue of his decree, occupies the position of his judgment-debtor, and is therefore entitled to establish his claim to a certain share of the estate left by his judgment-debtor's father." In another part of his judgment he says, and their Lordships quite agree with him in that remark, that "if every decree-holder could proceed by regular suit to enforce his decree, all the provisions in the Civil Procedure Code in regard to executions of decrees would be of no avail. But it is evident to the Court that where the Legislature has prescribed a particular mode of enforcing a right created by a decree, the possessor of that right is bound to follow the procedure prescribed, and no other." In this case the procedure prescribed is to proceed to execute the judgment by attachment and sale, if necessary, and not to proceed by action. If an action like this could be maintained,—if the plaintiff could recover these Rs. 12,420 from the persons in possession of the judgment-debtor's property—what answer would they have if another execution creditor were to ask to attach the same property and to sell it? Could they have the property attached in their hands and taken from them when they had paid Rs. 12,420? And how could the difference be ascertained if the Rs. 12,420 should not be the full value of the property liable to attachment? How could any other creditor get the difference between the Rs. 12,420 and the actual value of the property? He must be driven to a suit or he must take the property. If he attach the property, then it would be taken from the defendants, after having been compelled to pay the Rs. 12.420; if he could not attach the property, then he must be driven to a suit, and must be deprived of his right to execution of the decree.

It appears to their Lordships that the proper mode of enforcing a decree is that pointed out by the Code of Civil Procedure, namely, by execution and attachment and sale, or by execution and attachment and the appointment of a receiver under S. 243 to collect the property.

Their Lordships are of opinion that the Judicial Commissioner came to a right conclusion, and they therefore will humbly recommend Her Majesty to affirm his decision, and to dismiss this appeal, with costs.

APPELLATE CIVIL.

1876

JUNE 26.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

APPEL-LATE CIVIL.

TULSI RAM AND OTHERS (*Defendants*) *v.* GANGA RAM (*Plaintiff*).

[26th June 1876.]

1 A. 252.

1 A. 252.

Act VIII of 1859, S. 7.

The bar, under section 7 of Act VIII of 1859, applies to cases in which the plaintiff omits to seek relief in respect of a portion of a claim, and not to cases in which, though he may be entitled to claim more than one kind of relief, he seeks, for the time, one remedy only.

Where the purchaser of certain lands, who was in a position to have sued for possession, sued at first only for a declaration of his title under the sale, *held*, in a subsequent suit by him for possession, that he was not barred.

[Ap., 8 C. 483 **(F.B.).]**

JUDGMENT.

[253] The plaintiff sued to obtain possession of 4 bighas, 12 biswas of land out of 92 bighas, 12 biswas, and one-fourth of 1 bigha, 11 biswas (jureebi), situate in Thoke Muhoor, Mauza Rahtori, together with mesne profits for three years.

It appears that, on December the 23rd, 1862, Baldeo, the father of the defendants, sold the lands in suit with other lands to the plaintiff, and with a view, it is said, of confirming his title, he in 1864 sued for and obtained a decree declaring his rights under the sale. It is admitted that he had not at the time of the institution of the declaratory suit and that he has not up to the present time obtained possession.

The defendants pleaded *inter alia*, that the suit was barred by the provisions of S. 7, Civil Procedure Code. The Munsif allowed the plea and dismissed the suit without trial on the merits. The lower appellate Court held that the suit was not barred and remanded it for trial under S. 351, Civil Procedure Code. The lower appellate Court considered that S. 7 applies to cases in which the plaintiff omits to seek relief in respect of a portion of his claim, and not to cases in which, although he may be entitled to claim more than one kind of relief, he seeks for the time one remedy only.

In our judgment the lower appellate Court has properly interpreted the provisions of the section referred to. We have not now to consider whether the plaintiff ought to have obtained a declaratory decree, seeing that he might have obtained that relief in an ordinary suit for possession. We have to determine whether, in seeking a declaratory decree to establish his purchase-deed, and omitting to sue for possession, he can be held to have omitted any portion of the claim arising out of the cause of action he then put in suit. The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession. The plaintiff might have obtained a declaratory decree without entering on the question of possession. For these reasons we hold that S. 7 is inapplicable, and we consequently affirm the order of the lower appellate Court and dismiss the appeal with costs.

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JUNE 26.

APPEL-LATE CIVIL.

1 A. 254.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

TIMAL KUARI (*Plaintiff*) *v.* ABLAKH RAI AND OTHERS (*Defendants*).

[26th June 1876.]

1 A. 254.

Act XVIII of 1873—Limitation Act, IX of 1871, S. 15—Applicability.

Semble, Act XVIII of 1873 being a special law, the provisions of the Limitation Act, 1871, relating to disability, prosecutions of remedies in wrong Courts, etc., do not apply to suits and applications under the former Act (XVIII of 1873).

On an application by the plaintiff (who was illegally ejected from certain lands in or before 1873) in January 1876 under S. 95, cl. (*n*), Act XVIII of 1873, for recovery of possession of the same, the Assistant Collector, on the objection of the defendant, referred to the District Judge the question whether the provisions of S. 15, Act IX of 1871, applied to applications under Act XVIII of 1873 or not? The District Judge relying on H.C.R., N.W.P., 1873, page 30 and 5 W.R., Act X, Rulings 44, decided that they did not apply either to suits or applications. The plaintiff appealed against this decision to the High Court.

JUDGMENT.

[255] The appellant rightly contends that the Assistant Collector had no power to make the reference, and that consequently the Judge's opinion cannot be regarded as authoritatively binding on the Assistant Collector and the parties to the proceeding. It is not necessary for us to go on to consider the validity of the second plea, but we may notice that the opinion recorded by the Judge appears to be in conformity with the ruling of the Privy Council in *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (1), in which it was held that the analogous provisions of S. 14, Act XIV of 1859, do not apply to suits instituted under Act X of 1859, because the latter is a special law. On similar grounds it was ruled in *Mahomed Bahadur Khan* v. *The Collector of Bareilly* (2) that the provisions of the Limitation Law relating to disability do not apply to enlarge the period of limitation prescribed by Act IX of 1859. We must, however, declare the reference to the Judge has no legal effect and his opinion cannot be held binding on the parties. We order the Judge to return the reference to the Assistant Collector, that it may be submitted through the proper channel should the Collector think fit to make a reference, and we shall direct each party to bear his own costs.

FULL BENCH.

PRESENT:

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

FULL BENCH.

SHAM KUAR AND OTHERS (*Defendants*) *v.* GAYA DIN AND ANOTHER (*Plaintiffs*). [28th June 1876.]

1 A. 255=1 Ind. Jur. 198.

Hindu Law—Adoption—Inheritance.

An adopted son succeeds to property. which has descended to his adoptive mother as heiress of her father.

[F., 6 C. 256 (F.B.); R., 33 B. 404, 11 Bom. L.R. 641.]

1 A. 255=1 Ind. Jur. 198.

(1) 15 B.L.R. 60 note=19 W.R., 5.

(2) 13 B.L.R., 292=1 I.A. 167.

REFERENCE TO THE FULL BENCH.

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TURNER and SPANKIE, JJ. referred the following question to the Full Bench, *viz.*—

"Whether an adopted son is entitled to succeed to property which descended to the wife of the adopting father as the heiress of her father."

OPINION OF THE FULL BENCH.

[256] Looking to the object of the rite of adoption, we find it to be to ensure by providing a son the spiritual benefit of the adoptive father and the perpetuation of his family name (Dattaka Mimansa, Ss. 1—9), rather than to obtain any benefit for the adoptive mother, whose happiness in a future state is not so dependent on having a son to perform the funeral obsequies and can be otherwise secured (Dattaka Mimansa, S. 1, v. 29), and it is also the fact that the wife has no power to adopt on her own account, the right being absolute in the husband. Such being the case, there is no doubt at first sight much force in the contention that the adoption of a son merely affiliates him in the family of the adoptive father, and not of the adoptive mother, and that he cannot in consequence succeed by inheritance to the property which descended to his adoptive mother **[257]** as heiress of her father. But on the other hand we find that the wife is associated in making the adoption with the husband, and its effect is declared to be to make the adopted child the son of the adoptive mother as well as of the adoptive father.—"By the husband's mere act of adoption the filiation of the adopted son, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband"—Dattaka Mimansa, S. 1. v. 22. Nowhere do we find it stated that there is any difference in the effect obtained by this filiation with reference to the son's position towards the adoptive father and mother or their families, while we know that in respect of the natural father and mother the effect is alike to completely sever the adopted son from the families of both.—"A given-son must never claim the family and estate of his natural father. The funeral cake follows the family and estate, but of him who has given away his son the obsequies fail"—Dattaka Mimansa, S. 6, v. 6. "The estate of the maternal grandfather also like that of the father lapses from the son given"—Dattaka Mimansa, S. 6, v. 51. When the separation is so complete from the natural father and mother's family, in the absence of texts to the contrary, it may perhaps be not assuming too much to infer that the affiliation by adoption is into both families of adoptive father and mother. But we have what seems to be an express text to that effect. Dattaka Mimansa, S. 6, v. 50 declares—"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest: for the rule regarding the paternal is equally applicable to the maternal grandsires of adopted sons." There is also another fact which affords the strongest argument in favour of the adopted son's right of succession, and this is that he has the right to perform funeral obsequies to his adoptive mother's father. In Dattaka Mimansa, S. 6, vv. 52, 53, we find—"Accordingly Hemadri himself, from not being satisfied with that (just stated), has advanced the other position: 'In the same manner as for the secondary father, a funeral repast must be performed in honour of the secondary maternal grandfather and the rest.' And this even is proper. The adopted son as substitute for the real legitimate son being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the manes in honour of whom a legitimate son performs

1 A. 255=1

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1 A. 255 = 1 Ind. Jur. 198.

[258] such repast." This right of performing the obsequies indicates a right of heirship in the family of the adoptive mother. We have seen the rule laid down by Manu to be—"A given-son must never claim the family and estate of his natural father," and the reason assigned is because "the funeral cake follows the family and estate," and the same reason is assigned in v. 51, S. 6, Dattaka Mimansa, why the given-son cannot claim the estate of his natural maternal grandfather—'the funeral cake follows the family and estate;' "the family and estate are declared to be the cause of performing the funeral repast." So when we find that the adopted son performs by right the obsequies of his adoptive maternal grandfather, it will follow that he does so because he is amongst the heirs, or to quote the text, because "the family and estate are the cause of performing the funeral obsequies," and this doctrine of funeral cake has been held by a high authority (Sir W. Jones) to be the key to the whole Hindu law of inheritance.

Amongst decisions on the question, we find that in *Morun Moyee Debeah* v. *Bejoy Kishto Gossamee* (1), decided on the 23rd July 1863, the High Court of Bengal held that an adopted son cannot succeed to his adoptive maternal grandfather's estate when there are collateral male heirs.

There is the case of *Gunga Mya* v. *Kishen Kishore Chowdhry* (2), decided on the 17th December 1821, in which a *vyavastha* was delivered to the effect that a son adopted with the permission of her husband by a woman on whom her father's estate had devolved will not be entitled to such estate on his adoptive mother's death, but such estate will go to her father's brother's son in default of nearer heirs. This opinion was based on an interpretation given by the Daya-bhaga to the text of Manu by which the adopted son's right of succession collaterally was confined to succession to property of persons belonging to the same family as the adopting father. But that dictum was accepted by one Judge only, and the majority of the Court expressed no opinion on it, as the point did not arise in the case. The dictum has, however, been accepted by Mr. Macnaghten—Hindu Law, vol. ii, 187.

[259] Then there is the case of *Gungapersad Roy* v. *Brijessuree Chowdhrain* (3), decided by the High Court of Bengal on the 30th July 1859, in which the learned Judges considered that the doctrine laid down in the case of *Gunga Mya* v. *Kishen Kishore Chowdhry* (2) stood merely as the dictum of the Pandit who gave it, and had not been conclusively adopted by the Court and could not be said to have acquired all the authority of a recognised principle of Hindu Law to which the Sudder Court had intended to give effect, and the Court proceeded to decide the question before them, which was the converse of that before us, and held that the relations of the adoptive mother inherit the property of her adopted son just as they would inherit the property of her natural son.

In another case, *Teemcowree Chatterjee* v. *Dinnonath Banerjee* (4) the right of inheritance by the adopted son was held to be limited to the adoptive mother's stridhan, and did not extend to the property she had inherited from her father and paternal ancestors, but this limitation of the succession proceeded on the ground that the adopted son cannot perform the shradh of the adoptive mother's father, in which view the Court appears to have been mistaken.

(1) W.R., F. B., 121.
(2) 3 S.D.A. Rep., L. P., 128.
(3) 15 S.D.A. Rep., L. P., part ii, p. 1091.
(4) 3 W.R., 49.

Referring again to the decision in *Morun Moyee Debeah* v. *Bejoy Kishto Gossamee* (1), it should be noticed that in that case the Pandits of Moorshedabad and the Sudder Court gave their opinion that a legally adopted son can inherit the property of the adopting mother's father. They thus differed from the dictum given in 1821, and it should be also noticed that this *vyavastha* of 1821, on which the Judges in *Morun Moyee Debeah* v. *Bejoy Kishto Gossamee* principally relied, has special reference to the Daya-bhaga law, and will not have equal weight in deciding the question before us, which must be governed by the Dattaka Mimansa and Mitakshara.

On a full consideration of the question there seems no valid reason to doubt that the adopted son does succeed to property which descended to his adoptive mother as heiress of her father.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

1876 JUNE 29. —

JAGAN NATH (*Defendant*) *v.* LALMAN (*Plaintiff*). [29th June 1876.]

APPELLATE CIVIL. —

1 A. 260.

1 A. 260.

Appeal—Institution—Memorandum of appeal—Act VIII of 1859, S. 336.

1. In returning a memorandum of appeal, under S. 336, Act VIII of 1859, for being corrected, the Court should fix a time within which it should be represented.

2. In a case where the Court omitted to fix the time, and the memorandum of appeal was represented a few days after, *held*, that (for purposes of limitation) the appeal must be taken to have been instituted on the day when it was first presented.

An appellant (defendant) presented an appeal two days before the expiry of the period of limitation and the lower appellate Court returned the memorandum of appeal for correction without specifying any time within which the appeal should be again presented. Two or three days after the expiry of the period of limitation the appeal was again presented, and admitted. On the objection of the plaintiff, the lower appellate Court held that the defendant had shown no sufficient cause for not presenting it within time and dismissed it as barred by limitation. The defendant appealed to the High Court.

JUDGMENT.

[260] We are unable to hold that the appeal was presented after the proper time, for the date of its presentation is the date on which it is first presented to the officer. In returning the application that **[261]** the grounds of appeal might be amended, the Judge should have prescribed a time within which it should have been again presented in an amended form. The case of *Ismail Sahib* v. *Arumuga Chetti* (2) appears to be in point. The decree of the lower appellate Court is set aside and the case remanded under S. 351 for trial by the lower appellate Court.

(1) W.R. F.B. 121.

(2) 1 Mad. H.C.R. 427.

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JUNE 29.

APPEL-LATE CIVIL.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

TOTA RAM (*Defendant*) *v.* SHER SINGH AND OTHERS (*Plaintiffs*).

[29th June 1876.]

1 A. 261 = 1 Ind. Jur. 171.

Act XVIII of 1873, S. 93, cl. (h)—Suit for profits—Interest.

In a suit for profits, under clause (*h*), S. 93 of the Rent Act, a Revenue Court has power to award interest claimed on such profits.

[R., 6 O.C. 89.]

In a suit for profits, together with interest, of a certain mahal, under S. 93, cl. (*h*), Act XVIII of 1873, by some of the co-sharers, both the Court of first instance and the lower appellate Court gave them a decree for the full amount claimed. The defendant preferred a special appeal to the High Court contending that it was not competent to the first Court to give a decree for the interest claimed.

JUDGMENT.

[262] It is true that the Rent Act does not expressly declare that interest will accrue on other sums which may be recovered in the Revenue Court except sums due in respect of rent, but neither does it declare the Revenue Courts incompetent to award interest, and it would be contrary to the policy of the Act to compel a plaintiff to resort to the Civil Court to obtain compensation in the way of interest for the default in payment of sums which are only recoverable in the Revenue Courts. As it has been the practice in the Revenue Courts to decree interest on arrears of profits, we shall not interfere with the decree of the Court below in this respect.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

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JUNE 29.

APPEL-LATE CIVIL.

GAURI (*Plaintiff*) *v.* CHANDRAMANI (*Defendant*). [29th June 1876.]

1 A. 262.

Hindu Law—Hindu widow—Family dwelling house—Right of residence.

A Hindu widow, who was residing in her husband's house during the lifetime of her husband, is entitled to continue there after his death, and cannot be ousted by the auction purchaser of the interest of her husband's nephew. (4 B.L.R., O.J. 72 = 12 W.R., O.J. 35, *followed*).

[F., 3 A. 353. 13 B. 101, 2 B. 494; R., A.W.N. (1887), 279; 12 M. 260 (F.B.); D., 2 A. 141.]

The plaintiff, the auction-purchaser of the rights and interests in a certain dwelling house of his judgment-debtor, Bindesri Parshad (the son of Lachman Parshad, deceased, and nephew of Beni Parshad, also deceased), having been resisted in his endeavour to obtain possession of the house, by the defendant (the childless widow of Beni Parshad, residing

in his house, and claiming the right to reside in a moiety thereof as her husband's widow) brought the present suit to eject her. The first Court gave him a decree. The lower appellate Court dismissed the plaintiff's suit. The plaintiff preferred an appeal to the High Court.

1876 JUNE 29. APPEL-LATE CIVIL. 1 A. 262.

JUDGMENT.

[263] It does not appear to have been admitted that the property was held by Lachman Parshad and Beni Madho in equal shares, but assuming it was the joint property of the two brothers, the widow of Beni Madho is entitled to live in it, it being the house in which she resided with her husband. She cannot be ousted by a purchaser of her nephew's right. *Mangala Debi* v. *Dinanath Bose* (1). The house is a small one, and it is not shown that one moiety is more than sufficient as a residence for the Mussammat. We shall not therefore disturb the decree of the lower appellate Court, but dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1876 JUNE 30. APPEL-LATE CIVIL. 1 A. 263.

BISHAN CHAND (*Defendant*) *v.* AHMAD KHAN AND OTHERS (*Plaintiffs*).

[30th June 1876.]

Limitation—Act IX of 1871, S. 5 (a)—Institution of suit.

Where the period of limitation prescribed for a suit expired when the Court was closed for the vacation, and the Court did not sit on the re-opening day, but on a later day according to an order of the Judge, *held* that the suit was within time on the actual opening day.

A suit, the cause of action for which was stated in the plaint to have arisen on 2—11—1871, was instituted in the Court of the Subordinate Judge, Ghazipur, on Monday, 16—11—1874. That Court was closed from 12—10—1874 to 13—11—1874. It should have re-opened on Saturday, 14—11—1874, but did not do so until Monday 16—11—1874, under an order of the District Judge. The suit was dismissed by the Subordinate Judge who held that the period of limitation applicable was 2 years. The District Judge, on appeal, held that it was instituted within time. The defendant preferred a special appeal to the High Court contending that the suit was barred by limitation as it was not instituted on 14—11—1874.

JUDGMENT.

[264] It appears that the Court should have sat on the 14th November 1874, and if it had done so, the suit, according to the Judge's **[265]** view of the limitation that applies, would have been within time. The Judge does not notice the fact that the Court did not sit on the 14th, but confines his remarks to the point that, when the Court opened, the petition was filed, and the limitation being three years, not two years as found by the first Court, the suit was within time. It was contended that

(1) 4 B.L.R., O.J., 72=12 W.R., O.J., 35.

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1 A. 263.

the Courts did not sit because the Judge had issued an unauthorized order that they were not to open until the Monday following Saturday the 14th, on which day they should have been opened after the close of the vacation. The Judge's unauthorized order cannot, it is urged, override the law of limitation, which must be applied strictly. It does not appear why this order was issued; probably it was to suit the convenience of the Judges on their return to their Courts after the vacation, because Sunday caused another break between Saturday and Monday. There was considerable difference of opinion before the passing of the present Limitation Law, as to whether Act XIV of 1859 was to be strictly applied in a case of this nature when a Court happened to be unexpectedly closed. In the present case the plaintiff appears to have brought his claim to the Munsiff and to have been ready to present it on the 14th. It is dated the 14th, so is the vakalat-nama and the plaint was presented on Monday the 16th. In such a case we should not be disposed to apply the strictest interpretation, and looking at the terms of S. 5, cl. (*a*), Act IX of 1871, we do not think that we are called upon to do so. The section provides that, if the period of limitation prescribed for any suit, appeal, or application expires on a day when the Court is closed, the suit, appeal, or application may be instituted, presented, or made on the day that the Court re-opens. This was the course followed in the case before us, and the section appears to us wide enough, since it does not refer to vacations or holidays, to admit of the entertainment of the suit.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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3 A. 216.

JANKI PRASAD (*Plaintiff*) *v.* BALDEO NARAIN AND OTHERS (*Defendants*).

[30th June 1876.]

Construction of decree—Money-decree—Decree enforcing lien.

Where, in a suit on a bond charging immoveable property, the defendant agreed to pay the amount claimed with costs and interest within a certain time, and that, in default of such payment, the plaintiff might bring the hypothecated property to sale, and the Court passed a decree for the amount claimed and costs with interest, "in accordance with such agreement"—*held* (Turner, J. and Oldfield, J. dissenting) that the decree was only a money-decree, and not one under which the lien could be enforced.

[**R.**, 18 A. 344 (346); **D.**, 3 A. 388 (391) (**F.B**), 22 A. 401, (402 403).]

The plaintiff,—claiming the moneys due on a bond of the 18th December, 1867, "by establishment and enforcement of his right as mortgagee in respect of the property pledged and mortgaged in the bond," and seeking to recover such moneys from the obligors of the bond, one Ghulam Ismail and his two sons, personally, and by the auction-sale of the property hypothecated in the bond,—joined, as defendants in the suit, (i) Baldeo Narain, Jagat Narain and Bishen Narain, the purchasers of a portion of such property at a sale held on the 20th July, 1871, in execution of a decree dated

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the 5th March, 1866, against Ghulam Ismail and his sons, and, (ii) Abdul Ghanni, to whom Ghulam Ismail and his sons had transferred by sale another portion of such property, under an instrument bearing date the 20th June, 1870, and alleged that the decree of the 5th March, 1866, was a mere money-decree. The auction-purchasers had obtained that decree in the Court of the Principal Sadr Amin of Allahabad in a suit on two bonds for the payment of money executed in their favour (on 17—1—1860 and on 14—9—1860) by Ghulam Ismail and his sons, in which the property in respect of which they were sued had been hypothecated to them, —after the filing of a confession of judgment by the obligors of the bonds.

The material part of that contention of judgment being—

[217] "We (the defendants) * * * * do declare that, whereas a regular suit filed by plaintiffs, claiming Rs. 5,589-6-6, under two deeds dated 17th January 1860 and 14th September 1860 respectively, in which all our zemindari, as detailed therein, is mortgaged, is pending against us (defendants) in the Principal Sadr Amin's Court, and whereas the claim of the plaintiffs is in all respects right and proper, we have, considering its justice, willingly and voluntarily executed this confession of judgment covenanting to pay, without objection, in two years the aggregate amount of their claims with costs and interest, to the extent as may be specified in the decision. The interest on the amount decreed until liquidation thereof shall be paid by us half-yearly to the plaintiffs at the rate of one per cent. per mensem, and we shall have the payment endorsed on the decree, and a petition informing the Court of the fact will be presented. We (the judgment-debtors) shall not claim a deduction of any payments made in part or whole, unless endorsed on the decree and communicated to the Court by petition. We shall not claim a deduction of the stipulated interest paid by us in the principal amount of the decree, and should we do so, it shall be false and illegal. The whole of the property as entered in the deed shall remain hypothecated and mortgaged till payment of the entire demand. If a regular suit is brought against us jointly or severally by any creditors within the above stipulated period, or if an application for execution of decree is presented in Court by any decree-holder, or if a part or the whole of the mortgaged property belonging to us is farmed out or put up for auction-sale in default of payment of arrears of revenue, or if we (judgment-debtors) fail to pay interest mentioned above, or if the decree-holders find any obstacle, great or small, in the recovery of the decretal amount, they shall have the power at all times to duly realize, in a lump sum, the principal and interest due under the decree from us and from our zamindari property mortgaged and hypothecated in the deeds on which the claim is based, without waiting for the expiry of the fixed period, and in cancelment thereof, we (judgment-debtors) shall never have any objection to the annulment of the agreement. We have written this confession of judgment containing the foregoing conditions to stand as evidence. The correctness of the abcve facts can be ascertained from the pleader for the plaintiffs."

In the present suit the auction-purchasers contended that the decree of the 5th March, 1866, under which they had purchased, was not a mere money-decree, but one which enforced an hypothecation of the property purchased by them of an earlier date than the date of the hypothecation which the plaintiff sought to enforce, and consequently that property was not liable to the hypothecation which the plaintiff sought to enforce. Upon the issue,—Is the decree of 1866 to be considered as a decree against the mortgaged property?—the Court of first instance held that that decree should be so considered, its decision upon this issue being as follows:—"I

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have no hesitation in finding for the defendant. The decree was given without any inquiry into the merits of the case on the defendant's full confession of judgment, and was evidently intended to be in strict accordance with it. The decree-holder, if he discovered the omission, should have applied to the Court to have it repaired; but if he failed to do this, possibly from ignorance of the terms in which the decree was couched, or misapprehension of the full meaning of the omission, it would be obviously inequitable to punish him by stereotyping clerical error of the decree-writer."

The plaintiff appealed to the High Court.

REFERENCE TO THE FULL BENCH.

[218] The Division Bench before which the appeal came for hearing (PEARSON, J., and TURNER, J.,) referred to the Full Bench the question whether that decree was a mere money-decree or not.

JUDGMENTS OF THE FULL BENCH.

[219] STUART, C.J.—The question referred in this case is whether the decree under which the property was sold was a mere money-decree, or whether it was a decree which could also be enforced against the property hypothecated in the bond. The facts and procedure which raised this question are somewhat peculiar, and there may possibly have been some mistake in preparing the decree in the terms in which it is drawn up. But taking it as it stands, I am clearly of opinion that it was a mere money-decree and nothing more. It was a decree passed on a confession of judgment.

* * * * *

Such being the confession of judgment, it appears to me difficult to resist the conclusion that it was the intention of the parties to give the plaintiffs recovery against the property, as well as against the persons of their debtors, and that, if the decretal order stopped short at the money, and did not in its terms cover recourse against the property, that was simply a mistake on the part of the officer who drew it up. And such, I say again, was, I think, the probable intention. But we cannot construe a decree by means of supposed intentions, or presumptions, or inferences. We must look, and we must look alone, to the decreeing and operative words in which it is expressed, and so reading this decree I cannot extend its terms so as to make it enforceable against the hypothecated property in respect of the lien in the bonds, but must regard it as a mere money-decree. And as I suggested at the hearing, and notwithstanding any reasonable belief to the contrary, from the peculiar terms of the confession of judgments, the decree, by stopping short at the order for payment of the money only, may possibly have given effect to some under-**[220]**standing or intermediate arrangement among the parties. Such an understanding or arrangement may not have been likely, but it is a possible contingency, and it is not at least violently opposed to the terms of the defendant's confession. But be that as it may, there is the decree itself in the terms in which it was allowed to go out, and for the purpose of the present reference it is immaterial whether it was drawn up in these terms by mistake or not. Nor can it be said that, so far as it goes, it is not according to the confession of judgment, although it might have gone further according to the spirit and possible intention of that confession.

PEARSON, J.—We are asked whether the decree of the Court of the Subordinate Judge of Allahabad, dated 5th March, 1866, in the original suit No. 98 of 1866 is a mortgage decree or a mere money-decree. The

decree orders the payment to the plaintiffs of Rs. 5,589-6-6, the amount claimed, with costs and interest for the period during which the suit was pending and to the date of realization, by the defendants within two years, the period specified in the confession of judgment accepted by the plaintiffs. Having regard to the terms of the decree, it seems to me impossible to hold that it is more than a mere money-decree. The relief granted is money only, nor is it provided that the money may be realized by the sale of any particular property by reason of its hypothecation for the purpose. No doubt it appears that the decree was passed in accordance with a confession of judgment, and does not include all the purport thereof. There is reason to believe that it was imperfectly drawn out, and its imperfection is detrimental to the decree-holder. It was competent to him to have applied for its correction ; but it is not competent to us to rule that it is other than a mere money-decree in the terms in which it has been drawn.

TURNER, J. (OLDFIELD, J., concurring)—There can be no doubt that the Court intended to pronounce a decree in the terms of the confession of judgment, and that the confession contained a stipulation that, in the event of default in the payment of the instalments, the decree-holder should be at liberty forthwith to bring the property to sale. The intention of the Court then was that the decree should embody the relief. The operative part of the **[221]** decree runs as follows :—" In accordance with the confession of judgment filed by the defendants, it is ordered that a decree for Rs. 5,589-6-6, the amount of the claim, the costs, and interest pending the suit, and on the whole amount up to the date of realization, within the two years mentioned in the confession of judgment accepted by the plaintiffs, be passed in favour of the plaintiffs against the defendants." This decree is no doubt most inartificially prepared, but it contains in the judgment language sufficient to import, not a part only, but the whole of the terms of the confession ; and it being manifestly the intention of the Court and the parties that the whole of the terms should be incorporated in the decree, we consider ourselves warranted in pronouncing that the decree is not a mere money-decree, and that the sale effected under it was made in exercise of the power of sale for the enforcement of the security.

SPANKIE, J.—We are asked whether the decree is merely a money-decree, or whether it includes all the terms of the compromise, and so declares the decree-holder's lien on the property hypothecated in the bonds on which the plaintiffs sued and the defendants filed a confession of judgment. It appears to me, looking at the terms of the decree, that it is confined to a decree for Rs. 5,589-6-6, the amount claimed, and costs and interest, " in favour of the plaintiffs against the defendants, who promise to pay the amount due to the plaintiffs within two years as specified in their confession of judgment accepted by the plaintiffs." I think that this is a money-decree, and that the words outside the decree, " and according to the confession of judgment filed by the defendants, it was ordered," cannot be said to extend all the terms of the confession of judgment to the decree itself.

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APPEL-LATE CIVIL.

1 A. 266.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner and Mr. Justice Spankie.

RAM GHOLAM AND OTHERS (*Defendants*) *v.* SHEO TAHAL AND OTHERS (*Plaintiffs*). [7th July 1876.]

1 A. 266.

Appeal—Judgment—Decree.

Where, in dismissing a suit, the Court ordered "that the plaintiff's claim be dismissed *in the present form*," *held* that the defendant, who contended that the suit should be dismissed absolutely, had a right to appeal against it, and that his appeal would be, not against the decision, but against the decree with which he was dissatisfied. (H.C.R., N.W.P., 1874, p. 19, *Distd.*)

[Ap., 2 A. 497 (F.B.), 17 A. 174, 9 C.W.N. 584.]

In a suit by the plaintiffs, as the heirs of G.D., to recover possession from the defendants of certain lands which G. D. had mortgaged to their ancestor in 1835 for Rs. 25, alleging that the mortgage-debt had been satisfied from the usufruct, and for mesne profits, the defendants denied that the plaintiffs were the heirs of G. D., asserting also that they themselves were his heirs, and that the mortgage-debt had not been satisfied from the usufruct. The Court of first instance found that the plaintiffs were the heirs of G. D., but dismissed the suit on the ground that the mortgage-debt had not been satisfied, its decree being in the following terms:—"It is ordered that the plaintiffs' claim be dismissed in the present form." The lower appellate Court dismissed the appeal of the defendants. The defendants preferred a special appeal to the High Court.

JUDGMENT.

[267] We are of opinion that the ruling of the Full Bench (1) does not apply in this case. The appellant is dissatisfied with the decree of the Court of first instance. He contends that the respondents have, under no circumstances, a right to redeem, and that their suit should have been dismissed absolutely and not in such a manner that they are at liberty to come into Court again. We admit the force of the objection, and decreeing the appeal, remand the case to the lower appellate Court for decision on the merits.

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PRIVY COUNCIL.

26 W.R. 10=3 Suth.P.C.J 342=3 I.A. 209=3 Saraswati's P.C.J. 663=Bal. 86.

PRIVY COUNCIL.

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the Court of the Commissioner of the Lucknow Division.

CHOWDHRY MUNTAZA HOSSEIN *v.* MUSSUMAT BIBI BECHUNNISSA.

[13th July 1876.]

26 W.R. 10=3 Suth. P.C.J. 342=3 I.A. 209=3 Saraswati's P.C.J. 663=Bal. 86.

1. *Act VIII of 1859, Ss. 326, 327—"Sufficient cause."*

According to the true construction of Act VIII of 1859, the earlier sections are not incorporated into S. 327, as they are expressly incorporated into S. 326,

(1) H. C. R., N. W. P., 1874, p. 19.

and the words "sufficient cause" should be taken to comprehend any substantial objection which appears on the face of the award, or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in England.

2. *Ibid—Consultation with expert.*

The mere fact of the arbitrators consulting an expert was not a valid objection to their award.

3. *Ibid—Waiver of objection—Chances of arbitration, submission to.*

Where it was objected that the award was invalid because the Will referred to the arbitrators referred to another Will not produced by the plaintiff, *held* that the defendant could not object to the validity of the award, as notwithstanding the knowledge of the suppression he did submit to take his chances of the arbitration.

The term "award" as used in the plaint in this case must be taken to include the whole document which is scheduled to the plaint, *i.e.*, the formal judgment as well as the decree.

4. *General rule of Privy Council as to dealing with form of pleadings*

The general principle of their Lordships is that of not dealing very strictly with the form the pleadings if they find that a material point was substantially raised.

Appeal from a decretal order of the Commissioner of Lucknow, upholding a judgment of the Deputy Commissioner of that Division.

JUDGMENT.

SIR JAMES COLVILE delivered the judgment of the Judicial Committee as follows:—

[10] This is an application under S. 327 of Act VIII of 1859 to have an award filed in Court, with the usual consequence of having its provisions enforced as **[11]** a decree of Court. Some discussion was raised in the course of the argument touching the meaning of the word "award" as used in the plaint. Their Lordships have no difficulty in ruling that it must be taken to include the whole of the document which is scheduled to the plaint, and headed "Copy of the award;" that it comprehends both that which in some of the proceedings has been called the "formal judgment," and that portion of the document scheduled which is headed at page 10 with the word "Decree." If it were taken to be confined to the latter, the award would be obviously incomplete, since it would contain no finding upon many of the questions raised. The only reason for so confining it seems to have been a loose statement made by a pleader in one of the Courts.

The arbitration which resulted in this award came about in this way: The plaintiff, who seeks to have the award filed, was the widow of one Chowdhry Sarfaraz Ahmud; the defendant, who resists the filing of the award, is Chowdhry Murtaza Hossein, who was the brother of Sarfaraz Ahmud. It appears that Sarfaraz Ahmud left not only a widow, but a daughter and daughter's children, of whom one was a son; that a considerable part of his property consisted of talooks; and that he was registered as talookdar under the schedules of Act I of 1869, so as to make his talooks descendible in the case of intestacy to a single heir according to the rules laid down in S. 22 of that Statute. The effect of these was to make the talookdary property of Sarfaraz Ahmud descendible to his daughter's son, if he had been recognised and treated by the deceased as his own son, but in default of such recognition, to his brother, in preference of his widow. The Act gives the talookdars the power of altering this law of succession by any will, made more than three months before

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the death of the testator, or by one of later date if made with a particular form of attestation. It is, however, an admitted fact in this case, that the will of Sarfaraz Ahmud was made within a month of his death, and was not attested in the manner prescribed by the Statute. The question raised and considered in these proceedings was in terms whether the will was valid or invalid; but the proper issue was whether such a will was sufficient to pass talookdary property since it might be a good will according to Mahomedan law as to one-third of the testator's other property, although it was not executed according to the provisions of the Act.

In this state of things the brother, whose claim to inherit the talooks was liable to be defeated only by proof of the recognition of the grandson as a son, of which there is no question in these proceedings, was induced to enter into a submission to arbitration, the effect of which was to make his rights and the rights of the widow determinable according to the terms of the will of the testator, and therefore, for the purposes at all events of that arbitration, to recognise the sufficiency of the will. The submission to arbitration was in this form: We agree that "whereas Mr. W. Glynn, the Deputy Commissioner of Barabunki, has with our consent appointed Chowdhry Ghullam Furreed, talookdar of Barraiee, pergunnah Rodowlee, and Rughunath Singh, talookdar of Palee, arbitrators, to determine according to the terms of the will of the deceased talookdar the dispute between Chowdhry Murtaza Hossein and Chowdrain, widow of Sarfaraz Ahmud, deceased, relating both to the property specified in the will, and to that not mentioned therein, we do hereby declare and duly execute this document." The arbitrators made their award on the 16th March 1871. The suit to have it filed in Court was commenced on the 21st [12] August 1871. Both parties seem to have made references to the Deputy Commissioner complaining of portions of the award, but the result was that the widow, at least, adopted it, and took these proceedings in order to enforce it.

In the Courts below an objection was originally taken to the form of the suit on the ground that the award was not an award within the meaning of S. 327, but a judicial award which could only be dealt with under the earlier Sections of the Act. That point has been given up, and the propriety of the suit must now be taken to be admitted.

A question, however, has been raised whether the earlier Sections of the Act are incorporated into S. 327, so as to give the Court proceeding under the latter section the power of remitting an award which is insufficient upon the face of it back to the arbitrators for amendment: and also how far the power of such a Court to refuse to file an award is limited by S. 324, which says that no award shall be set aside except on the ground of misconduct or corruption of the arbitrators or umpire. Their Lordships are of opinion that, upon the construction of the Act, the earlier sections are not incorporated into S. 327, as they are expressly incorporated into S. 326; and that the words "sufficient cause" should be taken to comprehend any substantial objection which appears upon the face of the award; or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country.

The objections which were formerly taken to the admission of this award were embodied in the nine issues settled by the Deputy Commissioner of Lucknow, to whom the cause was transferred from the Deputy Commissioner of Barabunki, and are set out at page 42 of the Record. Those which are involved in the first, second, third, fifth, eighth

and ninth issues, have here been given up by the learned Counsel for the appellant as untenable. That raised by the fourth issue was relied upon; it is in substance that the arbirtators before making their award had consulted one Mahomed Ali, a vakeel or native lawyer. The sixth was in these terms, "Is the award, being based on an invalid will, itself invalid?" It will hereafter be considered what is embraced in that issue. The objection which it patently raises, *viz.*, that founded on the date and execution of the will, is now no longer relied upon. The seventh was that the arbitrators were bribed. The result is that the only objections raised by the issues which are now relied upon are, the consultation of the pleader, the corruption of the arbitrators, and whatever is included in the sixth issue.

It will be convenient at once to dispose of the seventh issue by saying that the Deputy Commissioner, after hearing the evidence that was adduced before him, came to the conclusion that there was no ground for imputing corruption to the arbitrators; that the story told by the witnesses as to the bribes that were given was false; and that their Lordships see no ground whatever for dissenting from that finding. This was not the finding of two Indian Courts, because the Commissioner to whom there was an appeal thought that he was incompetent to entertain that question. Their Lordships upon the evidence unhesitatingly acquit the arbitrators of corruption in this matter.

Some objections have indeed been raised at the bar which seem hardly to be included in the issues settled in the Indian Courts. Mr. Leith contended that the award was bad on the face of it, inasmuch as it failed to deal with some of the subjects referred to the arbitrators, and in particular with the two [13] estates Behlal and Hosseinpur. But the contention can only be supported if the award is taken to be merely that portion of the document scheduled to the plaint which is headed "decree," a point upon which their Lordships' opinion has been already expressed. If the whole document be treated as the award the arbitrators have expressly dealt with the subjects in question.

The point as to the consultation of the pleader was disposed of in the course of the argument by their Lordships, who intimated a clear opinion that the case implicating the pleader in the alleged corruption having failed, the mere fact that the arbitrators consulted a person supposed to be learned in the law was not a valid objection to their award. An objection was also founded on a passage in the Record wherein it appeared that on one occasion one arbitrator sat alone; but upon the whole their Lordships are of opinion that the final award was made by the two arbitrators, and that there is nothing in this objection which seems never to have been raised in the Courts below.

The case of the appellant is then reduced to the objection which he contends is involved, though not explicitly stated, in the sixth issue. It is in effect that, by reason of the reference in the ninth paragraph of the will which was before the arbitrators to another document described as "a will bearing the testimony of Rajah Farzand Ali Khan and Rajah Jugmohun Singh in the possession of my wife," which was not produced before the arbitrators, they cannot be said to have had the whole will of the testator before them; and ought not to have made an award without having that document produced before them, and that by reason of this miscarriage the Court ought to refuse to direct the award to be filed.

The award contains the following statement regarding the missing document: "It is worthy of observation that the Chowdrain has rendered her conduct suspicious by concealing the second will. But if it had been

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produced in compliance with our directions, it would not have prejudiced the Chowdrain, because we are not disposed to tolerate injury or harm being done to either party. It is regretted that the Chowdrain has, by concealing the second will, created suspicion in our minds as to the said will, and we have no reason whatever to believe that the will under consideration was in no respect similar in terms to that now before us." The arbitrators then suggest certain hypotheses as to what the will might contain, and add, "In the absence of sufficient cause being shown to the contrary, it may be suspected that it was destroyed through the foolishness or carelessness of the women. Be this as it may, we are not disposed to be led by suspicions in determining the case, but at any rate it shall be our duty not to lose sight of our inclination thus caused to favor Chowdhry Murtaza Hossein." From the proceedings before the arbitrators it would appear that both parties agreed that the missing document had existed. The Chowdrain alleged that the original had been taken away by the appellant, but admitted that she had a copy of it signed by the testator; the other party imputed to her that she kept back the original.

A question strongly contested before their Lordships was whether this objection to the filing of the award was sufficiently raised upon the Record. It does not appear to have been distinctly raised on the proceeding at page 41 of the Record, when the issues were settled. The sixth issue seems to have been framed upon the objection stated orally by Mr. Arathoon, which, a staken down by the Judge, is in these words: "The will was invalid, being made within a month of the "talookdar's death, and the arbitrators were wrong in attaching any importance to it."[14] The objection, however, had substantially been put forward in the petition impugning the award which the appellant presented to Mr. Glynn on the 31st March 1871; and also in a written statement tendered in this suit but rejected by the Court for want of sufficient verification, which therefore cannot be treated as part of the Record. Again, it appears that when the case came before the Deputy Commissioner the point was in a manner raised before him, and treated as included in the sixth issue. The Judge's note at page 57 of the Record after stating the sixth issue, and that the plaintiff does not care, so far as this case is concerned, to dispute the invalidity of the will, proceeds thus: "Mr. Arathoon argues that the award partly follows the will, in other parts the will is disregarded; that this is sufficient cause to refuse to file the award; but besides this there is a codicil which the arbitrators do not appear to have looked at." The Judge says, "There is nothing on the Record to show that any codicil was executed, and that point need not be considered. Had any codicil been in existence it should have been brought forward in evidence."

Now, if by the word "codicil" was meant the missing will referred to in paragraph 9 of the will produced, this mode of disposing of the objection was unsatisfactory, because in the statement of the arbitrators upon the face of the award which has been already read there is a clear *constat* that the document said to have been attested by Rajah Farzand Ali Khan and Rajah Jugmohun Singh existed. The Judge, however, went on to dispose of the question as to the effect of the invalidity of the will under the statute, but took no further notice of the question raised by Mr. Arathoon as to "the codicil."

The general principle of their Lordships is that of not dealing very strictly with the form of the pleadings if they find that a material point was substantially raised. They are disposed, though not without some little doubt and hesitation, to treat this particular point as sufficiently raised

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in the Courts below, and therefore to be one with which they are bound to deal upon appeal. The question which it involves appears to their Lordships to constitute the only formidable objection which can be taken to the filing of this award.

The contention is that it was miscarriage on the part of the arbitrators to make the award unless they had the whole of the will before them, which they cannot be said to have had in the absence of the document in question. Their Lordships have felt considerable difficulty upon this point. They are sensible, on the one hand, of the extreme impolicy of allowing parties to get out of awards upon objections which really do not affect the substantial justice of the case; and, on the other hand, they feel the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration do not entitle them to do. Upon the whole, however, their Lordships have come to the conclusion that the objection is not fatal to the filing of this award. They may observe that, looking at the whole will, they are disposed to believe that this missing document was really confined to some question relating to the marriage of the eldest granddaughter, which is the substance of the ninth paragraph, if that be treated as ending with the word "followed." On the true construction of the whole document the words "detail of expenses," and all that follows, seem to be no part of the ninth paragraph, although treated by the arbitrators. when they settled their issues, as within it.

It is, however, possible that the missing document may be something more than their Lordships suppose; and if there had been a clear *constat* that the defendant objected on this ground to the arbitrators proceeding to make an award, and that they had never-[15]theless gone on to make their award upon the terms of the will before them, their Lordships might have thought the objection sufficient. Looking, however, to the proceedings before the arbitrators, and particularly to the document at page 146, which is called the rejoinder, they think that, notwithstanding the knowledge that this document was withheld, the defendant did submit to take his chances of the arbitration, and that he cannot now, on the general rule upon which all Courts act with respect to awards, be allowed, having taken his chances of the arbitration, to set aside the award upon the ground of the objection taken. In the very first paragraph of this rejoinder he no doubt says: "But the arguments of the plaintiff carry no weight with them unless the other will, which forms an essential part, be produced, because in the will produced it is enjoined that a regard should be paid to the will therein referred to, which signifies that the provisions of the latter will are to be carried out and not of the former." But what is the conclusion that he draws from that? Not that the arbitrators are to abstain from making an award, for he says: "Wherefore, in the event of the other will not forthcoming the arbitrators are, under the law, competent in every respect to determine the dispute according to the British law, according to the custom or according to Mahomedan law, and to render justice to me. But notwithstanding all the objections taken to the powers of the arbitrators, and to myself, the plaintiff has exceeded all proper bounds, and instead of giving fit answers to my objections has made frivolous statements. Although silence is preferable to the refutation of such statements, I apprehend that if I keep quiet my silence may be construed in a manner which might show that I have been unable to refute the plaintiff's statements, or that I have admitted them. I am also of opinion that, in order to obtain justice at the hands of the arbitrators, it is better for me to

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bring to their notice the true facts; I therefore beg to submit a rejoinder to the plaintiff's reply, in the following paragraphs." Therefore, as far as that first paragraph goes, it is not an objection to their proceeding to make an award at all because they have not the whole will before them, but it is a suggestion that they should make an award in a particular manner, namely, by declaring that, the whole will not having been produced, it is not to be operative, but that the dispute is to be determined according to the British law, which their Lordships take to be the course of succession prescribed by Act I of 1869, as to the talookdary estate, according to the custom, which is probably some supposed family custom applying to the personal estate other than the talookdary estate, or according to the general Mahomedan law. That is one alternative which is put forward by this document. The other is at page 152, where he says, "As for that part of the will which relates to Khanpur, I beg to urge that inferential, optional, and adverse constructions have been put on it suited to the interests of the plaintiff. Such constructions have not been put by any one of the community who has had occasion to read the will, except by the agents of the plaintiff, nor does that part of the will anyhow convey the meaning attached to it by the plaintiff. Then he says, "I believe the other will, which the plaintiff assiduously tries to conceal, supports this assertion of mine. Every letter and every word of a will signifies nothing less than the declaration of the intentions of the testator. This is supported by law. No one is competent to put thereon an optional or implied construction. I, however, expect that the learned (meaning, apparently, the arbitrators) will clear up the meaning of the will, and will, in consequence of concealment of the other will, interpret **[16]** the will" (that must mean the will before them) "favorably to myself and detrimentally to the plaintiff. The will produced allows maintenance only of the plaintiff and her descendants which may be born after the time the will was drawn up, out of mouzahs Shareefabad and Alapur. This does not give her any right as against myself." Therefore he goes on to treat, as still open to the decision of the arbitrators, the question of the construction of that will, and only claims a right to have presumptions drawn in favor of himself.

There was some dispute as to this rejoinder and the time when it came before the arbitrators. That it came before the arbitrators seems to be pretty clear, by the translation of the petition at page 146, but there is some confusion occasioned as to the time by the supposed date of that petition. It is clear that the petition covered the rejoinder, and it is quite clear, from the internal evidence in the rejoinder itself, that it was addressed to the arbitrators, and proceeded upon the assumption on the part of the writer that the arbitration was still open. Their Lordships conceive that that document must have been before the arbitrators, and can hardly suppose, in the absence of clear proof, that it was before them after the arbitration was closed. At all events it shows what was in the mind of the party and what were the points which he intended to raise upon the omission to produce the missing will. Again, it appears from the proceeding of the 19th February 1871, that the parties had then also, with full knowledge of the absence of the missing will, expressed their willingness to allow the case to be dealt with by the arbitrators in its absence. The statement at page 136 of the Record is:—"The parties after some discussion have expressed their willingness to give up the different footings on which they grounded their claims, *i.e.*, they have withdrawn their claim to partition under the Mahomedan law of succession, according to custom or English law, and have agreed that

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those points of the will in respect of which they are at issue should be cleared up and the rest left untouched." The proceeding then goes on to frame certain issues, of which the first is one as to the real and true interpretation of that which is called the ninth paragraph, but which obviously means the detail which follows the ninth paragraph, and which deals with the different talooks, Khanpur, Shareefabad, and Alapur, which were some of the subjects of the award. This issue contains these words: "What is the real and true interpretation of the ninth paragraph of the will, and what was the real intention and object of the testator? In other words, whether the entire talooka Khanpur should be divided in equal moieties between the parties, or exclusively of Shareefabad and Alapur." Again, there is a passage in the award which reads as if the arbitrators had then before them the document called a rejoinder, and were accepting the proposition put to them by the defendant in the latter part of it. The following is the passage in question: "Be this as it may, we are not disposed to be led by suspicions in determining the case, but at any rate it shall be our duty not to lose sight of our inclination thus caused to favor Chowdhry Murtaza Hossein." On the whole, therefore, their Lordships think that the appellant having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favorable to himself, and that it is too late for him, after the award has been made, and on the application to file the award, to [17] insist on this objection to the finding of the award.

Their Lordships, therefore, will humbly advise Her Majesty to dismiss the present appeal; and to affirm the order of the Deputy Commissioner, which is the operative order; but, having regard to the confusion which has been caused in a great measure by the absence or withholding of this document, for which the arbitrators, on plausible grounds, treat the plaintiff as responsible, their Lordships are of opinion that there should be no costs of this appeal. But the appeal having been decided in favor of the respondent, the appellant must pay the costs of the respondent upon the application for leave to appeal made on the 9th March, as those costs were ordered to abide the result of this appeal.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.

RAI NURSINGH DOSS v. RAI NARAIN DOSS AND OTHERS and RAI NARAIN DOSS v. RAI NURSINGH DOSS. [21st July 1876.]

3 Suth. P.C.J. 349=Bal. 98.

Joint Hindu family—Partnership—Agreement between parties.

By an agreement, it was settled that each member of the family was to draw money at his discretion out of the family firm, and to employ that money in

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his separate trade or separate speculations, the firm not being responsible for the losses sustained, not being entitled to share in the profits arising from these speculations, but subject to this modification, all members of the family retained the interest which they had as joint members. Their Lordships conceived that the relation between the two brothers (the plaintiff and the defendant) could not be taken to be strictly that of members of a joint and undivided Hindu family; for although they were joint as to their general concerns, and in some sense joint as members of a firm, yet that relation was qualified by the provision that each member of the firm might take out and use assets derived from the firm for the benefit of his sole and separate speculations. The above arrangement, being of such an extraordinary character as to leave it in the power of each member to draw to an unlimited extent upon the assets of the firm, the Privy Council declined to extend the operation of such an agreement one *tota* beyond its terms, and were, therefore, of opinion that the High Court was right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm.

This was an appeal from the High Court of Allahabad, affirming a decision of the District Judge of Benares concerning the partition of the joint estate of an undivided Hindu family.

JUDGMENT.

[349] This appeal and cross appeal have arisen out of the peculiar and somewhat complicated arrangements of a Hindoo family descended from one Rajah Putnee Mull. The Rajah had two sons, Sree Kishen and Ram Kishen. Sree Kishen was the father of the plaintiff in the suit, Rai Nursingh Doss, of Rai Narain Doss, who is the principal defendant, and of a third son, Hurree Doss, who died in his father's lifetime. Seeta Ram and the other respondents, who have not appeared on the appeals, are the descendants and representatives of Ram Kishen's branch. It may, their Lordships think, be taken to be established for the purposes of these appeals, that the descendants of Ram Kishen have become generally separate in estate; although, in respect of certain properties, *viz.*, the banking firm afterwards mentioned, and the other properties which remain undivided, they continue to be joint with the Sree Kishen branch. On the other hand, their Lordships think it must be taken to be also established that Nursingh Doss and Narain Doss have continued to be generally joint in estate. There is no evidence that the two brothers have **[350]** ever come to a formal partition. On the other hand, it appears that on those occasions on which there has been a partial partition of family property between the two branches of the family, the properties to be divided were divided into eight lots, of which four were taken by Narain Doss and Nursingh Doss jointly, or by Narain Doss for himself and his brother; but that there has been no sub-division of those lots between them. It also appears that up to a comparatively recent period they messed together, and were joint in food and worship, as well as, generally speaking, in estate.

With respect, however, to the whole of the family, it seems clear that the joint family property has chiefly come out of the transactions of a certain trading or banking firm founded by the common ancestor, Putnee Mull, under the style of "Rai Sree Kishen and Rai Ram Kishen," and that the interests of the different members of the family in this firm have for a long period been upon a somewhat peculiar footing. It appears that in Rajah Putnee Mull's lifetime he either estimated the assets of the firm at four lacs, or separated and set aside that sum; that he divided two lacs of this between Sree Kishen and his three sons, and the remaining two lacs between the four sons of Ram Kishen, who was then dead, placing to the separate account of each in the books of the firm the sum of

Rs. 50,000. This is said upon the one side to have been merely an indication of the share and interest which in the event of a partition each was to take. On the other hand, it has been contended, and that contention is certainly supported by the accounts, that it was intended to give to each a separate interest, and a power of drawing upon separate account, which is not ordinarily possessed by the members of a joint and undivided Hindoo family carrying on trading transactions.

The relations of the members of the firm, however, do not depend solely on this arrangement of Putnee Mull, whatever be the effect of it. Upon the 19th May 1845, after the decease of Rajah Putnee Mull, but during the lifetime and management of Sree Kishen, a family council was held, at which the adult members of the family agreed to the document at page 165 of Record, upon which so much discussion has taken place. That document, after reciting that the general expenses of the family had hitherto been defrayed by Sree Kishen, but that objection had been taken to his extravagant expenditure upon the occasion of the tonsure of Lakhmi Chund, states, "It was consequently resolved by all that, from and after the month of June 1845, each member should bear his own expenses; and that the messing, as well as servants' charges, should at present be left as they are. Whereupon all objected that the interest of Rs. 50,000 only would not be sufficient; they should therefore be allowed the liberty of drawing in their respective names from the firm any sum of money they liked, and getting the same entered in their respective accounts." Of course, if the instrument had stopped there, it might be supposed to relate only to sums to be drawn for private expenditure; but it goes on, "each is at liberty to carry on his own business, and to defray each his own expenses out of the profits arising therefrom. Some discussion having taken place as to interest, it was unanimously agreed by all, that if the members were to be charged with interest at the usual rate of the firm, they would save nothing, so the interest of any sum which may be drawn should be paid at the rate of 4 per cent., as was allowed by the Rajah Sahib for the money deposited. This was agreed to, with the proviso that as each member will take the profits arising from his trade, so likewise the firm will have nothing to do with the loss sustained by any of them (the members). It shall be incumbent to repay the sum to the firm with interest. And the business of the firm shall continue as before; but if any member, contrary to this agreement, shall engage in any business for the firm without the permission of all, he alone will be responsible for the loss, and will have to repay the money to the firm." Therefore, the effect of this agreement was to entitle each partner to draw money at his discretion out of the firm, and to employ that money in his separate trade or separate speculations, the firm not being responsible for the losses [351] sustained, and not being entitled to share in the profits arising from those speculations; but, subject to this modification, all the members of the family retained the interest which they previously had as joint members of the firm. Indeed, at one of the subsequent meetings of the family, at which a partial division of jewels and other property took place, it was expressly stipulated that the firm should remain joint. That will be found at page 178 of the Record.

It has, their Lordships think, been conclusively established that this document was executed by those by whom it purports to be executed, and that it was afterwards acted upon. Two points, however, are taken by the plaintiff in the suit. He says that he, being a minor, was not a party to this document, and has more or less contended that he was not bound by the arrangement which it embodied. He further contends

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that if it is binding upon him at all, it is only binding upon him as a member of his branch of the family, which has continued to be joint, and for whose joint benefit the arrangement must be taken to have been made, that all that was drawn out of the firm under it by Sree Kishen, or afterwards by Narain Doss, and employed by either in separate speculation, must be taken to have been so drawn out and employed by the managing member of the joint family, consisting now of himself and his brother, and that all such separate acquisitions, no matter in whose name they stand, must be taken to be their joint property.

These are the two chief questions raised by the principal appeal. The District Judge and the High Court have concurrently determined them against the appellant, in judgments of which their Lordships think it right to remark that both are remarkably able and well considered. Mr. Henderson, the District Judge of Benares, in dealing with the first question, after showing that some of the other defendants, Bishen Chund and others, the descendants of Ram Kishen, had recognised, at all events, the practice established by the roobokaree of the 19th May 1845, though one disputed his signature to the document, says: "The plaintiff also in claiming half share of the acquisitions made with the sums drawn from the firm by Narain Doss, whether in joint names or in his own name, to the exclusion of the other members, does actually concede the fact of such an arrangement,"—an observation which seems to their Lordships to be perfectly unanswerable. He then deals with the evidence of the gomashtas and the books of the firm, which he finds to be in accordance with that view, and he ultimately finds that the plaintiff must be taken to have had full knowledge of this arrangement, and that as a member of the firm he must be taken to have admitted that it was properly acted upon. He then deals with the question between the two brothers, whether the acquisitions of the two are to be brought into hotch-potch and divided equally, and upon the evidence, he comes to a conclusion adverse to the plaintiff. These findings are more succinctly embodied and stated in the judgment of the High Court at page 906 of the Record. They say, "We therefore concur with the Judge in holding that the appellant has recognised and acquiesced in the arrangement whereby the individual members of the family engaged in transactions for their separate benefit with moneys taken on loan from the firm. It is shown from his account with the firm, that he has, in virtue of this arrangement, himself taken moneys from the firm to make purchases and carry on loan transactions of which he derived the whole benefit, and while there is evidence to show that at one time the respondent, Narain Doss, had it in his mind to make his brother a partner with himself in all his transactions, we find that so long ago as in the year 1849 he changed his intention, and asserted his right to treat the acquisitions made by him as his sole property; and we also find that the appellant, although he had ample opportunity of informing himself of his brother's proceedings, and was, as we believe, aware of them, took no exception to them until the year 1865. Under these circumstances we hold that the appellant cannot now be allowed to maintain a claim to the acquisitions made by his brother with moneys borrowed from the firm."

Their Lordships, who, if the case of the appellant had been stronger than it is, **[352]** would have hesitated to set aside the concurrent judgments of the two Courts, upon what is very much a question of fact, feel bound to say, notwithstanding the long and able argument of Mr. Doyne, that the conclusion is one to which they themselves would have come upon the evidence to which their attention has been directed. There is

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no doubt in this, as in all cases arising between members of a joint family, a good deal of ambiguity as to the character of their dealings; and that ambiguity has been increased by the practice, the reason of which does not clearly appear, of using sometimes the name of one brother, when the transaction was in fact the transaction of the other. But their Lordships conceive that the relation of these brothers cannot be taken to be strictly that of the members of a joint and undivided Hindoo family; for although they were joint as to their general concerns, in some sense joint as members of a firm, yet that relation was qualified by the provision that each member of the firm might take out and use assets derived from the firm for the benefit of his sole and separate speculations. It is contended, however, that as between these brothers this must be taken to be only a provision that the brothers might do this jointly for their joint benefit. And it is no doubt shown that for a short time after, this young man, Nursingh Doss, came of age, or at all events for some short time after the father's death. Narain acted upon this footing. But then it is sworn by the gomashtas, and the Judges have given credit to that evidence, that Narain afterwards determined that he would cease to do so; and thenceforward speculated on his separate account, as, according to the terms of the arrangement, he was at liberty to do. This evidence is confirmed by the fact appearing on the Commissioner's summary of the accounts, that while Narain drew out and employed money on the joint account of himself and his brother, the moneys which he so drew out were debited to the joint account of both brothers; whereas it is perfectly clear upon the evidence of the gomashtas, and on the face of the accounts, that after a certain date separate accounts were opened for each brother, each being separately debited with the particular sums drawn out for the purposes of the different transactions now found to have been on his separate account. Again, it appears that one transaction was originally treated as the separate investment of Nursingh Doss; but that he, for some reason or other, did not care to retain it; that the other brother took to it; and that thereupon the accounts of the firm were corrected and the sum which had originally been debited to Nursingh Doss was transferred to the debit of Narain Doss.

Now that transfer of account if proved,—and their Lordships see no reason to doubt the truth of the evidence given to prove it—is inconsistent with the notion that the brothers used their separate accounts for their joint purposes, putting, as they saw fit, this transaction to one account and that transaction to the other account; whereas it is perfectly intelligible on the theory that the debit in the books of the firm was intended to show on whose separate account the transaction had been made.

Their Lordships, therefore, having given every attention in their power to the case, feel it impossible to dissent from the conclusion of the two Courts, that Nursingh Doss has failed to make out his right to throw his acquisitions, and the acquisitions of the other brother into hotch-potch, and to claim an equal division of them; and that, therefore, the general principle upon which the account was ordered to be taken is correct.

There only remain, therefore, to be considered the points raised by the cross appeal, and though there is some little complication as to the particular transactions to which that appeal relates, their Lordships are of opinion that the High Court has taken a correct view of them. The agreement which their Lordships have found to be binding on all the members of the firm was certainly a very extraordinary one, leaving it as it did in the power of each member to draw to an unlimited amount upon the assets of the firm, an arrangement of which the abuse could only be

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corrected by a dissolution of partnership. Their Lordships would not be inclined [353] to extend the operation of such an agreement one *iota* beyond its terms; and they are therefore of opinion that the High Court was right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm. Therefore, as to those profits (which do not seem to be very large or important, further than as involving a question of principle) which have been found to belong to the firm, and of which the plaintiff can only claim one-fourth, they are not disposed to disturb the decree of the High Court.

The result is that both the appeals must be disallowed; and their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross-appeal, and to affirm the decree of the High Court; and, considering the nature of the case, and that each party has to a certain extent failed, they think that each should bear his own costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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ANANT DAS (*Defendant*) *v.* ASHBURNER & CO. (*Plaintiffs*).

[27th July 1876.]

Contract—Act IX of 1872, S. 28—Agreement not to appeal—Void agreement.

An agreement not to appeal against a decree, in consideration of time being given to satisfy it, is not a void agreement, and is not prohibited by S. 28 of the Indian Contract Act. It is a reasonable compromise, for which there is consideration on both sides, and is prohibited neither by the language nor by the spirit, of the Indian Contract Act. And Courts are bound by the rules of justice, equity and good conscience to give effect to it.

[D., 3 A. 152, 5 O.C. 49; F., 8 C. 455.]

In consideration of the respondents in this appeal giving the appellant time to satisfy a decree against him, the latter agreed not to appeal against the decree. Contrary to this agreement, the appellant appealed. The respondents contended that the appeal ought not to be entertained. The appellant urged that the agreement was void under S. 28, Act IX of 1872.

REFERENCE TO THE FULL BENCH.

TURNER AND OLDFIELD, JJ. being doubtful whether the terms of the section applied, referred to the Full Bench the question whether, under the circumstances stated, the appellant ought to be allowed to proceed with the appeal.

OPINION OF THE FULL BENCH.

[268] STUART, C.J.—I would answer this reference in the negative. It is perfectly clear that S. 28 of the Contract Act does not apply to such a case, while in my judgment the agreement of the 24th July 1875, was a valid and reasonable arrangement which can be enforced. The appellant therefore ought not to be allowed to proceed with his appeal.

TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion:—

S. 28, Act IX of 1872, declares that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals is void to that extent. These provisions appear to embody a general rule recognised in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the Courts; but notwithstanding this rule it was long since determined that, if a person after mature delibera-[269]tion enters into an agreement for the purpose of compromising a claim *bona fide* made to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and the agreement is valid. This principle has been recognised in the Indian law in the provisions of the Procedure Code, which enable the parties to a suit to go before the Court and obtain a decree in the terms of a compromise. Further more, that the parties to a suit may, before a decision is passed in the Court of first instance, agree to abide by the decision of that Court and forego their right of appeal is shown by the decision of the Privy Council in *Munshi Amir Ali* v. *Maharani Inderjit Koer* (1). That case was, it is true, decided before the Indian Contract Act was passed, but if, as we are of opinion, the provisions on which the appellant relies only declare what was before a recognised rule of law, it is an authority in favour of the conclusion at which we have arrived, that those provisions are not applicable to the circumstances of the present case. By the agreement not to appeal, for which the indulgence granted by the respondents was a good consideration, the appellant did not restrict himself absolutely from enforcing a right under or in respect of any contract. He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is in our judgment prohibited neither by the language nor the spirit of the Contract Act, and an appellate Court is bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow the party bound by it to proceed with an appeal.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

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THE MUNICIPAL COMMITTEE OF MORADABAD (*Defendants*) *v.* CHATRI SINGH (*Plaintiff*). [27th July 1876.]

1 A. 269.

1. *Act XV of 1873 (N.W.P. and Oudh Municipalities Act), S. 28—Local Government, not impleaded—Objection whether can be taken for first time in special appeal—Mis-description of defendant.*

Quære:—Whether a plea, that the Local Government had not been impleaded in a suit against a Municipal Committee as required by S. 28 of the Act, can be taken for the first time in special appeal?

Where, in such a case, the Magistrate was impleaded, not only as President of the Municipal Committee, but as representing the Local Government, *held*, that this was, at the most, a mis-description of the officer representing Govern-

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(1) 9 B.L.R. 460.

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ment, a mis-description which that officer might have applied to have corrected, and that the Government *was* impleaded.

2. *Act XV of 1873 (N.W.P. and Oudh Municipalities Act), S. 43—Notice of suit—Special appeal.*

Notice of suit under S. 43 of the Act is necessary, only when damages consequential on the act done by the Municipal Committee are claimed in the suit.

3. *Plea of want of notice when to be taken.*

The plea of want of notice under S. 43 of the Act cannot be taken for the first time in special appeal.

[2.—**F.**, 16 M. 296; **Ap.**, 4 A. 102; **R.**, 22 B. 289 (F.B.); **D.**, 28 A. 600=3 A.L.J. 341=A.W.N. (1906), 107; **3—R.**, 4 A. 339=A.W.N. (1882), 63, 25 B. 142.]

On the complaint of one D.S. that the plaintiff was encroaching on a certain public highway in Moradabad Municipality, the Municipal Committee took the matter up, and, in the carrying out of a resolution by them, the line of the highway was marked out so as to admit of the passage of carts. A suit was instituted by the plaintiff against D. S., and the Magistrate of the District as President of the Municipal Committee and as representing the Local Government, and in this suit the plaintiff claimed to be maintained in possession of the piece of land in question. The suit was dismissed by the first Court on the ground that the plaintiff failed to prove his title to the land. The lower appellate Court decreed in plaintiff's favour. The Magistrate as President of the Municipal Committee appealed to the High Court.

JUDGMENT.

[270] A plea was, however, urged which is not entered in the memorandum of grounds of appeal that the suit ought to be dismissed on **[271]** the ground that the Local Government had not been made a party in accordance with the provisions of S. 28, Act XV of 1873. Inasmuch as in a former case (1) this objection had been allowed in special appeal and the suit remanded to the Court of first instance for re-trial after adding the Local Government as defendant, we permitted the plea to be argued although it was not entered in the memorandum. In the present instance it appears to us that the plea should not be allowed. It is the practice to implead the Collector as representing the Local Government. The Collector and the Magistrate are one and the same person, and in this suit the Magistrate was impleaded not only as President of the Municipal Committee but as representing the Local Government.

At the most it appears to us in this case there was a misdescription of the officer representing Government, a misdescription which that officer might have applied to have corrected. Consequently, assuming that it would be a valid plea in special appeal that the Government must necessarily have been impleaded, and on this point we must not be taken to express an opinion, we hold that the plea cannot arise in this suit because the Government was impleaded.

The question which next calls for decision is whether or not the suit should be dismissed because notice of action was not given in pursuance of S. 43 of the Act. This plea was not, it appears, raised in either of the Courts below, and it is not a plea affecting the decision on the merits. It therefore can hardly be held to be a good plea in special appeal. We may, however, observe that a plea based on similar provisions in a former Act was considered by the Court in an unreported case. It was then pointed out that, on the construction of analogous provisions in English

(1) Unreported.

Statutes, it had been held that notice of action is only necessary where the suit is brought for a tort or a quasi tort—Addison on Torts (1)—and that in *Poorno Chunder Roy* v. *Balfour* (2) Mr. Justice Phear expressed his opinion that similar provisions in Act III of 1864 (B. C.) "were directed solely to the cases of suits brought against Commissioners for damages consequential on the act done by them:" and seeing **[272]** that the suit then before the Court was not brought for damages, the Court held that the provisions of S. 31, Act VI of 1868, respecting notice of action was inapplicable to it. We agree with that ruling. The object of requiring such notice appears to be to enable the Committee or those acting under them to tender compensation and so prevent the necessity for a suit. In the suit now before the Court no damages are claimed. For the reasons we have stated we disallow the plea.

1876 JULY 27. — APPELLATE CIVIL. — 1 A. 269.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1876 AUG. 3. — APPELLATE CIVIL.

FARZAND ALI (*Defendant*) *v.* ALIMULLAH (*Plaintiff*).

[3rd August 1876.]

1 A. 272.

1. *Act XXIII of 1861, S. 14—Pre-emption—Co-sharer—Stranger—Pattidari Estate.*

With respect to the right of pre-emption, the co-sharers of one patti in a pattidari estate, are not "strangers" with reference to co-sharers in another patti of the same estate, within the meaning of S. 14, Act XXIII of 1861; and the section gives no preferential right of pre-emption among themselves, between co-sharers in the same patti and sharers in other pattis, who come under the denomination of members of the co-parcenary.

2. *Suit for possession by disallowed auction-purchaser—Maintainability.*

Where, in an execution sale of a share in a pattidari estate, an auction purchaser's claim to pre-emption is disallowed, under S. 14, Act XXIII of 1861, he cannot maintain a suit for possession against the successful pre-emptor; he can only sue for a declaration that the latter has no right of pre-emption against him and that the sale to him is invalid. He cannot obtain possession until the sale to him has been confirmed and made absolute,—a remedy to be sought in the Court which executed the decree.

[1—D., 14 C. 761.]

The plaintiff, a co-sharer in the estate but not a co-sharer in the patti wherein the share in suit was situated, having purchased that share at an execution sale to the same, sued for a declaration of his right as against the defendant, a co-sharer in that patti, whose claim to the right of pre-emption under S. 14, Act XXIII of 1861, had been allowed and in whose favor the sale had been confirmed. The first Court dismissed the suit. The lower appellate Court holding that the plaintiff was not a stranger within the meaning of that section gave him a decree. The defendant preferred a special appeal to the High Court.

1876 AUG. 3. — APPELLATE CIVIL. — 1 A. 272.

JUDGMENT.

[273] STUART, C. J.—The judgment of the Judge is substantially right. This is really not a case where the defendant shows any exclusive

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(1) 4th ed., 764.

(2) 9 W. R., 535.

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right of pre-emption and where the plaintiff is a "stranger," but of competitive pre-emption, if I may be allowed the expression, the plaintiff's claim in respect of title being quite as good as that of the defendant, while he has priority by purchase. As pointed out by the Judge, although the plaintiff did not live in the same patti as the vendor, but in another patti, he was a member of the co-parcenary, and therefore his claim under S. 14 of Act XXIII of 1861, must be allowed, and the sale to the defendant declared invalid. But the plaintiff cannot benefit by this judgment, and obtain possession, until the sale to him has been confirmed. I am therefore of opinion that, with this slight modification, the appeal should be dismissed, and with costs, the plaintiff, respondent, having substantially succeeded, and defendant treating him as a stranger and denying his right as a member of the co-parcenary.

OLDFIELD, J.—The plaintiff is himself a member of the co-parcenary, being a sharer in another patti of the estate. The right of pre-emption can only be asserted against a stranger, *i.e.*, one who is not a co-sharer or member of the co-parcenary. A sharer in one of the pattis in a pattidari estate cannot be said to be a stranger with reference to the co-sharers in another patti, and the section gives no preferential rights of pre-emption among themselves between co-sharers in the same patti and sharers in other **[274]** pattis, who come under the denomination of members of the co-parcenary. But the plaintiff can, however, only obtain a declaration that the defendant has no right of pre-emption as against him, and that the sale of the defendant is invalid, but he cannot obtain possession until the sale has been confirmed in his favour and made absolute. He has taken no steps to effect this by moving the Court which ordered the sale to confirm it in his favour, which is the proper remedy open to him. I would modify the decree of the lower appellate Court by declaring that the defendant has no right of pre-emption as against plaintiff, and that the sale to the defendant is invalid.

APPELLATE CIVIL,

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

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1 A. 274.

DARSHAN SINGH AND OTHERS (*Defendants*) *v.* HANWANTA (*Plaintiff*).

[11th August 1876.]

1 A. 274.

Registration—Act VIII of 1871, S. 17, cl. (2)—Charge.

An instrument which creates a charge on immoveable property for the payment, in a given time, of Rs. 99 *plus* Rs. 6, interest for 3 months, thus making up over Rs. 100, must be registered under cl. (2), S. 17 of Act VIII of 1871.

[F., 2 A. 40, 2 A. 688 ; **D.**, 2 B. 353, 5 M. 214, 4 C. 61 ; **Cons.**, 3 A. 1.**]**

Suit on 15th September 1875, on a bond dated 21st March 1871, which charged immoveable property with the payment on a day specified therein (5th June 1871), of Rs. 99 the principal amount and Rs. 6 interest thereon. The plaintiffs claimed to recover this amount from the defendants personally and by the sale of their property specified in the bond. The first Court held that the plaintiff's claim against the defendants personally was barred by limitation and that his claim against that particular property was not maintainable as no charge was created. The lower appellate

Court referring to H.C.R., N.W.P., 1867, p. 124, held, that the bond created a charge on that property. The defendants preferred a special appeal to the High Court.

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1 A. 274.

JUDGMENT.

[275] Assuming that the instrument creates a charge on immoveable property, which may be doubted, it purports to create an interest over Rs. 100 in value, for it secured the repayment of Rs. 99 *plus* Rs. 6, the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered we cannot act upon it. Nor can we decree the debt apart from the lien, for the agreement should have been but was not registered, and more than four years had elapsed prior to suit from the date on which the agreement to repay the money was broken. This claim was therefore barred by limitation. The appeal is decreed, and, the decree of the lower appellate Court being reversed, the decree of the Court of first instance is restored with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

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1 A. 275.

DEOJIT (*Plaintiff*) *v.* PITAMBAR AND OTHERS (*Defendants*).

[11th August 1876.]

Contract—Act IX of 1872, S. 29—Uncertain agreement—Evidence Act I of 1872, S. 93—Ambiguous or defective document.

Semble. A bond for the repayment of money, in which the executants charge "all their property" as collateral security for such repayment, is void for uncertainty so far as concerns the charge on immoveable property, under S. 29 of the Indian Contract Act. And where a document is, on the face of it, defective or ambiguous, no evidence can be given to make it certain.

[Diss., 12 A. 175 = A.W.N. (1890), 60; **R.,** 3 M. 35; **D.,** 5 A. 11.**]**

Suit to recover certain money alleged to have been charged on the immoveable property of the defendants situated in mouza Jaro Bas Mohan by a certain bond which purported to be executed by the defendants, described as residents of Jaro Bas Mohun, in favour of the plaintiff. The portion of the bond relied on by the plaintiff in support of his allegation was "we hypothecate as security for the amount our property with all the rights and interests." Both the Courts below held that the plaintiff failed to prove the bond. The plaintiff preferred a special appeal to the High Court.

JUDGMENT.

[276] This case differs widely from the one to which reference has been made (1). If the debtors had described themselves as the owners of certain property and then gone on to pledge their rights and interests, it would have been reasonable to refer the indefinite expression to the description. In this case the debtors simply describe themselves as residents

(1) *Martin* v. *Pursram*, H.C.R., N.W.P., 1867, p. 124.

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in a place and pledge "*kul haq haquk.*" This case falls within the principle of the decision (1) that a general hypothecation is too indefinite to be acted upon.

Under [277] the Contract Act, S. 29, an agreement is void if its meaning is not certain or capable of being made certain, and under S. 93 of the Evidence Act, where the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain. The Courts below have, however, found that the deed was not proved, and by this finding we are bound. Our observations on the other issue are intended to impress upon money-lenders that distinctness in the description of property mortgaged is essential. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1876 AUG. 16. — APPELLATE CIVIL. — 1 A. 277 = 1 Ind. Jur. 269.

NARAIN SINGH (*Defendant*) *v.* MUHAMMAD FARUK (*Plaintiff*).

[16th August 1876.]

1 A. 277 = 1 Ind. Jur. 269.

Act XXIII of 1861, S. 14—Pre-emption.

The right of pre-emption cannot be preferred at a sale in execution of a decree of a Revenue Court. The provisions of S. 14 of Act XXIII of 1861 are, therefore, inapplicable in the case of lands sold in execution of decrees of Revenue Courts.

Suit, based on the provisions of S. 14 of Act XXIII of 1861, to establish plaintiff's right to certain land—(sold to the defendant in execution of a decree of the Revenue Court in a suit under Act XIV of 1863)—forming portion of a patti of a pattidari mahal. Plaintiff's claim to take the land at the price knocked down to the defendant was disallowed. The first Court held that the suit was not maintainable, but the lower appellate Court held to the contrary. The defendant preferred an appeal to the High Court.

JUDGMENT.

[278] The suit was instituted under S. 14, Act XXIII of 1861, but that section cannot apply to sales in execution of decrees by Revenue officers. The Act is supplementary to and amends Act VIII of 1859, which is purely a Code of Civil Procedure. The Rent Act X of 1859, provided for the execution of decrees under the Act by Courts presided over by Revenue officers, and Act XIV of 1863, under which the suit was brought and decreed, and the property now in suit was sold in execution on the 20th August 1874, is by S. 18 declared to be a part of Act X of 1859. Hence it is quite clear that S. 14, Act XXIII of 1861, would not apply to the present suit, and no claim to pre-emption would be asserted under it. Since the decree under Act XIV of 1863, Act X of 1859 has been repealed, and if the present Rent Act admits of the assertion of a pre-emptive title in cases of sale in execution of decrees, the suit should have been founded on some section in that Act. The Munsif possibly might have thrown out the suit as based on S. 14, Act XXIII of 1861, which did not apply; but the plaint distinctly stated that the sale took place in the execution of a decree of a Revenue Court, and the Munsif

(1) See (e.g.) *Ram Buksh* v. *Sookh Deo*, H.C.R., N.W.P., 1869, p. 65.

made it an issue whether the plaintiff had any right of pre-emption in such a case. In making this issue we think that the [279] first Court was right, as the nature of the claim was apparent, and the defendant would not be prejudiced on the merits of the case, if it would be successfully urged; and on the other hand if the Rent Act provided no means of asserting a pre-emptive title in sales in execution of decrees, the defendant had a complete answer to the suit. The lower appellate Court's judgment opens with the remark that the plaintiff brought his suit under the Mahomedan law in respect of pre-emption. But this is not so; no such claim was asserted. The suit rests upon some assumed right as a co-sharer to claim at a sale in execution of a decree by a Revenue Court to purchase the property sold at the price it was knocked down to the last bidder, and the plaintiff asserts that he made the claim at the time of sale, and fulfilled all the conditions of the sale, but his claim was disallowed. It was contended that S. 177, Act XVIII of 1873, and S. 188, Act XIX of 1873, applied to the case. S. 177 of the former Act gives power to the Board of Revenue to order the sale of immoveable property under certain conditions, and if the property be sold, the sale shall be made under the rules in force for the sale of land for arrears of land revenue. The only reference to pre-emption in Act XIX of 1873 is to be found in S. 188. It is contended that, as the sale is concluded before the claim to pre-emption can be made, the claim itself is not made under any rules for the conduct of sales. We should, however, be disposed to disallow this contention. It is not, however, necessary on the present occasion to determine the point. S. 188 provides that, when any land sold under S. 166 is a patti of a mahal, any recorded co-sharer, not being himself in arrear with regard to such land, may, if the lot has been knocked down to a stranger, claim to take the said land at the sum last bid. From this section, and S. 166, it is clear that the land must be a patti of a mahal and not a portion of a patti; and this contention of the appellant's pleaders appears to us to dispose of the suit in which the land claimed is only a portion of a patti. We, therefore, think that this suit founded on the alleged right to claim as a pre-emptor in a sale in execution of a decree of a Revenue Court, under rules for the conduct of such sales, fails, and was properly dismissed by the first Court. We, therefore, decree the appeal, and reverse the decision of the lower appellate Court, restoring the decree of the Munsif with costs.

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1 A. 277 = 1 Ind. Jur. 269.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

SALAMAT ALI AND OTHERS (*Plaintiffs*) *v.* BUDH SINGH AND OTHERS (*Defendants*).

[16th August 1876.]

1 A. 303 = 1 Ind. Jur. 385.

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1. *Mortgagor and Mortgagee—Constructive fraud.*

If a prior mortgagee, knowing that a second mortgage is going to be executed, simply keeps quiet, he is not guilty of constructive fraud, and does not lose his priority.

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2. *Attestation, effect of.*

Nor does his attestation to the second mortgage amount to constructive fraud, if he is unaware of its contents.

If he attests the second mortgage, knowing its contents, and keeps silent, and thereby leads the second encumbrancer to believe that the property is unencumbered, and if the circumstances are such that the latter would not have advanced money on the property, if he had known of the prior encumbrance, the silence would amount to constructive fraud, and the prior mortgagee will lose his priority.

[R., 1 O.C. 252 (253).]

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ORDER OF THE HIGH COURT REMANDING THE CASE.

[304] The appellants allege that their brother Mansab Ali having incurred debts, borrowed Rs. 400 from them wherewith to discharge the debts, and to secure the repayment of the loan executed a mortgage of the property which the appellants now claim to bring to sale for its satisfaction. The mortgage-deed in favour of the appellants was duly registered. On the 3rd August 1870, Mansab Ali having become still more involved in debt, borrowed Rs. 2,000 from Pirthi Singh, and again hypothecated the property. One of the appellants, Intizam Ali, was a witness to the execution of the mortgage. On the 16th February 1871, Mansab Ali took Rs. 2,600 from Budh Singh to pay off the mortgage due to Pirthi Singh and for other purposes, and hypothecated the property to Budh Singh. The debt due to Pirthi Singh was discharged out of the loan taken from Budh Singh. The appellant Salamat Ali witnessed the execution of the mortgage-deed in favour of Budh Singh. This deed does not contain any statement to the effect that no mortgage subsisted on the property, nor is there any allegation that the mortgagee inquired of any of the appellants whether or not there were any charges on the property. Budh Singh brought a suit on his mortgage-deed and obtained an order for sale. The appellants were not parties to this suit, but they caused the lien they now claim to enforce to be notified at the time of the sale. The property was purchased by the respondents for a sum of Rs. 5,000. It therefore is apparent that, at the time the mortgage was executed in favour of Budh Singh, its value was more than sufficient to discharge that debt as well as the debt due to the appellants.

The respondents pleaded that the appellants are estopped from enforcing their lien because they fraudulently concealed their charge, and they further pleaded that the charge created in the appellants' favour was a merely nominal transaction for the purpose of protecting Mansab Ali's property from his creditors, or that, if *bona fide*, the debt had been discharged.

[305] The Court of first instance held the mortgage-deed executed in favour of the appellants to have been a *bona fide* transaction, and disbelieved the witnesses called to prove that the money had been refunded. As to the plea of estoppel, the Court found that, regard being had to the value, there could have been no intention on the part of the appellants to deceive the second encumbrancers, inasmuch as it was ample to satisfy both charges, and that the mere attestation of the subsequent encumbrance was not sufficient to create estoppel. It therefore decreed the claim. On appeal the same pleas were urged by the respondents, the then appellants, as they had pleaded in the Court of first instance. The lower appellate Court held that the appellants had purposely and intentionally concealed their prior demands, and that, had they mentioned them, the subsequent creditors would either have abstained from lending their money or would have considered their advantages and disadvantages

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The lower appellate Court, without determining the other pleas, reversed the decree of the Court below and dismissed the suit.

It is contended that there was no sufficient evidence to justify the lower appellate Court in finding that the appellants fraudulently concealed their mortgage, and the mortgagees had been deceived by them, and that at least a distinction should have been made between such of the appellants as did not attest the deed under which the property had been sold and appellant who attested it.

It is conceded that all that is proved against the appellants Mumtaz Ali and Akbar Ali is that, being brothers of the mortgagor and cognisant of his dealings with his property, they remained silent and did not give the mortgagees notice of their lien. In addition it is proved against Intizam Ali that he attested the deed executed in favour of Pirthi Singh, and it is proved against Salamat Ali that he attested the deed under which the property was sold. Are these circumstances sufficient to deprive all or any and which of the appellants of the right to enforce their lien?

Although the plea has not been taken in special appeal, we may express our opinion that the respondents, who now hold the property in virtue of their purchase at auction, are entitled to put forward the same pleas as might have been urged by the mort-[306]gagees had the question of priority arisen before the sale. Although they purchased with a knowledge of the appellants' claim, they also knew that the claim was contested, and the notification of the claim at the sale could not restore to the appellants' priority if they had already lost it. Had they or have any of them lost it?

It is a rule of equity that where a man by his conduct or language wilfully causes another to conceive an erroneous impression and to act upon the impression he has so formed and to alter his position, he cannot afterwards be allowed to claim any benefit for himself by asserting that the facts were contrary to the impression he had produced, and it may be added that a man must be presumed to intend the natural consequences of his conduct or language. If a man stands by and sees another sell property which belongs to him, he is bound to proclaim his title. If he fails to do so and a stranger is induced by his silence to believe he has no title, and under that impression expends his money on the purchase of the property, equity holds the man so standing by, if he fails to explain his silence, guilty of constructive fraud and postpones his title to that of the purchaser. The cases on this point are noted in Story's Equity Jurisprudence, S. 393, and in Fisher on Mortgages, S. 1541. It is, however, of the essence of constructive fraud that the person sought to be charged therewith should be proved to have concurred or co-operated in some deceit or to have been guilty of gross negligence. It is not therefore enough to show merely that a man, knowing that persons are dealing with his property out of his presence, keeps silence—Story's Equity Jurisprudence, S. 394. "A mortgagee need not go out of his way to give notice to his security upon hearing that the mortgagor is dealing with the estate"—Fisher on Mortgages, S. 1541. But if a person who proposes to make an advance on a property informs a mortgagee of his intention in such a manner as to show that he intended to be guided by what he might hear from the mortgagee and the mortgagee remains silent, still more if a direct inquiry is made of the mortgagee and he remains silent, then in either of these cases the mortgagee will be held guilty of constructive fraud. Again, although the mere attestation of the execution of a mortgage-deed by a prior mortgagee is not, as it was at one time held to be, sufficient to create estoppel, because it does not necessarily follow that a witness is aware of

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the contents of the [307] deed of which he attests the execution, yet where that knowledge is brought home to him, and there are circumstances to show that he acted dishonestly and disingenuously to the mortgagee, and the mortgagee was in consequence deceived, the prior mortgagee will be deprived of his priority.

Applying these principles to the case before us we are unable to hold there was any sufficient evidence to justify the lower appellate Court in finding the appellants Mumtaz Ali and Akbar Ali guilty of constructive fraud, and therefore debarred from insisting on their claim Looking to the value of the property, it may well be doubted whether there was a design on the part of any of the appellants to deceive the mortgagee. However this may be, Mumtaz Ali and Akbar Ali simply remained silent, although cognisant of the fact that their brother was dealing with the mortgaged property elsewhere. Nor does the case seem stronger against Intizam Ali. He, it is true, attested the deed executed in favour of Pirthi Singh, but the sale was not made under that deed, nor was the mortgage executed in favour of Pirthi Singh kept alive and assigned to the subsequent mortgagee. So far as concerns Budh Singh, Intizam Ali simply remained silent. We hold that the facts proved did not justify the lower appellate Court in holding Intizam Ali had concurred or co-operated in any fraud practised on Budh Singh.

Against Salamat Ali there is the circumstance that he attested the execution of the deed of mortgage in favour of Budh Singh, that he was the brother of the mortgagor and in constant intercourse with him, whence it may be inferred he was aware of the contents of the deed he witnessed. and lastly, that possessing this knowledge he kept silent as to the existence of a prior lien in favour of himself and his brothers. Under these circumstances, if Budh Singh was deceived, it would be competent to the Court to find that Salamat Ali wilfully misled Budh Singh and so co-operated and concurred in that deceit, and to hold that, in consequence, his interest in the alleged prior encumbrance must be postponed to that of Budh Singh and those who purchased under Budh Singh's mortgage. Being of opinion that there had been no sufficient investigation of the issue whether Budh Singh was deceived by Salamat [308] Ali's silence, and to enable it to pass final orders in this appeal, the Court remanded the case for the trial of the following issues: (i) Was the mortgage on which the appellants rely executed *bona fide* and for good consideration? (ii) If it was so executed, has the debt so created been discharged? (iii) Was Budh Singh ignorant of the mortgage on which the appellants rely, and if he had known of its existence, would he have declined to advance his money on the security of the property?

FINDING OF THE LOWER APPELLATE COURT.

The lower appellate Court determined the two first of the issues above mentioned in favour of the appellants, and the third issue in favour of the respondents.

JUDGMENT OF THE HIGH COURT.

The judgment of the Court (after accepting the findings of the lower appellate Court on the two first issues) was as follows:—

We accept the finding that Budh Singh would not have agreed to take a second mortgage of the property had he been aware of the existence of the prior mortgage in favour of the appellants. He was about to advance a large sum on the property of which the bulk was, as he knew, and as Salamat Ali must have known, to be applied to extinguish existing encum-

brances, and had he been aware of the lien held by the appellants it may reasonably be inferred he would have insisted on its satisfaction out of the monies he had advanced. Each case must of course be governed by its own circumstances, but on the facts found in this case we must hold that Salamat Ali has by his silence lost his right to priority so far as his interest in the mortgage is concerned.

It must also be presumed that the shares of the four brothers in the mortgage-debt were equal. The decree of the lower appellate Court, so far as it dismisses the claim in respect of three-fourths of the mortgage-debt and interest is reversed, being the shares of Mumtaz Ali, Intizam Ali, and Akbar Ali and the decree of the Court of first instance to this extent restored, but the decree of the lower appellate Court, so far as it dismisses the claim to one-fourth of the mortgage debt, being the share of Salamat Ali, is affirmed. The appellants will recover three-fourths of their own costs in all Courts from the respondents and pay one-fourth of the respondents' costs. The respondents or either of them are of course at liberty to pay off the three-fourths of the mortgage-debt, interest, and costs, and to prevent a sale.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

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MEGHRAJ (*Plaintiff*) *v.* ZAKIR HUSSAIN (*Defendant*).

[21st August 1876.]

APPEL-LATE CIVIL.
1 A. 280.

Act XVIII of 1850, S. 1—Judicial officer—Good faith—Jurisdiction.

In a suit for damages against a judicial officer, where want of jurisdiction is not alleged, the question of "good faith" does not arise.

[Ap., 12 A. 115.]

Suit to recover damages from the Munsif of Meerut on the plea that he had acted in contravention of law and had postponed, on the 2nd August 1876, the sale in execution of a decree held by the plaintiff. The first Court dismissed the suit for want of cause of action. The plaintiff appealed to the High Court.

JUDGMENT.

[280] The appellant obtained a decree in the Small Cause Court of Meerut for a sum of Rs. 61. The judgment-debtor having no **[281]** moveable property, the appellant obtained a certificate from the Small Cause Court and applied to the Munsif to execute the decree by attachment and sale of the judgment-debtor's rights and interests in a house. Orders were accordingly issued, but with the consent of the appellant or his pleader the sale was from time to time postponed. Eventually it was ordered the sale should take place on the 3rd August; but on the 2nd August the judgment-debtor again applied for a postponement, stating that negotiations were in progress for the sale of the house by private sale. The Munsif inquired of the decree-holder's pleader if it was probable the money to satisfy the decree would be raised, and on the pleader's stating that he thought it was probable, and apparently offering no opposition to

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the postponement, the sale was again put off to the 16th September. On that day the judgment-debtor brought into Court Rs. 50, and prayed for further delay. The decree-holder's pleader complained that the amount paid in was too small, but consented to the payment of the money, and did not press any objection to the postponement of the sale. Subsequently the sale took place, but it was set aside on the ground that it was held after the proper time of the day, and therefore no adequate price was offered for the property. These are the facts on which the appellant relies to establish his case.

1 A. 280. Now it is enacted by Act XVIII of 1850 that no Judge or other officer therein mentioned shall be liable for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he at the time in good faith believed himself to have jurisdiction to do or order the thing complained of.

It is clear the Munsif had jurisdiction, and therefore the question of good faith does not arise. He is protected from suit by the provisions of the Act, and although it is unnecessary to express any opinion on the point, we feel bound to say that, whether or not the Munsif was right in setting aside the sale on the ground urged before him, and whether or not he should have declined to grant the postponement of the sale on the 16th September, we have heard nothing which would support the suggestion (which was not made in the plaint) that he has not acted in good faith. We dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

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NAND KUMAR AND OTHERS (*Defendants*) *v.* RADHA KUARI (*Plaintiff*).

[21st August 1876].

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Res judicata—Hindu widow—Reversioner.

1 A. 282. A Hindu widow succeeding to her husband's estate as heir, represents the estate fully; and reversioners, claiming to succeed after her, are bound by decrees relating to her husband's estate, obtained against her without fraud or collusion.

[**Ap.**, A.W.N. (1881), 106; **R.**, 8 A. 365 = A.W.N. (1886), 129, 29 P R. 1895, 107 P.R. 1906.]

On her husband's death, the mother of the plaintiff in this suit, a Hindu widow, Ananda by name, obtained possession of his estate as his heir, and, in a suit against her by certain persons (the defendants in this suit) claiming to succeed to the estate as rightful heirs, a decree was obtained by them, it being proved that the property was the joint and undivided property of the said defendants and the plaintiff's father. The plaintiff, in this suit claimed the estate in succession to her widowed mother, averring that it was the separate property of her deceased father and that the decree in the former suit was obtained by collusion and fraud on the part of her mother and the defendants. The defendants set up the plea that the decree against her mother in the former suit was a bar. The first Court overruled this plea and decreed in favour of the plaintiff. On appeal, the defendants raised the same contention.

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[283] We are of opinion that the objection is a valid one and disposes of the plaintiff's claim. A Hindu widow succeeding to her husband's estate as heir represents the estate fully, and reversioners claiming to succeed after her are bound by decrees relating to her husband's estate obtained against her without fraud or collusion,—*Katama Natchiar* v. *The Raja of Shivagunga* (1); *Ganga Jali* v. *Ram Sukal* (2); *Bansi Kuari* v. *Sunjhari Kuari* (3); *Suga Kunari* v. *Ramugrah Dubay* (4); *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (5); *Amirtolal Bose* v. *Rajoneekant Mitter* (6).

There is no reason to believe that the decree against Musammat Ananda was obtained by collusion or fraud, and we must therefore consider that it has finally disposed of the plaintiff's claim. We allow the appeal and dismiss the suit with costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner and Mr. Justice Spankie.

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1 A. 291 = 1 Ind. Jur. 409.

MAHABIR PARSHAD AND ANOTHER (*Plaintiffs*) *v.* DEBI DIAL AND OTHERS (*Defendants*).

[21st August 1876.]

1 A. 291 = 1 Ind. Jur. 409.

1. *Pre-emption—Rights of persons equally entitled.*

When, under the village administration-paper, a number of persons, holders of equal shares in the patti, are equally entitled to the right of pre-emption of a share, which is being sold, they are entitled to have equal portions of the share sold to them.

2. *Conditional decree in pre-emption suit.*

In a decree in a pre-emption suit, it is usual to fix a time within which to deposit the purchase money in Court. Where there are a number of claimants, it is proper to make a direction in the decree that, in the event of any one of the claimants failing to deposit his proportion of the purchase money, any other of them making the deposit within the time should be entitled to the share of the defaulters.

[1—F., 6 A. 370, 7 A. 720 ; **Expl.,** 10 A. 182.**]**

ORDER OF REMAND.

The Court remanded the case to the lower appellate Court in the following terms :—

It having been found that the plaintiffs and Duliman were all co-sharers, a right of pre-emption accrued to all of them, and equitably they will be entitled each to have the sale made to him to the extent of one-third of the property sold. We have not to decide whether such a right is to be divided in proportion to the extent of the shares or in proportion to the

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(1) 9 Moore's Ind. App., 604.
(2) S. A., No. 335 of 1875, decided the 26th August, 1875.
(3) R. A., No. 16 of 1875, decided the 19th August, 1875.
(4) R. A., No. 72 of 1875, decided the 21st April, 1876.
(5) B. L. R., Sup. Vol., 1008=9 W. R., 505.
(6) 15 B. L R. 10.

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number of persons entitled to pre-emption, for in this case three persons assert their right to pre-emption and the shares to which the right is appurtenant are equal. We cannot, however, pass a final decree until the lower appellate Court has determined what was the price actually paid for the share. This issue we remit under S. 354 for trial.

FINDING OF THE LOWER APPELLATE COURT.

The lower appellate Court found that the price actually paid for the share was Rs. 300.

JUDGMENT.

The case having been returned to the High Court, judgment was delivered as follows :—

[293] We accept the finding on the issue remitted, and the decree will be modified accordingly. The appellants are entitled to pay into court within one month from this decree Rs. 200 and obtain a two-third share, and Duliman will pay into court within the same period Rs. 100 and obtain a one-third share; and if either the appellants or Duliman fail to pay in the amounts within the month, the other of them making the further deposit within the time shall be entitled to the share of the defaulter.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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1 A. 293 = 1 Ind. Jur. 410.

HINGAN KHAN AND OTHERS (*Decree-holders*) *v.* GANGA PARSHAD AND OTHERS (*Judgment-debtors*). [21st August 1876.]

1 A. 293 = 1 Ind. Jur. 410.

1. *Pre-emption—Conditional Decree.*

When the plaintiff, in a suit for pre-emption, obtains a conditional decree, to the effect that if the purchase money be not deposited in Court within a fixed time, the decree will become null and void, he loses the benefit of the decree by failing to deposit the money within the time.

2. *Final judgment and decree.*

When a suit was carried to the stage of special appeal to the High Court, but the appeal was withdrawn, *held* that the final judgment and decree in the case were those of the lower appellate Court. (1 A. 132, *Distd.*)

[2—R., 16 C. 598, 15 B. 370; D., 30 A. 385 = 5 A.L.J. 580 = A.W.N. (1908), 161; 3—R., 40 P.W.R. 1908 = 87 P.L.R. 1908 = 54 P.R. 1908.]

Suit to establish right of pre-emption. The material portion of the decree of the Court of first instance passed on the 1st April 1874 was as follows: "That the plaintiffs' claim for a declaration of right to, and possession of, the property in suit be decreed, and the delivery of possession be duly effected, and if the plaintiffs deposit in this Court the whole amount of the purchase-money within one month from the date this decision becomes final, this decree will be executed, otherwise it will be held null and void." On appeal by both the parties, the lower appellate Court on the 19th May 1874, affirmed it. The plaintiffs' special appeal to the High Court on the 26th August 1874, against this decree was allowed to be withdrawn by the Court on the 9th December 1874,

its order being "The pleader for the appellant does not support this appeal, and it is withdrawn. Costs to be paid by the appellant." After depositing in Court the amount of purchase-money, on the 7th January 1875, the plaintiffs, on the 21st June 1875, applied for possession of the property in execution of the decree. The objection of the judgment-debtors, vendees, to the execution, that the purchase-money had not been deposited within time, was disallowed by the first Court but allowed by the lower appellate Court.

The decree-holders appealed to the High Court, their pleas being:—

(i) that the right of pre-emption decreed in their favour was not lost by reason of their failing to deposit the purchase-money within time, and

(ii) that the decree did not become final till the date of the order of the High Court.

JUDGMENT.

[295] The first plea fails. No absolute right of pre-emption was established by the decree; the decree made the right conditional on payment of the purchase-money within a certain period. Failing fulfilment of this condition, the right under the decree became null and void and the decree incapable of execution. Whether or not such a conditional decree could be legally made (and the counsel for the appellant denies that it can) is not a question for us to consider in execution of the decree: if there is force in the objection it is one which applies to the decree, and should have been taken by review of judgment.

The next objection raises the question as to when the judgment of the Court of first instance is to be held as having become final. It is alleged by the appellant that it ought to be held as becoming final on the 9th December 1874, when this Court gave its order allowing the appellant to withdraw the special appeal. We are, however, of opinion that, under the circumstances of this particular case, the judgment became final on the 19th May 1874, when the Judge affirmed the decree of the Court of first instance. What took place in the special appeal did not and could not affect the finality of the Judge's decree. There was no decision after a hearing but only a withdrawal, by which course the plaintiffs showed the judgment to be not open to revision. So far as affecting the finality of the judgment of the Judge in regular appeal, we must look on the proceedings in special appeal as though non-existent, and in consequence hold that the judgment of the Court of first instance became final when affirmed by the Judge in regular appeal, and that therefore the order of the lower appellate Court should be affirmed, and this appeal should be dismissed, and we dismiss it with costs.

[296] Our attention has been drawn to a case decided by a Bench of this Court (1), where a somewhat similar question was before the Court, but there is this distinction between the two cases that in the one referred to the special appeal had been decided after trial, whereas in the case before us the appeal was withdrawn without trial.

STUART, C.J.—I have signed this judgment because I think that, under the circumstances of this case, it is right. But I wish to add that I am not to be understood as approving the practice of inserting conditions into decrees as to the time of payment or otherwise, notwithstanding the rulings of this Court to the contrary referred to.

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(1) *Shaik Ewaz* v. *Mukuna Bibi*, 1 A. 132.

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APPEL-LATE CIVIL.

1 A. 309.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

MANNA LAL (*Defendant*) *v.* THE BANK OF BENGAL (*Plaintiff*).

[21st August 1876.]

1 A. 309.

Contract—Act IX of 1872, S. 2 (d), 25—Consideration—Agreement without consideration—Void agreement.

Where the acceptor of two hundies, maturing on the 12th June and the 15th June, 1874, gave the holder, on the 21st May 1874, (the drawer having become insolvent), a mortgage of certain immoveable properties as collateral security for the payment of the amount of the hundies, so long as it shall remain unpaid, *held*, in a suit on the mortgage bond, the hundies having been dishonoured, that the contract of mortgage was void under the provisions of S. 25 of the Contract Act, as there was no consideration for it. To constitute a consideration as defined in the Act, there must be an act, abstinence or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was none of these things and, therefore, there was no consideration for the mortgage.

[Ap., 22 B. 176.]

Suit to recover Rs. 5,000 on a mortgage-deed dated the 21st May 1874. While 2 hundis (maturing on 12th June and 15th June, 1874) were running, the acceptor (Manni Lal) gave the holder, on the 21st May 1874, the drawer having become a bankrupt, a mortgage of certain immoveable property as security for the payment of the hundis in the event of their dishonour when they became due. The material portion of the bond by the defendant was as follows:—"I, therefore, of my own free-will and pleasure, agreeably to the request of the Bank of Bengal, for security for the amount of the hundis due to the Bank of Bengal, Cawnpore Branch, do hereby hypothecate and pledge for the said amount a house and six shops situated in the chauk in the city of Cawnpore, and a bungalow situated in the Cawnpore Cantonment, and execute this by way of a collateral security-bond. . . . The hypothecated property shall remain hypothecated and pledged as long as the amount of the hundis is not paid. The said Bank of Bengal is at liberty to realize on account of the hundis the amount thereof from the hypothecated property and from me in any manner it likes." The hundis having been dishonoured on maturity, the Bank of Bengal instituted against the drawer a suit on the 24th June 1874, and obtained a decree against him. It was unsatisfied at the time (9th March 1875) when the present suit was instituted against the defendant. One of the chief pleas of the defendant was that the mortgage was obtained from him on the promise that the Bank would exhaust every means to obtain payment of the hundis from the drawer before recourse was had to the acceptor. The agent of the Bank denied that any such promise was made. The first Court and the lower appellate Court found that no such promise had been made. The latter Court held that inasmuch as the acceptor of a bill derives benefit reciprocally with the drawer in banking transactions, and that both are liable for the prompt discharge of the bill on its arriving at maturity, any security given meanwhile by either of them is not devoid of consideration, inasmuch as it carries with it the prospect of a deferred demand for the money. The defendant in his special appeal to the High Court contended that there being no consideration for the agreement of mortgage, it was void under S. 25, Act IX of 1872.

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1 A. 309.

[311] But we must admit the validity of the plea that the contract of mortgage is void under the provisions of S. 25 of the Contract Act. We do not quite understand the Judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the hundis when discounted; but, assuming that he had done so, and admitting that under the circumstances he was liable on the hundis, neither the antecedent benefit, nor the existing liability, nor the anticipated advantage to which the Judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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1 A. 311.

JAGESHAR SINGH (*Plaintiff*) *v.* JAWAHIR SINGH AND OTHERS (*Defendants*).

[21st August 1876.]

1 A. 311.

1. *Pre-emption—Limitation—Act IX of 1871, Sch. II, Art. 10—Actual possession.*

For computing the period of limitation for a suit for pre-emption, which commences when the purchaser takes "actual possession" of the property, the purchaser of the equity of redemption of immoveable property takes "actual possession," within the meaning of Art. 10, Sch. II of Act IX of 1871, when the equity of redemption is completely transferred to, and vested in him. Full effect is given to the expression "actual possession" by holding that, when the nature of the subject of the sale admits of visible and tangible possession, limitation will run from the period when tangible possession is taken, but that when the nature of the subject of the sale does not admit of tangible possession, limitation runs from the time when the subject of sale is completely conveyed to, and vested in, the purchaser, and he has acquired such possession as, before the sale, was enjoyed by the seller.

Per STUART, C.J.—Such a purchaser does not take "actual possession" until he takes visible and tangible possession, or enjoys the rents and profits of the property, after redemption of the mortgage.

2. *Statute—Construction.*

When the language of a Statute admits but one construction, considerations of equity and convenience, hardship or injustice cannot be allowed to prevail against it; but where it is not incompatible with a construction that avoids hardship and injustice, Courts are at liberty to adopt that construction.

[1—Ap., 1 A. 592, 3 A. 24 **(F.B.)**; **R.**, 20 A. 315 **(F.B.)**; 3 O.C. 184, 24 A. 17 **(P.C.)** 5 C.L.J. 491=11 C.W.N. 593=2 M.L.T. 207.**]**

Suit on the 5th October, 1874, to enforce the plaintiff's right of pre-emption of a share in a certain village and for possession of the same,

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the right of pre-emption being founded on a special contract in the village administration paper. The deed of sale impeached was dated the 15th September 1873, the usufructuary mortgagees then being in possession, and the deed recited that the vendees were entitled to possession on the 31st May 1874, by redemption of the mortgage. The suit was dismissed by the lower appellate Court, as being instituted after the prescribed period of limitation. The plaintiff preferred a special appeal to the High Court.

REFERENCE TO THE FULL BENCH.

TURNER and OLDFIELD, JJ. referred to the Full Bench the question as to the time from which the period of limitation began to run: with the following remarks:—

By art. 10, sch. ii, Act IX of 1871, the period begins to run "when the purchaser takes actual possession under the sale sought to be impeached." The terms of the former Act were—"the time at which the purchaser shall have taken possession under the sale impeached."

The word "actual" has thus been introduced in the present Act, and there appears a doubt as to the object of this change, whether in the case before us the possession meant is possession by enjoyment of the profits on expiry of the term of the mortgage, or whether such possession as the nature of the property admits of is all that is intended, dating in this case from the time of the sale.

OPINIONS OF THE FULL BENCH.

[313] STUART, C.J.—I am clearly of opinion that the possession intended in art. 10, sch. ii, Act IX of 1871, is possession by enjoyment of the profits on expiry of the term of the mortgage. The time mentioned in the former Act was "the time at which the purchaser shall have taken possession under the sale impeached," and the meaning of this being doubtful, as various rulings of the Calcutta Court and this Court show, the word "actual" has been introduced into the present Act with the view no doubt of making it plain what the real date was intended to be. Actual possession, in my opinion, means personal and immediate enjoyment of the profits; and as in the present case the mortgagee was in possession at the time of the sale, the purchaser could not take actual possession till the mortgage-term had expired. And this is my answer to the reference.

PEARSON, J.—The possession of a mortgagee is tantamount to the possession of the mortgagor or his vendee, and does not interfere with his equity of redemption. Nor can the latter be said not to be in possession by enjoyment of the profits when those profits are applied to the liquidation of the mortgage-debt for which the property purchased by him is liable. He may, when he has taken his vendor's place, be reasonably held to have obtained actual possession under the sale, and from the date on which he acquired it will run the limitation prescribed by art. 10, sch. ii, Act IX of 1871. The introduction of the word "actual" in that article seems to render the terms used more precise than those used in the former Act, and to adopt the Full Bench ruling in *Ganeshee Lal* v. *Toola Ram* (1) rather than to negative it, and make any change in the law.

[314] TURNER, SPANKIE and OLDFIELD, JJ., concurred in the following opinion:—

The provisions of the former law, Act XIV of 1859, declared that in suits for pre-emption the period of limitation should be computed from the

(1) H.C.R., N.W.P., 1868, p. 376.

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time at which the purchaser shall have taken possession under the sale impeached. On the construction of the term possession this Court held in *Ganeshee Lall* v. *Toola Ram* (1) that such possession was intended as the nature of the thing sold admitted of, and that it did not necessarily mean tangible or visible possession. Thus, where a property was in the possession of the mortgagee, and the rights of the mortgagor were sold, it was held that possession was acquired under the sale as soon as the right of redemption was completely transferred to the purchaser, and that limitation must be computed from that period and not from a subsequent date when the mortgage having been discharged from the usufruct the purchaser was able to resume possession. It was pointed out that at the time of the sale two persons had rights in the property, the mortgagor and the mortgagee, and that the subject of the sale was the right of the mortgagor as it subsisted at the time of the sale. Seeing that the purchaser had purchased the right to recover and enjoy the profits at an indefinite period, for it could not be ascertained with certainty at what date the debt and interest would be discharged from the usufruct, it was deemed inequitable to allow a pre-emptor to obtain the property in 1867 freed from mortgage at the price paid by the purchaser in 1860 for the estate encumbered with the mortgage. As an analogous case it was suggested that, if land were leased for a certain term at a nominal rent, and during the term the lessor sold and conveyed the reversion to a purchaser, although the purchase would not have conferred on the purchaser the right to any immediate profit from the estate, the subject of the sale would have been his and in his possession, for all intents and purposes, as completely as before the sale it was in the possession of the vendor.

The language of the present Limitation Act, IX of 1871, differs somewhat from that of the former in declaring the date from which **[315]** the period of limitation is to be computed in suits for pre-emption. In Sch. ii, cl. 10, it is declared the period begins to run when the purchaser takes actual possession under the sale impeached, and the question put to us is whether there has been any change in the law, whether by actual possession we are to understand in all cases visible and tangible possession or such possession as the nature of the subject of the sale allows.

We have felt some difficulty in determining this question, for it may be presumed the term actual was not introduced without a purpose. But it will equally apply to subjects of sale which admit of visible and tangible possession as well as subjects of sale which do not admit of such possession. The purchaser of an equity of redemption or of a right of reversion is, it must be allowed, actually in possession of what he has purchased, when the rights of the mortgagor or lessor have been completely transferred to and vested in him. In the one case he and he only could maintain suit for any injury to the reversion, in the other he and he alone could maintain suit for damage done by the mortgagee to the property mortgaged in contravention of the terms of the mortgage. We are pressed, too, by the argument in *Ganeshee Lall* v. *Toola Ram* (1) that it would be inequitable to allow a pre-emptor to lie by for a number of years to see whether the purchase was beneficial or otherwise, and to come in and claim the benefit of the sale when the subject of the sale is freed from the encumbrance existing at the time of the sale, or where its market-value may have considerably increased. Of course if the language of the law admitted but one construction, we could not allow this consideration to

(1) H.C.R., N.W.P., 1868, p. 367.

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influence us, but where it is not incompatible with a construction that avoids hardship and injustice, we are at liberty to adopt that construction. It appears to us that full effect is given to the term actual possession if it be held that, where the nature of the subject of the sale admits of visible and tangible possession, limitation will run from the period when tangible possession is taken, but that when the nature of the subject of the sale does not admit of tangible possession, limitation runs from the date when the subject of sale is completely conveyed to and vested in the purchaser, and he has acquired such possession as before the sale was enjoyed by the seller.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

1876 AUG. 22. — APPELLATE CIVIL. — 1 A. 283.

ALI MUHAMMAD (*Defendant*) *v.* TAJ MUHAMMAD (*Plaintiff*).

[22nd August 1876.]

1 A. 283.

Mahomedan Law—Pre-emption—Immediate demand.

The right of pre-emption is considered not a strong right, and any one claiming it should be held bound by the conditions of the Mahomedan law, and should promptly assert it by immediate demand. It is not the duty of the Courts to enlarge the conditions under which so inconvenient, and sometimes so oppressive, a right can be asserted.

[R., 35 C. 575.]

Suit for pre-emption, founded on Muhammadan law.

JUDGMENT.

[284] The "*talab-i-mawasabat*," or immediate demand, should be made when a person entitled to pre-emption has heard of a sale, on the instant, whether there is any one by him or not, and when he remains silent without claiming the right it is lost,—Baillie's Digest of Muhammadan law, Bk. vii, ch. iii. The "*talab-i-ishad*," or demand with invocation of witnesses, is a calling on witnesses to attest the immediate demand and must take place in the presence of the purchaser or seller or of the premises which are the subject of sale,—Baillie's Digest of Muhammadan Law, Bk. vii, ch. iii.

The Munsif dismissed the claim because it was obvious from the examination of the plaintiff that he did not, on hearing of the sale, immediately, on the instant, claim his right of pre-emption. He heard of the sale in the morning but did not assert his right **[285]** until 7-30 or 8 in the evening. The plaintiff appealed and contended that the delay in making affirmation of his demand did not destroy his right of pre-emption.

Mahomed Waris v. Hazee Emam-odd-deen (1).

The Judge, citing a decision of the Calcutta High Court noted in the margin and based upon a decision of the Sudder Dewanny Adawlut in 1857 (2), held that the delay in this case was not such that it interfered with the plaintiff's right of pre-emption. He therefore remanded the case under S. 351 for re-trial on the merits.

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(1) 6 W.R., 173.

(2) In 1 S.D.A. (1857) 454 it was held that a delay of one day "is not such a delay as to interfere with the plaintiff's rights to pre-emption under the Mahomedan Law."

It is contended here by the special appellant that the delay was fatal. Moreover, the plaintiff had opportunities of asserting his right on the premises and before some labourers at work on the roof, and he neglected to do so, and so lost his right.

It is to be observed that the Munsif laid down as an issue whether or not the plaintiff had fulfilled the conditions of immediate demand, and demand with invocation of witnesses, and his judgment would seem to imply that he did not fulfil the condition of immediate demand, as he heard of the sale in the morning and did not assert his right until 7-30 or 8 P.M. in the evening. On the other hand, the Judge seems to have lost sight of this finding, and to have addressed himself solely to the plea that the affirmation of purchase (before witnesses) in the evening was not such a delay as to vitiate the right of pre-emption. This clearly appears from his citing a judgment in which the question was whether the demand by invocation of witnesses had been made too late.

In special appeal the contention appears to be that neither of the conditions of immediate demand, or demand with invocation of witnesses, has been made. At the same time the third plea seems to confuse both conditions, for it is not necessary that the immediate demand should be made on the premises, though it ought to have been made before the labourers. As the Munsif only received the evidence of one person, who was the plaintiff himself, for it does not appear that any evidence was offered by the defendant, and as the two judgments seem to relate to different demands, we think that we ought to consider what it was that the plaintiff really said, and what was the effect of his admissions.

[286] The plaintiff at the outset of his examination stated that he heard of the sale for the first time on the 16th June in the evening at 5 P.M., when he returned from Court, and saw several men repairing the house in dispute. He asked them on whose part they were making repairs, and they said on the part of Ali Muhammad. "I sent my brother," the plaintiff continued, "in search of Ali Muhammad to his house, but he was not found; at 7-30 or 8 o'clock Ali Muhammad came to my house." But in the after part of his deposition the plaintiff very distinctly stated that he heard at 7-30 A.M. from the labourers that "they were repairing the house on the part of Ali Muhammad, who had purchased the house; after hearing this, I did not say a single word more to the labourers, but I at once sent my brother to Ali Muhammad to call him. I went to Court * * * * * I told my brother only this much, go and call Ali Muhammad, I did not tell him anything more. I made mention about pre-emption for the first time at 7-30 in the evening when Ali Muhammad came."

This evidence justifies the decision at which the Munsif arrived, inasmuch as it shows that the plaintiff did not make the immediate demand on the instant when he first heard of the sale. He should have done so before the labourers. He said that two minutes after leaving the labourers he sent his brother to call Ali Muhammad, but he admits that he did not even before his brother claim the right. Although the plaintiff's intention doubtless was to make the demand to Ali Muhammad had he been found and had come to him in the morning, still the delay in making the immediate demand is such that cannot be remedied. The meaning of the word "*mawásabat*" is literally jumping up, and though it has been said that the demand may be made at any time during the meeting at which the information has been received, still even if this were so, in this case it is clear that no demand was made until twelve hours after the

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plaintiff became aware of the sale, and then it was made at the same time with the demand with invocation of witnesses.

We are not called upon to say whether the Judge has rightly ruled (if he has so ruled) that the delay in making the demand with invocation of witnesses was not too late. The making of this [287] demand is measured by the ability to do so, and the Judge considers apparently that it was made with the least practicable delay. But if the Judge is to be understood as applying this test to the immediate demand, then we think that he is wrong, and that delay in making the immediate demand is fatal, because it must be made at once when the fact of the sale becomes known.

Chundo v. *Hakeem Alimooddeen* (1).

The Full Bench decision of this Court cited marginally ruled that, under S. 24, Act VI of 1871, Muhammadan Law is not strictly applicable in suits for pre-emption between Muhammadans not based on local custom or contract, but it is equitable in such cases to apply that law. So in cases relating to gifts it was held in another Full Bench decision (2) that it was equitable as between Muhammadans to apply Act VI of 1871, to such questions. The right of pre-emption is not a strong right, and it appears to us that any one claiming it should be held bound by the conditions of the Muhammadan Law, and should promptly assert his right of pre-emption by the immediate demand. It is not surely the duty of the Courts to enlarge the conditions under which so inconvenient and sometimes oppressive a right can be asserted. Following the principle laid down in the Full Bench decisions of this Court already referred to, we think that the judgment of the lower appellate Court is wrong, and that of the first Court should be restored. We, therefore, decree the appeal and reserve the judgment of the lower appellate Court, and restore that of the first Court with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

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APPEL-LATE CIVIL.
1 A. 287.

IN THE MATTER OF THE PETITION OF RUKMIN AND ANOTHER.

[22nd August 1876.]

Act XXVII of 1860, Ss. 5 & 6—Certificate for collection of debts—Security—Appeal.

No appeal lies to the High Court against the order of the District Judge, requiring security from the person to whom he has granted a certificate to collect debts under Act XXVII of 1860. (H.C.R., N.W.P., 1870, p. 146. 1 C. 127=24 W. R. 362, *F.*).

[F., 3 A. 304 (305).]

Semble. A review of the order may be admissible.

The District Court, on an application by the widows and sole heirs of the deceased, for a certificate under Act XXVII of 1860, for the collection of the debts due to the estate of the deceased to the extent of Rs. 3,000, granted the certificate but required the applicants to furnish security

(1) H.C.R., N.W.P., 1874, p. 28.
(2) *Shumshoolnissa* v. *Zohra Beebee*, H.C.R., N.W.P., 1874, p. 2.

under the provisions of S. 5 to the amount of Rs. 3, 000. On appeal to the High Court against the District Court's order requiring security, it was urged that that order was unreasonable and unjust inasmuch as the applicants had no separate property of their own. and there were no debts due by the estate.

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JUDGMENT.

[288] We must follow the ruling of this Court in *Soonea* v. *Ram Suha* (1), which is in accordance with a recent ruling of the Calcutta High Court in *Monmohinee Dassee* v. *Khetter Gopaul Dey* (2). The appeal then fails; but if the facts are such as the petitioners assert, we consider that the appellants should apply to the Judge to reconsider the order relating to security, and that the Judge might well comply with their prayer and reduce the amount demanded.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

HASSAN ALI (*Defendant*) *v.* NAGA MAL (*Plaintiff*).

[22nd August 1876.]

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Hindu Law—Adoption—Jain Law.

1. In questions arising between parties of the Jain sect, the custom of the sect should be inquired into and given effect to, although it may be at variance with Hindu Law. (H.C.R., N.W.P., 1874, p. 382. *F.*).

2. Under Jain Law, the adoption of a sister's son is valid.

JUDGMENT.

[289] The plaintiff is the adopted son of one Chunna, and is at the same time Chunna's sister's son, and the material question raised in special appeal is whether, under the Jain Law (the parties being Saraogis), an adoption of a sister's son is valid. Evidence on the point was given in the Court of first instance, and the lower appellate Court gave the parties opportunity of producing further evidence, which was produced, and which supports the view taken by both the lower Courts, that such an adoption is valid under Jain Law. We find no reason to doubt the correctness of this decision, and find that it is quite consistent with a ruling of this Court,—*Sheo Singh Rai* v. *Dahko* (3), where all the authorities have been reviewed. In that case it was held that, in questions arising between parties of the Jain sect, the custom of the sect should be enquired into and given effect to, although it may be at variance with Hindu Law, and it was further held that, among followers of the Jain sect, a daughter's son might be adopted. In the case before us the adoption is of a sister's son, but the principle involved in both cases is **[290]** the same, and, indeed, looking to the grounds upon which the objection to such adoption is based under the Hindu law, it would have more force in the case of the adoption of a daughter's son than of a sister's son.

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(1) H.C.R., N.W.P., 1870, p. 146.
(2) 1 C. 127=24 W. R., 362.
(3) H. C. R., N. W. P., 1894, p. 382.

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CIVIL JURISDICTION.

CIVIL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Turner.

IN THE MATTER OF THE PETITION OF MATHRA PARSHAD.

[23rd August 1876.]

1 A. 296.

1 A. 296. *Stat. 24 and 25 Vic. c. 104 (High Court's Act), S. 15—High Court's powers of Superintendence—Act VIII of 1879, S. 378—Review of judgment.*

Where a Subordinate Judge rejected an application for review of judgment, on the ground that he had no right to interfere, as the judgment sought to be reviewed was that of his predecessor, *held* that the High Court, under the general powers of superintendence vested in it by S. 15 of the Letters Patent, is competent to point out to the Subordinate Court its error and to direct it to reconsider the application presented to it, and to dispose of it according to law.

[R., 9 A. 104 **(F.B.)** = A.W.N. (1886), 309.**]**

The Subordinate Judge of Mainpuri rejected an application presented to him on 13—9—1875 for the review of a judgment of his predecessor dated 18th December 1874, in the following terms:—"Upon a perusal of the petition with the record of the case, it appeared that the judgment of the former Subordinate Judge is not correct, but I have no right to interfere with his judgment, nor has the petitioner produced any new evidence. The objections of the petitioner have been determined by the former Subordinate Judge." An application was made to the High Court for the exercise of its powers under S. 15 of the High Court's Act.

ORDER OF THE HIGH COURT.

[297] It is obvious that the Subordinate Judge has misconceived the duty imposed on him. The circumstance that the decree, of which a review was sought, was passed by his predecessor did not discharge the Subordinate Judge from the obligation of considering whether any sufficient grounds were shown for the application. Where a Subordinate Court has obviously failed to perform its duty, and there is no remedy by appeal, it appears to us within the competency of this Court, under the general powers of superintendence with which it is invested under S. 15 of the Letters Patent, to point out to the Subordinate Court its error and to direct it to proceed according to law. The Subordinate Judge is therefore directed to reconsider the application presented to him, and to deal with it as if a review was sought of a decree which he had himself passed.

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APPELLATE CIVIL.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

BISHAN DIAL AND ANOTHER *(Defendants)* *v.* MANNI RAM *(Plaintiff)*.

[24th August 1876.]

1 A. 297 = 1 Ind. Jur. 411.

1 A. 297 = 1 Ind. Jur. 411. *Mortgage—Foreclosure.*

When the whole of a mortgage debt is due to the persons claiming under the mortgage, jointly and not severally, there cannot be a foreclosure as to a portion

of the mortgage, and a suit for possession of a portion of the mortgaged property is not maintainable.

[Ap., 9 A. 68 (F.B.) = A.W.N. (1886) 298 ; R., 17 M. 12 ; 19 M.L.J. 221 ; D., 3 M.L.J. 176.]

JUDGMENT.

[298] Sarab Sukh Rai, the original proprietor of mauza Barauli, died in 1844, leaving a widow, Ram Kuar, and three sons, Sheo Dial, Gulab Rai, and Bishan Dial. In 1864 Sheo Dial, who appears to have managed the business of the family in the absence of his brothers, of whom one, Bishan Dial, was residing at Lucknow, and the other, Gulab Rai, at Cawnpore, desired to raise a loan of Rs. 13,000, in order to pay off the sums due to Daula Kuar and others, decree-holders, who were in possession of mauza Barauli and mauza Darjanpur, and for other necessary purposes; and in order to raise the sum required, Bishan Dial, on the 23rd August 1864, executed a power-of-attorney authorizing Sheo Dial to take a loan from any person he pleased, and to execute and register in the name and on behalf of Bishan Dial "a mortgage deed" for Rs. 13,000 in respect of mauza Barauli. On the 13th September 1864, Sheo Dial, on his own behalf and as attorney for Bishan Dial, executed a deed of mortgage of mauza Barauli for the sum above mentioned in favour of Gobind Parshad, Swami Lal, and Kashi Parshad, for a term of seven years, subject to the following condition, *viz.*, that the mortgagors should, at the expiry of the term named, redeem the mortgage by a re-payment of the Rs. 13,000 and the interest left unpaid. After this mortgage was registered, and the money paid to Sheo Dial, the mortgagees appear to have discovered that Gulab Rai had a share in the estate, and required that he also should join in the mortgage. Accordingly on the 9th November 1864, Gulab Rai executed a power-of-attorney in favour of Sheo Dial, in which, after reciting that Sheo Dial had executed the mortgage of the 13th September, and had registered it and that he had received and deposited the loan in the Government Treasury on account of all three brothers, Gulab Rai declared that he agreed and consented to the proceedings of his brother thereinbefore recited, and that he accordingly appointed his brother his attorney that he might execute "a deed of mortgage on his part also in **[299]** respect of mauza Barauli in favour of the mortgagees, and under conditions similar to those recorded in his own deed." On the 13th December Sheo Dial, for himself and as the attorney of his brothers, executed another deed of mortgage in favour of the same mortgagees. The deed recites the mortgage of the 13th September that Gulab Rai had been no party to it, and that consequently the mortgagees were not content with that deed, and declares that the deed now in recital had been executed in lieu of the deed above-mentioned. By this deed Sheo Dial mortgaged the same property for the same sum as in the former deed, but with this difference that the mortgagors bound themselves to pay compound interest on all arrears of interest, and that whereas the former deed was a deed of simple mortgage accompanied with provisions enabling the mortgagees, in the event of default, to convert it into a mortgage with possession, in the substituted deed the mortgagees are also empowered, in the event of default, to treat the simple mortgage as a conditional sale and to obtain foreclosure. In April 1865 Gobind Parshad, Swami Lal, and Kashi Parshad executed a sub-mortgage of the property to Girdhari Lal and Jagan Nath. Default having been made in payment of the sum due on the sub-mortgage, Chotai Lal, son of Girdhari Lal, and Jagan Nath, in May 1872 sued the original mortgagees and obtained decrees in execution of which they brought to sale the mortgagees' rights,

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1 A. 297 = 1 Ind. Jur. 411.

and became each a purchaser of one moiety. In August 1872, Chotai Lal sold his moiety to the respondent. It appears that, on Sarab Sukh Rai's death, the estate of Barauli was recorded in the revenue registers as held by his widow and three sons in equal shares of four annas. It is alleged, nevertheless, that they remained joint Hindu family. On the 4th December 1859, Sheo Dial mortgaged his share, described as a 5-anna 4-pie share, to Har Sahai, whose son, Raj Bahadur, obtained a decree on the mortgage-deed on April 15th 1862. In execution of the decree, and of another decree held by one Har Dial for Daula Kuar, the 4-anna share standing in his name in the revenue registers was sold on the 20th July 1867, and purchased by Suraj Parshad. Sheo Dial died in 1866, and if the family was joint his brothers obtained his interest by survivorship. If the family was not joint, it devolved on his daughter. On the 24th December 1867, Ram Kuar, the widow of Sarad Sukh Rai, executed a deed by which she professed to divide the 4-anna share standing in her name, and to transfer [300] a 2-anna share to Lalta Parshad, the son-in-law of Sheo Dial, and the remaining 2-anna share to Har Parshad, son-in-law of Gulab Rai.

The respondent having, as has been stated, acquired the one moiety in the original mortgage purchased by Chetai Lal in April 1873, issued notice of foreclosure in respect of one moiety of the mortgage, and on the expiry of the year of grace he has instituted four suits. In the first he claims in virtue of the mortgage and foreclosure to obtain the possession of 4 annas out of the two shares of 4 annas each, which are still recorded in the names of Gulab Rai and Bishan Dial respectively. In the second, on the same title, he claims possession of a 2-anna share out of the 4-anna share purchased by Suraj Parshad. In the third, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Lalta Parshad, and in the fourth, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Har Parshad. A common objection was urged in the Courts below and in this Court that the foreclosure was invalid, in that a person entitled to one moiety of a mortgage-debt cannot require the mortgagees to pay off one moiety of the mortgage-debt or to stand foreclosed of one moiety of the mortgage-money. We must allow the validity of this plea. The whole of the mortgage-debt is due to the persons claiming under the original mortgages jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid mortgage-debt, except under circumstances which do not exist in this case. The notice must declare foreclosure if the whole of the subsisting debt is not paid before the expiry of the year of grace. We are, therefore, of opinion that these suits cannot be maintained, and in that opinion we are confirmed by ruling of the Calcutta High Court—*Bhora Roy* v. *Abilack Roy* (1). It is unnecessary to consider the other pleas raised in this and the connected appeals. The decrees of the Courts below are reversed and the suits dismissed with costs.

(1) 10 W. R., 476.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

JAN MUHAMMAD (*Defendant*) *v.* ILAHI BAKSH (*Plaintiff*).

[26th August 1876.]

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APPELLATE CIVIL.
1 A. 290.

1 A. 290.

Act VIII of 1859, S. 260—Certified purchaser.

In a suit by the certified purchaser at an execution sale, to establish his right to, and for possession of, the property purchased by him, the defendant is not precluded, by S. 260 of Act VIII of 1859, from contesting the suit on the ground that *he* was the actual purchaser of the property.

S. 260 declares that "any suit brought against the certified purchaser—shall be dismissed." The section should be construed literally and applied strictly.

[R., 3 O. C. 229.]

The plaintiff, the certified purchaser of certain property at an execution-sale, brought a suit for establishing his right to the property and for possession thereof, the possession of the same being with the defendant who urged that he was the actual purchaser. The first Court gave him a decree. The lower appellate Court finding that the property belonged to the judgment-debtor and was the subject of the sale, *held* that the defendant was precluded by S. 260, Act VIII of 1859, from raising the plea that he was the actual purchaser. The defendant preferred a special appeal to the High Court.

JUDGMENT.

[291] In our opinion the Court has taken an erroneous view of the law. All that S. 260 declares is that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used shall be dismissed." The law will not, therefore, in strictness apply to this case, where it is the certified purchaser who is suing to enforce his alleged purchase, and where the objection is taken by the defendant who is in possession. The section should be construed literally and applied strictly. The Court will not apply S. 260 so as to assist the certified purchaser to enforce his claim against the party in possession, by relieving him from the necessity of showing the justice of his claim or excluding inquiry as to its fraudulent character. This view of the law is supported by the Privy Council rulings in *Buhuns Koonwur Lalla* v. *Buhoree Lalla* (1), and in *Lokhee Narain Roy* v. *Kalypuddo Bondopadhya*(2). We remand the case for trial under S. 354, Act VIII of 1859, of the issue whether plaintiff or defendant was the real purchaser at auction of the property in suit.

(1) 10 B.L.R. 159=18 W.R. 157.
(2) 2 I.A. 154.

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1 A. 325 = 4 I.A. 15 = 3 Suth. P.C. J. 357 = 3 Saraswati's P.C.J. 673.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier.

On appeal from the High Court of Judicature, North-Western Provinces.

NARAIN SINGH AND OTHERS (*Plaintiffs*) *v.* SHIMBHOO SINGH AND OTHERS (*Defendants*). [3rd & 4th November 1876].

1 A. 325 = 4 I.A. 15 = 3 Suth. P.C.J. 357 = 3 Saraswati's P.C.J. 673.

First and second mortgage—Dispossession of second mortgagee—Cause of action—Limitation.

There were two mortgages on the same property, the condition in each being that, on failure to repay the amount within a fixed time, the mortgagee should be put in possession; the second mortgagee obtained a decree on his mortgage, and, in execution of it, took possession; the first mortgagee then sued on his mortgage, obtained a decree, and in execution of it ousted the second mortgagee; and finally the heirs of the mortgagor discharged the debt of the first mortgagee and resumed possession.—*Held*, in a suit by the second mortgagee against the heirs of the mortgagor for possession of the lands:—That the cause of action for the plaintiff arose, not on the date of his dispossession by the first mortgagee, who had a better title, but on the date when the heirs of the mortgagor, after discharge of the first mortgage, entered into possession of the land. When the first mortgage was paid off, the title of the plaintiff, which was always a good title against the mortgagor, was a valid title against every one, and when his title became a valid and good title, the heirs of the mortgagors had no right to enter upon the possession of their land.

Held, also, that the plaintiff could not claim interest on the mortgage amount for the period during which he was dispossessed, as this was a suit for possession of the mortgage property and not for the mortgage amount.

[**F.**, 38 P.R. 1894, 83 P.R. 1894, 2 O.C. 145 (Bench), 4 O.C. 171; **D.**, 5 C.L R. 227.]

Appeal from a decree of a Division Bench of the High Court at Allahabad, dated the 13th May 1873, reversing the decree of the Subordinate Judge of Aligarh, dated the 23rd November 1872 (1).

JUDGMENT.

[326] SIR BARNES PEACOCK.—In this case the plaintiffs, as sons and heirs of Pohoop Singh, a mortgagee, seek to recover possession of 20 biswas of the zemindari right of mauza Lallpoor. The defendants in the suit are the representatives of the mortgagor. The plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, Pohoop Singh, "in that, under a mortgage-deed, dated Phagoon Badi 7th Sumbat 1896, Pohoop Singh, the ancestor of the plaintiffs, having obtained a decree from the Sudder Ameen's **[327]** Court, was put in possession on the 31st August, 1846." Most of the defendants admit the claim, but the defendants Man Singh, Shimbhoo, Girdharee, and Motee, put in an answer, by the second paragraph of which they admitted that under the former decree the plaintiffs' ancestor was in possession for upwards of a year; but they set up in the fourth paragraph of the same written statement, that "the mortgage alleged by the plaintiffs is wholly unfounded. The defendants' ancestor did not receive the mortgage-money from the ancestor of the plaintiffs; and Pohoop Singh, the ancestor of the plaintiffs, was a person notorious for his expertness in Court affairs. He had with a view to deprive Asaram and Sheo Lall of their mortgage-money, obtained by deception a decree on the mortgage-deed in suit, and

(1) H.C.R., N.W.P., 1873, p. 153.

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the defendants' father had, according to the Shasters, no right to transfer and waste the defendants' ancestral property without any legal necessity to satisfy illegal demands. Hence under the Shasters also, the mortgage alleged by the plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the plaintiffs did obtain possession by virtue of a decree, and that he remained in possession for a year, the defendants also, in the same written statement, alleged that the mortgage was collusive and a *benami* transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the plaintiffs' ancestor did get into possession on the 31st August 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, Asaram and Sheo Lall. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage-deed do not appear, but, as far as can be collected, it was a mortgage-bond, by which it was stipulated that in the event of the non-payment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the plaintiffs be put into possession.

[328] It appears that the plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the plaintiffs, as mortgagees, a title to the land as against the defendants, but it gave them no title as against the prior mortgagees, Asaram and Sheo Lall. When Asaram and Sheo Lall turned the plaintiffs' ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to Asaram and Sheo Lall, but it did not destroy the right which the plaintiffs obtained against the defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues: first whether the original mortgagors executed the mortgage-deed in respect of the property in suit on receiving the full mortgage-consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage-deed could take effect against the defendants according to the Hindu Law. The Judge says in his judgment—"It is apparent that plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage-deed, and the payment of mortgage-consideration; and the fact of the decree having been made is admitted by defendants. Again, all the defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of Maulvi Inayat Ali, pleader, Chuni Lall, patwari, and two other persons, both named Hulasi, witnesses for plaintiffs. The plea urged by defendants must therefore be overruled; and they have failed to refute the claim." He thereforë gave a decree in favour of the plaintiffs.

Upon that an appeal was preferred by Shimbhoo alone to the High Court; and of his grounds of appeal is that there was "no cause of action and foundation for the plaintiffs' suit; neither the deed of mortgage nor the decree has been produced; the conditions agreed upon between the parties cannot be ascer-**[329]**tained." The High Court, having heard the case argued, gave judgment and reversed the decision of the first Court. They say that "the High Court's order of the 1st April 1872 could not give any legitimate cause of action. Nor did any right of

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action accrue to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheo Lall and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheo Lall, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870, the title of the plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title become a valid and a good title, the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it and keep the possession from the plaintiffs; and it appears to their Lordships that, having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land, to which the plaintiffs had obtained a right under the second mortgage, gave them a cause of action against the mortgagors, the defendants. The Court proceed: "The right of the plaintiffs or their forefather to possession was created by the mortgage-deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the plaintiffs a title. The High Court proceeded: "The dispossession of Pohoop Singh after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding because he was dispossessed by persons who had better title, namely, the first mortgagees. The Court go on: "Although he was thereby deprived of the right he had obtained, [330] he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible and cannot be decreed even against the confessing defendants."

The High Court held that the plaintiff's suit was barred by limitation.

It appears, however, to their Lordships, that the plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the defendants after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court. so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by Pohoop Singh, the plaintiffs' ancestor. In the first place, as already stated, the written statement of the defendants admits that there was that former decree. They say that "under the former decree, the plaintiffs' ancestor was in possession for upwards of a year" and then he was turned out by the first mortgagees. Again, when Asaram and Sheo Lall, the first mortgagees, brought an action against the second mortgagee, Partab Singh, the ancestor of the plaintiffs, and Lulloo and others, the zamindars, the mortgagors, were also made parties to that suit. And in that suit, it appears that the decree of Partab Singh against the zamindars was in evidence. The Sudder Court says:—"The plaintiffs sued Lulloo and others, zamindars of the above-named village, for possession on a mortgage-bond, dated the 18th Kower, 1859 Sumbat; but in consequence of their having omitted to specify the nature of the tenure, they were non-suited. Pohoop Singh also sued the zamindars on a mortgage-bond and obtained a decree which was upheld in appeal." There was a finding then in that case that Pohoop Singh did sue the zamindars on the mortgage-bond and that he obtained a decree against

them. Further when the first mortgage had been paid off and the plaintiffs had [331] been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against that mortgagors, and they applied to the Court for an execution of the decree. The Munsif decided that they were entitled to have an execution. In that suit, Simbhoo, who is the present defendant, was one of the parties, and in that case the judgment was produced. The Munsif says :—"The record of the case having been brought forward, it appears that the objection of the defendants, judgment-debtors," that is, Simbhoo, one of the present defendants, "is that Pohoop Singh, the original decree-holder, and deceased ancestor of the plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is "to recover possession as mortgagees over the entire 20 biswas zemindari right of mauza Lallpur, pargana Goree, within the jurisdiction of the Iglass Tahsili, valued at Rs. 5,000,"—the valuation is not a matter of importance,—"the principal amount of the mortgage loan, and to recover Rs. 6,999-15-0 interest thereon during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs. 11,999." Now the plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be—how much is due to the plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem? The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for 6,999 rupees interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to [332] what the judgment ought to be. He says: —Claim to recover possession as mortgagees over the entire 20 biswas zemindari right in mauza Lallpoor, pargana Goree, valued at Rs. 5,000, principal of the mortgage-loan, and Rs. 6,999-15-0 interest on the mortgage amount." Then he says:—"Ordered that plaintiffs' claim be decreed with costs against the defendants, that the pleaders get their fees." Then he says: —"Subject-matter of decree. Recovery of possession as mortgagees over the entire 20 biswas right in mauza Lallpore, pargana Goree, valued at Rs. 5,000, the principal amount of the mortgage-loan, and of Rs. 6,999-15-0 interest on the mortgage-amount for the period of the plaintiffs' dispossession: total Rs. 11,999-15-0." If by that decree the lower Court intended to give the plaintiffs a decree not only for recovery of the possession of the land, but also to recover Rs. 6,999 in money as interest, it appears to their Lordships that that judgment, so far as giving decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the plaintiffs merely to the possession of the land. In that case, the plaintiffs having got possession of the land, the question, as before observed, will remain open until the defend-

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ants seek to redeem the land. Then the question will arise—how much is due to the plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage?

Their Lordships therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the appellants are entitled to the costs of this appeal.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier.

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PRIVY COUNCIL.

Bal. 105.

On Appeal from the Court of the Chief Commissioner, Oudh.

RAJAH JUNG MOHAN SINGH *v.* DOOHUN AND OTHERS.

[24th November 1876.]

Bal. 105.

Sub-settlement—Talukdar—Taluk—Act XXV of 1866 (Sch. II)—Estoppel—Defendant held bound by admission made in a former period of the suit.

The *talukdar* having obtained a settlement of his *taluk* including another estate of which the village now in question formed a part, he could not now be heard to say that the said village was for the first time included in the estate which he settled with the Government.

JUDGMENT.

[105] SIR ROBERT COLLIER:—This is an appeal by the *talukdar* of a *taluk* called Bunsingpur, in Oudh against a judgment of the Chief Commissioner of Oudh, by which it was directed that a sub-settlement should be made with the plaintiffs with respect to the under-proprietary rights which they possessed in that *taluk*. It has been contended that, inasmuch as the village of the plaintiffs, Gurha, in respect of which they claim under-proprietary rights was for the first time included in the *taluk* when the *taluk* was settled in 1859 with the defendant in the case, the *talukdar*, under Act XXVI of 1866, schedule No. I, the plaintiffs were not entitled to any sub-settlement. The words at the end of that section of the schedule which have been relied upon are: "To entitle a claimant to obtain a sub-settlement, he must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation. He must also show that he, either by himself or by some other person or persons from whom he has inherited, has, by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favour of the *talukdar*, held such lands under contract (*pucka*), with some degree of continuousness, since *the village came into the taluka.*" It is argued that, as the village came into the *taluka*, for the first time when the settlement was made with the *talukdar*, the plaintiffs are excluded from compensation by the terms of this schedule. It appears, however, to their Lordships that this argument does not arise, the fact being found otherwise. There have been a

number of proceedings in this case. There have been, altogether, no less than six or seven judgments; some of them undoubtedly obscure and some contradictory; and statements have been made both by the plaintiffs and the defendants, to a certain degree conflicting with their respective claims,—but it appears to their Lordships enough to refer to the last proceedings which have been taken.

The case came on appeal before Sir George Couper, the Chief Commissioner, on the 21st September 1871. He remanded it for further inquiry on the question: "When did the estate first pass into the *taluka*, and who was at that time in proprietary possession?" The latter question does not appear to their Lordships of much importance. The case was investigated upon this remand by Mr. Carnegy, the Officiating Commissioner, and Mr. Carnegy finds in this way:—"The *wasilbakis* alluded to by Mr. Wood as proving that the village was in defendant's estate in 1217-8 F. have been duly examined. I find one *wasilbaki* as early as 1202 Fasli, when the village of Gurha is mentioned under *taluka* Raipur (now Bunsingpur),"—which is the *taluka* now in question, which was settled with the defendant—"so that as far as documentary evidence goes (and there is no oral evidence on the point) the village appears in the *taluka* in 1202 Fasli, 1217-8 Fasli, and 1255-9 Fasli." Here is a distinct finding of fact that the village had formed part of the *taluka* for a long period of time before. On referring to the finding of Mr. Wood, to which reference is here made, it appears that upon a remand to him (page 107 of the record) he finds:—"The village was in possession of the *talukdar's* father for five years within the twenty years preceding annexation; the twenty years' rule is taken, because the village was in the taluka prior to 1836 A.D., *i.e.*, in 1217 and 18 Fasli."

Further Mr. Perkins, before whom the case came in one of its stages, referred to by Mr. Carnegy, observes: "The respondent admits before me that the mouza in suit was in the *taluk* about or before 1217 Fasli." It appears to their Lordships therefore, that the question of fact is found distinctly against the appellant, and that the argument on the point of law does not arise.

Their Lordships would require to be satisfied by very strong evidence that such a finding of fact was wrong, in accordance, as it is, with *the talukdar's* own admission in a former period of the suit. The finding appears only to be impeached on the supposition that this mouza was one of eight villages comprising an estate of Bhowaneeghur, and that it was not originally in Bunsingpur. Even if that were so, their Lordships are of opinion that the *talugdar* having obtained a settlement of Bunsingpur including, as it appears to them, it was then taken to include, Bhowaneeghur, and Bhowaneeghur having included this mouza, he cannot now be heard to say that the mouza was for the first time included in the estate which he settled with the Government.

Under all the circumstances, it appears to their Lordships that the judgment of the Chief Commissioner was right, and that this appeal must be dismissed.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1876
DEC. 5.

JADULAL (*Plaintiff*) *v.* RAM GHOLAM AND ANOTHER (*Defendants*).

[5th December 1876.]

APPEL-
LATE
CIVIL.

1 A. 316.

C. P. C., S. 2—Res judicata.

When a plaintiff claims an estate, and the defendant, being in possession, resists it, he is bound to resist it upon all the grounds that it is possible to him, according to his knowledge, then, to bring forward; if he fails to do so, he is estopped from asserting any of them thereafter. [1 A. 75, *F.*]

1 A. 316.

The facts are exactly similar to those in 1 A. 75.

[Overruled, 26 A. 61 (F.B); **F.**, 3 A. 189.**]**

As this case merely follows the decision in *Baldeo Sahai* v. *Batashar Singh* (1 A. 75) it is not reported in the Indian Law Reports, Allahabad series. For the decision in *Baldeo Sahai* v. *Bateshar Singh*, see p. 59, *supra*.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Pearson.

1876
DEC. 6.

THE QUEEN *v.* PETERSON.

[6th December 1876.]

APPEL-
LATE
CRIMINAL.

1 A. 316=1 Ind. Jur. 560.

Penal Code, S. 494—Attempt to commit bigamy—Publishing the banns.

The causing of the publication of banns of marriage is not an attempt to marry, but only a preparation for such an attempt.

1 A. 316=
1 Ind. Jur.
560.

JUDGMENT.

[317] PEARSON, J.—I proceed to consider whether the prisoner has been rightly convicted of an attempt to commit the offence defined in S. 494, Indian Penal Code. He was charged with and has been found guilty of "attempting to marry E. A. Guise by causing the publication of the banns of marriage between them when he, being a Christian, had a wife alive." The question shortly is whether the publication of the banns of marriage is an attempt to marry. An attempt to commit a crime is to be distinguished from an intention to commit it and from preparation made for its commission. "Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations have been made"—Mayne's Commentaries on S. 511, Indian Penal Code. In one of the cases cited by Mr. Mayne in his Commentaries on the Indian Penal Code in illustration of the above doctrine, it was ruled that there could be no attempt to contract a marriage until the parties stood before the Magistrate about to begin the ceremony. It would follow in the present case that the publication of the banns was not an attempt

on the prisoner's part to marry Miss Guise, but only a preparation for such an attempt. The publication of banns may or may not be, in cases in which a special license is not obtained, a condition essential to the validity of a marriage, but common sense forbids us to regard either the publication of the banns or the procuring of the license as a part of the marriage ceremony. If the rule laid down in America, that an attempt can only be manifested by acts which would end in the [318] consummation of the offence, but for the intervention of circumstances independent of the will of the party, be accepted, it is clear that the prisoner's act, in causing the banns of marriage between himself and Miss Guise to be published was not, in the eye of the law, an attempt to marry her, inasmuch as he might, before any ceremony or marriage was commenced, have willed not to carry out his criminal intention of marrying her. For the reasons above stated the verdict of the jury by which the prisoner is convicted of an offence punishable under Ss. 511, 494, Indian Penal Code, and the sentence passed on him, under those sections by the Sessions Court, must be and hereby are annulled.

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1 A. 316=
1 Ind. Jur. 560.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

1876
DEC. 16.

IN THE MATTER OF THE PETITION OF BISH NATH.

[16th December 1876.]

FULL BENCH.

1 A. 318.

1 A. 318.

Registration—Act VIII of 1871, S. 73—Person "claiming" under Document—Petition to have document registered.

Where it appears, on the face of a document, that the person applying for its registration is not a person "claiming" under it, his petition for its registration cannot be entertained.

Per Stuart, C.J.—The mere fact that it so appeared on the face of the document could not preclude the petitioner from applying to have the document registered.

Per Oldfield, J.—When the document is duly executed and the requirements of the law are fulfilled, it is the duty of the Court to order registration without going into the question whether or not the petitioner could claim under it.

On a petition to the High Court for establishing the petitioner's right to have a deed of sale registered, STUART, C.J., AND OLDFIELD, J. called for the records of the registration proceedings. The Registrar stated that, in refusing to register, he believed that the vendor was seeking to have registered a document of his own creation, and that the deed could not be registered in the absence of the purchaser. The purchaser denied the contract of sale.

REFERENCE TO THE FULL BENCH.

The Court referred to the Full Bench the question whether, under the circumstances, and with reference to the provisions of Act VIII of 1871, the registration of the document should be ordered.

JUDGMENT.

[320] STUART, C.J.—It was objected by the respondent that, under S. 73 of the Registration Act, there was no appeal in a case like the pre-

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1 A. 318.

sent, by which, as I understand, is meant that, inasmuch as the appellant could not be said to "claim" under the document, he had no right to make the present application to this Court, being the remedy provided by S. 76, where the Judge of the district was, as in this case, the registering officer. But I am not satisfied that for the purposes of this section he must be regarded as not claiming under the document. He might not succeed in establishing his claim, say, to the purchase-money, but, although the deed was unilateral and executed by the vendor alone, it appears to be in the form of sale-deed customary in these Provinces, and on the face of it, therefore, and so far as its form is concerned, and whether it be registrable or not, I do not see that we are obliged at once to assume that it could not be given effect to, or that because it is in form unilateral the appellant could claim the purchase-money. There is, however, in relation to this point a curious inconsistency in the Act; for, whereas by this S. 73 the party desirous of making an application under it must be a person "claiming" under the document, by S. 32 the document for registration shall be presented "by some person executing or claiming under the same," not executing *and* claiming, but executing *or* claiming. Why this should be, and the parties proceeding under these two sections in different positions, it is not easy to understand, unless it was intended that a party against whom an order refusing to register had been made was in a different position, at such a stage of the proceeding, from a party merely executing the document. Be this as it may, I do not see that for the purposes of S. 73 we are bound to assume *in limine* that the applicant did not or could not claim under it. I therefore consider that he was not precluded from his remedy by the application he has made to this Court.

But on the merits of the question embraced in the reference before us, I must express the opinion I have formed on it, and that is, that registration of the document in question should not be ordered. Even on the assumption that the applicant may be understood to [321] claim under this sale-deed, I am not satisfied that it is a document or instrument within the meaning of the Registration Act. It is not only not executed by the alleged purchaser, but has been repudiated by him altogether, and this is a state of the case which I think may be allowed to come within the scope and intention of S. 35 of the Act, which provides that, if all or any of the persons by whom the document purports to be executed deny its execution, the registration shall be refused.

Was this so-called sale-deed a legal and enforceable document at all? I think not. As I have remarked, such unilateral instruments are not uncommon in these Provinces, and I may add that, in the practice of Scottish conveyancing, such instruments as sale-deeds, or deeds in the nature of mortgages, and the like, are only signed by the seller or obligor, and no inconvenience is experienced from this where the instrument records a true contract. But when there is no evidence at hand of such a contract, the unilateral character of the instrument leaves it open to the alleged purchaser or obligee to repudiate it. In the case before us the alleged sale-deed recites no previous contract or agreement, the repudiation of it is express, and there is also the serious fact that no consideration had passed upon it. It was suggested at the hearing that there was no limit to the nature or character of the documents which might be presented for registration, but that the registering officer was bound to accept and register all documents without exception which purported to be executed at all. But this is a view of the law which I cannot concur in. If such was the position of the registrars under the Act, the public time would be wasted, and their duties would become intolerable. On

the other hand, the consequences of registration are very serious, and I cannot allow that these consequences should be visited on the heads of innocent persons. The registering officers must satisfy themselves by evidence and inquiry that documents are honestly presented in their office, otherwise no one would be safe.

PEARSON, J.—The vendee was not a party to the instrument in question, which does not in any way bind him. It was executed by the vendor alone, and merely declares that he has sold the property therein mentioned, for a consideration which he has received, to Lachman [322] Parshad. But no claim could be founded upon it against Lachman Parshad or anyone else. The vendor could not, therefore, as a person claiming under it, apply by petition, under S. 73, Act VIII of 1871, to the High Court, in consequence of the Judge's refusal to register it, with a view to establish his right to have the document registered. His petition cannot be entertained. Whether the Judge was right or wrong in refusing to registerit is a question which we are not required to consider and determine.

TURNER AND SPANKIE, JJ.—The petitioner having, as he alleges, agreed to sell certain lands and other property to the respondent, executed a conveyance and presented it to the Registrar for registration. That officer refused registration on the grounds that the deed had not been delivered nor the consideration paid. Had the question before us rested here, there would have been little difficulty in disposing of it, as the law does not prescribe either of the grounds recorded by the Registrar as justifying the refusal of registration. The deed was in a form not uncommon, if not most usual, in these Provinces, that is to say, it was unilateral, the seller alone being a party to it. It was duly executed by the seller, who appeared before the Registrar and admitted its execution. It is not alleged, and it does not appear that there had been any failure to comply with the requirements of the law, consequently registration should not have been refused. But it is contended on the part of the respondent that the petitioner is not entitled to apply to this Court for an order for the registration of the instrument, seeing that the law accords that privilege only to a person claiming under such instrument or his representative, and that on the face of the instrument it appears that the petitioner does not claim under it. The only claim which it is suggested the petitioner could assert would be a claim to the purchase-money, but inasmuch as the instrument purports to be and is executed by the petitioner alone, it is clear that he cannot claim the purchase-money under it. It would not be the duty of the Court, we apprehend, on such an application to enter into any involved question of construction to determine whether or not the person presenting such an application has not a claim, but when, on the face of the document, it clearly appears that he can claim nothing under it, we hold that a mere unfounded assertion of a claim will not give him a *locus standi*, and that his application should be refused.

[323] OLDFIELD, J.—All documents to which the Registration Act applies may be presented for registration by some person executing or claiming under the same (S. 32), and it is the duty of the registering officer, on presentation of the document, to inquire (*a*) whether or not such document was executed by the persons by whom it purports to have been executed, (*b*) satisfy himself as to the identity of the persons appearing before him, and alleging that they have executed the document, and (*c*) in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear (S. 34), and, if satisfied on these points, it is his duty to register it (S. 35). In the present case the Judge should have ordered registration, as the above conditions were satisfied.

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FULL BENCH.
1 A. 318.

By S. 76 an appeal lies to this Court from the Registrar's order refusing registration, on the application of any person claiming under the document, or his representative, assign, or agent, in order to establish his right to have the document registered, and the Court's duty is to order registration if it finds that the document has been executed, and the requirements of the law have been satisfied (S. 76).

It is, however, argued that the petitioner in the present case cannot appeal, for though he executed the document, he is not claiming under it, since it is a document which can support no claim. The document purports to effect a sale of certain lands on the part of the petitioner to Lachman Parshad. As such, it is certainly one of these documents capable of registration, and to which the law applies as purporting or operating to create, declare, or assign, an interest in immoveable property ; it is a document which the Registrar should register on application by the petitioner. No doubt the deed is signed by the vendor only as executor, but I do not think we can look into the document and say. that since it is unilateral it can give to the petitioner no valid claim, and therefore he has no *locus standi* to appeal ; the document by itself may make no complete contract, but it may go to form one ; for it is possible that another forming the counterpart may have been executed completing the contract, and so we cannot say that petitioner may not be in a position to assert a claim under it as **[324]** forming part of a contract. In entering on these questions, I think we go beyond the powers given by the Act, which confines the inquiry to the question of the right to have the document registered, dependent on due execution and fulfilment of the requirements of the law. Documents of this character are not uncommon, and our refusal to allow the appeal, and order registration of such documents, may have prejudicial effects. I would admit the appeal, and order the Registrar to register the document.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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DEC. 16.
APPELLATE CIVIL.
1 A. 324=1 Ind. Jur. 561.

ILAHI BAKSH AND OTHERS (*Defendants*) *v.* IMAM BAKSH AND OTHERS (*Plaintiffs*). [16th December 1876.]

Suit—Omission of part of claim—Withdrawal of suit—Fresh suit—Addition of portion of claim omitted—Act VIII of 1859, Ss. 7 and 97.

Where, in the first suit, a portion of the claim was omitted, and the suit withdrawn with permission to bring a fresh suit, which should include the portion omitted in the first suit, *held* that the additional portion of the claim included in the fresh suit brought, is not barred under S. 7, Act VIII of 1859. (Decision of All. H. C. in S. A. No. 180 of 1876, R.)

[R., 17 A. 53, 14 C.P.L.R. 105.]

A previous suit brought by the present plaintiffs for being maintained in possession of a plot of land alleging as the cause of action the act of the defendants in prohibiting the plaintiffs from watering the trees thereon, was permitted to be withdrawn with liberty to bring a fresh suit, the application for the same not disclosing the grounds on which the plaintiffs applied for

such permission and the Court granting such permission without recording any reason for granting the same. The present suit was also based on the same cause of action but the prayer as to possession referred to three plots of land. Both the lower Courts decreed the plaintiffs' claim. The defendants on special appeal urged that the claim to additional plots of land was barred by S. 7, Act VIII of 1859.

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JUDGMENT.

[325] As to the first plea, it would seem that the reason for which the former suit was withdrawn was that a fresh suit might be brought which should include a portion which had been omitted before of the claim arising out of the cause of action, and the permission to bring the new suit must be reckoned to be permission to supply the former omission. This being so, we are of opinion that the additional portion of the claim in this suit is not barred by S. 7, Act VIII of 1859. A similar view was taken in special appeal case No. 180 of 1876, decided by a Bench of this Court on the 28th April last.

1 A. 324 = 1 Ind. Jur. 561.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

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DEC. 21.
FULL BENCH.

RAM KISHAN (*Plaintiff*) *v.* BHAWANI DAS (*Defendant*).

[21st December 1876.]

1 A. 333.

1 A. 333.

1. *Right of prior attaching creditor to sale proceeds as against holder of decree charging lands.*

Held by a Division Bench, that the attaching creditor is not entitled to the sale proceeds, as against the holder of a decree charging the lands attached, on the ground of the priority of his attachment, if the charge had been created prior to the attachment.

2. *Suit for money received by the defendant for the plaintiff's use--Limitation—Act IX of 1871, Sch. II, Arts. 15, 26, 61 and 118.*

Where, in such a case the Court had wrongly ordered the holder of the decree charging the lands to refund to the attaching creditor the sale proceeds paid to him, and he brought a suit to recover the money by the establishment of his prior right to the same, and to cancel the order of the Court compelling him to refund the money, as it was made without jurisdiction.

Held, by a majority of the F.B.—The suit was one for money received by defendant for the plaintiff's use, and was, therefore, governed by Sch. II, Art. 60 of the Limitation Act.

Per Stuart, C. J. and *Spankie, J.*—The suit is one for which no period of limitation was provided elsewhere than in Cl. 118, Sch. II and was, therefore, governed by that clause.

[2—F., 2 A. 354; R., 32 C. 527 = 1 C.L.J. 167; D., 13 C. 159.]

The defendant in this case who had obtained a money-decree on the 22nd August 1871, caused certain immoveable property to be attached in execution of his decree on the 1st April 1872. The same property was subsequently attached in execution of a decree held by the plaintiff in this case, dated the 19th August 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The

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1 A. 333.

property was sold in execution of this decree. The defendant in this case claimed the whole of the sale proceeds on the ground of his prior attachment. The Munsif ordered that the plaintiff's decree should be satisfied out of the sale-proceeds and the balance paid to the defendant. On appeal by the defendant against this order, the Judge, declaring that he was entitled to the proceeds, reversed the Munsif's order. This resulted in the plaintiff refunding the money to the defendant. The plaintiff sued to recover the money by the establishment of his prior right to the same and for the cancelment of the Judge's order, alleging that the same was without jurisdiction. The first Court decreed the plaintiff's claim. The lower appellate Court dismissed the plaintiff's suit. The plaintiff in his special appeal to the High Court contended that as the sale was ordered in execution of his decree to satisfy a charge declared by the decree, the defendant, the holder of a money-decree only, was not entitled to be paid first out of the sale-proceeds by reason of his prior attachment.

ORDER OF REFERENCE.

PEARSON AND SPANKIE, JJ. referred the case to a Full Bench, the order of reference being as follows:—

The ground of appeal is valid and is supported by two precedents which have been brought to our notice. But it is contended on the part of the respondent that the suit is barred by cl. 26, sch. ii, Act IX of 1871. We refer to a Full Bench the question whether that clause is applicable to the present suit, or, if not, which clause of that schedule is applicable.

JUDGMENT OF THE FULL BENCH.

[335] PEARSON, TURNER, AND OLDFIELD, JJ., concurred in the following opinion:—

To determine what period of limitation is applicable to a suit, we must look to the nature of the relief sought. In the case before us, the principal relief sought is the recovery of the money. Although the plaint claims the cancelment of the Judge's order and the declaration of plaintiff's prior right, these claims are subsidiary to the principal relief sought, and, indeed, since it is alleged in the plaint that the order impugned was not passed by a competent Court, it was unnecessary for the plaintiff to claim that it should be cancelled. Cl. 15, sch. ii of the Limitation Act is clearly inapplicable, for that clause refers to suits brought to cancel the orders of competent Courts, it being declared that limitation runs from the date of the final order of a Court competent to pass the order.

If the Judge's order was passed by a Court which was not competent to pass it, the plaintiff is entitled to rely on the order of the Munsif as the only valid order, and in virtue of that order to contend that the money was wrongfully taken by the defendant. We do not say that the plaintiff may not be required to prove that the Munsif's order was right, that he was entitled to the priority which that order recognized. This must depend on the defence set up to his claim. Looking to the substantial relief sought, it appears to us that this suit must be regarded as a suit for money had and received to the plaintiff's use. It is then governed by cl. 60 of the schedule to the Limitation Act. If it is not a suit for money had and received to the plaintiff's use, then it falls under cl. 118 of the schedule, and in either case it has been brought within time.

[336] SPANKIE, J.—The claim was to get back a sum of money which the defendant had unlawfully and illegally realized from the plaintiff

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under an illegal and improper order of the Judge passed in appeal on the miscellaneous side. The Judge had no jurisdiction in the matter, there being no appeal, and the plaintiff seeks to have the order nullified. The suit is based on the plaintiff's preferential right to recover the money, being the proceeds of an auction-sale, he holding a decree which gave him a lien over the property and which ordered its sale in satisfaction of the decree. In satisfaction of the decree, the property was sold in due course and the entire decretal amount was made over to the plaintiff by the Munsif, who rejected the claim of the defendant, a third party, to be paid the sale-proceeds. The defendant appealed (there being no appeal), and the Judge reversed the Munsif's order, declaring defendant entitled to the amount. The defendant then obtained an order from the Munsif, directing plaintiff to refund the sale-proceeds that he had received, and plaintiff did so and defendant realized the money. Such is a brief abstract of the plaint, and it will be seen that the suit is really one for a declaration of the plaintiff's preferential right to the sale-proceeds as against the defendant, who also claims them, to have the Judge's order declared a nullity, and to get a refund of the money paid in consequence of that order from the defendant.

It was contended by respondent before the Division Bench that cl. 26, sch. ii, Act IX of 1871, bars the suit. We are asked whether that clause is applicable to the suit, or if not applicable, what clause is so.

In my opinion cl. 26, for taking or damaging moveable property, does not apply to the suit. There is nothing in the claim which could be brought under this clause of sch. ii. Nor is the plaintiff claiming any damages.

I was disposed to consider that cl. 15 might apply. But on fuller consideration, I do not think it is applicable. A suit under this clause is brought to alter or set aside a decision or order of the Civil Court in any proceeding other than a suit where the Court was competent to determine it finally. The Court, therefore, must **[337]** have jurisdiction, which the Judge had not when he reversed the Munsif's order giving the sale-proceeds to the plaintiff. The order therefore is of itself a nullity and could have no effect. But even if the Judge had had jurisdiction, I am doubtful whether the clause would have applied, as the plaintiff asks for something more than the reversal, or, as he calls it, the nullification of the order. It has been suggested that cl. 60 applied; that this is a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. But I am unable to accept this view. The money was not in the first instance received by the defendant for the plaintiff. It was the plaintiff who had received it and who was compelled under legal process to refund the money. It was not the Judge who actually compelled the plaintiff to refund the money. It was the Munsif who directed the plaintiff to bring back the money to Court, and it is the Munsif's order that the plaintiff should have sued to set aside on the ground that the Judge had no jurisdiction to reverse the first order of the Munsif, and therefore the Munsif's second order could not be maintained. Both plaintiff and defendant claimed the sale-proceeds as their own, one by virtue of his decree which maintained his lien on the hypothecated property ordered for sale, and the other by virtue of his prior attachment of the property sold. When defendant obtained them in consequence of the Judge entertaining an appeal to hear which he had no jurisdiction, the defendant received the money after it had been paid back into Court from the Munsif's Court for his own use, and not as belonging to the plaintiff, or to be held by defendant to his use. The plaintiff may be legally entitled

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to the sale-proceeds, but I do not think that it can be said that the defendant received the money under circumstances which render the receipt of it a receipt to the use of the plaintiff. Even more, the plaintiff does not ask for the money on the ground of its having been so received by defendant, [338] but he prays the Court to declare his preferential right as against defendant to recover the sale-proceeds; to nullify the Judge's order which led to his being compelled to refund the money into the Munsif's Court, and to have a decree given to him for the money against the defendant. I think with reference to the circumstances of this case that cl. 60 does not apply, and as I do not find any period of limitation provided for a suit of the nature of the one now before us, it falls within the terms of cl. 118 of the schedule, and six years would be the limitation from the time when the right to sue accrued.

STUART, C.J.—I am of the same opinion as that which Mr. Justice Spankie has given, although not without hesitation. I am clear that articles 15, 26, and 60 do not apply, and there being apparently no other provision of the Limitation Act expressly applicable, the general law provided by article 118 appears to afford the only solution of the question referred to us.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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JAN. 11.
FULL BENCH.
1 A. 338.

ABDUL AZIZ AND ANOTHER *(Plaintiffs) Appellants* v. WALI KHAN *(Defendant) Respondent.* [11th January 1877.]

1 A. 338.

Lease of Zamindari rights—Wrongful dispossession of lessee by lessor—Compensation—Revenue Court—Civil Court—Jurisdiction—Act XVIII of 1873 (N.W.P. Rent Act), S. 95, cl. (m).

Where a lessee, to whom the full Zamindari rights in certain villages had been leased by the Zamindar for a term of years at a fixed rent, was, before the expiry of the term, dispossessed by the Zamindar, who, thereafter himself collected the rents from the agricultural tenants; *held*, (By a majority of the F.B.) in a suit by the lessee for the recovery, from the Zamindar, of the rents collected by him for the unexpired period of his lease, that the suit was one for compensation for wrongful dispossession as described in cl. (*m*), S. 95 of Act XVIII of 1873, and was, therefore, under that section, cognizable only by a Revenue Court, and that the Civil Courts had no jurisdiction. (Stuart, C. J. and Spankie, J.), *contra*.

[R., 15 A. 387 (F.B.).]

Suit in Civil Court to recover from the defendant, the lessor, certain moneys illegally collected by him from certain villages leased to the plaintiff, after dispossessing the plaintiff of the same before the expiry of the term in breach of the condition of the lease.

REFERENCE TO THE FULL BENCH.

The Court (PEARSON AND SPANKIE, JJ.) referred the case to a Full Bench, the order of reference being as follows:—

We refer to the Full Bench the question whether, as ruled by the lower Courts, they are precluded from taking cognizance of this suit by

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the provisions of S. 95, Act XVIII of 1873, with reference to cl. (*m*); or whether, as contended by the appellants, the suit being not one for compensation for wrongful dispossession, but for the recovery of money improperly received and wrongfully detained by the defendant (respondent), and in the eye of the law had and received by him for their use, is cognizable by the Civil Courts.

OPINIONS OF THE FULL BENCH.

[340] STUART, C.J.—I am clear that both the lower Courts are wrong, and that the suit is not one of the kind described in cl. (*m*) of S. 95 of Act XVIII of 1873. The lease given by the defendant to the plaintiffs was not merely an agricultural one, and did not simply establish the relation of landlord and tenant, but within its limits constituted an independent and indefeasible title and right which the defendant invaded. The defendant is therefore answerable to the plaintiffs in damages, the measure of which materially is the money improperly received and wrongfully detained by him, the defendant, and such a claim is alone cognizable by the Civil Courts.

PEARSON, TURNER, AND OLDFIELD, JJ., concurred in the following opinion:—

The appellants took a lease of several villages from the respondents, and they allege that, after the lease had been acted upon, the respondent in breach of the conditions of the lease collected the rents and profits which in virtue of the lease appertained to the appellants, and they have instituted the present suit to recover the sums actually collected. The respondent pleaded that the claim was virtually one for damages for wrongful dispossession, and therefore could not form the subject of an application in the Revenue Court. To this the appellants have replied that the Rent Act does not apply to persons who in these Provinces are known as thikadars or katkinadars, and in the old Regulations and Acts are denominated under-tenants, persons who take from the Zemindars lease of their Zemindari rights in lands.

Although no express mention of this class under any of the particular designations by which they are ordinarily known may be found in the Rent Act, when their position in relation to the lessors is regarded they are unquestionably tenants, and they are not deprived of this character because in relation to the actual cultivators of the whole or some parts of the property leased they may be described as landlords. They hold an intermediate estate in the property leased which the proprietors have as it were carved out of **[341]** their own estate; they hold the property leased under the proprietors; the payments they make to the proprietors are rent, and fall within the definition of that term in the Rent Act; and, therefore, although all the sections of the Rent Act may not apply to such lessees, but some are restricted in their operation to particular classes of tenants, the persons whose position we are considering are not the less subject to those provisions of the Act which apply to tenants of all classes. Before the last Rent Act was passed it was not doubted that the class of thikadars was competent to sue and liable to suit in the Revenue Courts; and inasmuch as the intention of the framers of the Rent Act was to extend rather than curtail the jurisdiction of the Revenue Courts, the presumption favours the construction that the general provisions of the Rent Act apply to this equally with all other classes of tenants, save those who by the proviso to the first section are excluded from the operation of the Act.

There remains then the question raised by the respondent's plea that

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the Civil Courts are not competent to entertain the suit by reason of the provisions of S. 95 of the Rent Act. Although the suit is brought not to obtain damages for illegal dispossession, but to recover moneys which the appellants allege were payable to them under their lease, and which have been wrongfully collected by the respondent in breach of the provisions of the lease, it is clear that on an application for compensation for wrongful dispossession it would be incumbent on the Revenue Court to award compensation for wrongful collections actually made, as well as for the other profits which the lessees might have enjoyed had their possession not been disturbed; and it is also clear that by making collections in breach of the lease, the respondent disturbed the possession of the lessees. The 95th section of the Act prohibits Courts other than the Revenue Courts from taking cognizance of any dispute or matter on which an application of the nature mentioned in that section might be made. One of the applications mentioned in that section is an application for compensation for wrongful dispossession, and inasmuch as under such an application the appellants could obtain what they now claim, it must be held that the jurisdiction of the Civil Courts is ousted, and that the appellants can obtain relief only in the Revenue Court.

[342] SPANKIE, J.—I cannot think that the provisions of cl. (*m*), S. 95 of Act XVIII of 1873, are applicable to the case referred to us. I regard the clause as applying to the ordinary tenant or agricultural ryot paying rent for the use or occupation of land, and not to the lessee of an entire estate for a fixed term of years, as the plaintiff is, or rather was, in the case before us. The application for compensation on account of wrongful dispossession referred to in cl. (*m*) must be brought within six months from the date of the wrongful dispossession, and the compensation applied for must refer to some loss or injury already suffered by the applicant, and not to the loss of profits in future years.

The plaintiffs were the lessees of several villages and aver that two years before their lease expired they were dispossessed by the lessor, who appropriated the collections of those two years. But for the wrongful ejectment, the lessees would have made the collections on account of those two years. They waive any claim, if they had one, for compensation under cl. (*m*), S. 95 of Act XVIII of 1873, and sue to recover in a Civil Court the sums actually collected by the defendant in breach of the terms of the contract between them. In such a suit the Collector could not give to the plaintiffs all the relief prayed for, for the compensation claimable under cl. (*m*) is for an injury that has already accrued in consequence of the wrongful dispossession, loss of seed sown, or of crop, or otherwise, on account of the harvest immediately following the wrongful dispossession. The ordinary tenant has no claim for compensation on account of future years; for under cl. (*n*), S. 95 of the Act, he can at once claim recovery of occupancy of the land from which he has been wrongfully dispossessed. So that the claim for compensation for the loss already sustained and for recovery of the land can proceed *pari passu*.

"Tenant" has not been defined in the Rent or Revenue Acts, though "landholder" has been defined to be the person to whom a tenant is liable to pay rent, and rent is, whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use or occupation of land. In Act XVIII of 1871, an Act for the levy of rates on land in the North-Western Provinces, tenant is described **[343]** as any person using or occupying land and liable to pay rent thereof, and land means land used for agricultural purposes, or waste land which is culturable. Again, in the Rent Act there is no distinction made between a tenant holding

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on a pattah, which is the ordinary term for a ryot's lease and a thikadar, katkinadar, or other lessee holding for a term of years a portion of an estate, or the whole of it. Any one to whom the entire estate is leased is, for the term of his lease, placed in the position of the owner as regards the ordinary agricultural tenants of that estate. A lessee of this character does not fall within the provisions of Ss. 24. 25, 26, or 27 of Act XVIII of 1873, for all other tenants mentioned in S. 27 must be those tenants who do not pay at fixed rates, and who are not proprietary and occupancy tenants, *i.e.*, they must be tenants without a right of occupancy: for the only classes of tenants recognized by S. 10 are —*first*, tenants at fixed rates; *secondly*, ex-proprietary tenants; *thirdly*, occupancy tenants; *fourthly*, tenants without a right of occupancy. Having regard to the definitions referred to above, and the classification of tenants in the Act, I find it difficult to bring in the lessee for a term of years of an entire mahal as a tenant without rights of occupancy, and to include him in class 4. It seems to me that the section includes only agricultural tenants, and classifies them in their relation to the landlord or other person entitled to receive rent from them; but it does not include persons like the plaintiffs in the case before us, who for a certain fixed annual payment occupy the same position towards the four classes of tenants mentioned in the Act as the absolute owner of the estate would do, had he not for a term of years withdrawn himself from that position by assigning the management of his estate and the collection of rents from the ryots to another. I do not deny that a farmer or lessee could sue or be sued in certain suits under the old Rent Act which has been repealed. But the lessee could not have brought a suit of the nature of the one referred to us in a Revenue Court. He must have gone into a Civil Court. In the present Rent Act, whether designedly or by some accidental omission, and intermediate lessee between the owner of the property and his tenants appears to have been overlooked. Such a lessee might perhaps, as the person entitled to receive the rents from the agricultural tenants, sue for arrears due to him. But I think it doubtful **[344]** whether he could make an application to a Revenue Court under cl. (*n*) (application for the recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed), S. 95. Cl. (*n*) seems the complement of cl. (*m*), application by a tenant for compensation for wrongful dispossession, which applies to the tenants of the four classes specified in S. 10, and to them only.

With this view of the case, I would say that the suit was not barred, as the claim was not of the nature of an application that could be made to a Revenue Court under cl. (*m*), S. 95, Act XVIII of 1873, and that it was properly instituted in the Civil Court.

APPELLATE CIVIL.

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APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

BALWANT SINGH (*Defendant*) *v.* GOKARAN PRASAD (*Plaintiff*).

[12th January 1877.]

1 A. 433=2 Ind. Jur. 177.

1 A. 433= 2 Ind. Jur. 177.

Charge against immoveable property—Subsequent lease—Auction-purchaser's rights.

When the holder of a simple mortgage bond obtains only a money decree on the bond, in execution of which the property hypothecated in the bond is attached,

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brought to sale and purchased by him, and the debt is completely discharged, he cannot afterwards sue to enforce his lien on the collateral security for his debt, which no longer exists. *Semble.* Even if the debt had not been fully satisfied, he could not enforce the lien so as to avoid a lease granted subsequent to the bond. [1 A. 240, *F.*]

APPEL-

LATE

CIVIL.

JUDGMENT.

1 A. 433 = 2 Ind. Jur. 177.

[434] SPANKIE, J.—On the 26th June, 1872, one Daulat executed a bond for Rs. 6,000 in favour of Gokaran Prasad payable by instalments extending over thirty years, and he hypothecated his five biswa share in the village of Bajua as security for the payment of the debt, any transfer being prohibited until the money was repaid. In case of any default in the payment of the instalments, interest at the rate of one per cent. per mensem was payable. If two instalments remained unpaid, the obligee was entitled to recover the entire amount from the obligor and the property hypothecated. On the 12th May, 1873, Paras Ram, lambardar, and Lal Singh, pattidar, sons of the obligor, Daulat, describing themselves as owners of two-thirds out of the five biswa share hypothecated by the said Daulat, leased their two-thirds including sir lands and all other rights for a period of twelve years to Hukam Singh. This lease was registered on the 28th of August, and mutation of names was had in the Revenue Court. In the meantime default had occurred in the payment of instalments under the bond, and a suit was instituted by Gokaran Prasad on the 28th October, 1873, for the money due on the bond against them, but he had not sought to enforce his lien against the property, as there was no decree against it. On the 28th August, 1874, the same plaintiff as decree-holder purchased the property, and after taking a receipt for the money due to the decree-holder, the judgment-debtors received the balance of the sale-proceeds, some Rs. 3,000. The plaintiff then found that the lessee under the lease of May, 1873, opposed his possession in respect of a little more than three biswas, six biswansis, thirteen kachwansis, and six manwansis. He therefore brought this suit, making the lessee and lessors defendants in the case. He sues, as auction-purchaser and to set aside the lease as having been executed collusively and fraudulently without his knowledge with **[435]** the view of depriving him of his right, in spite of the hypothecation made in the bond of 1872. By a subsequent petition, the plaintiff was allowed to amend his plaint by the additional prayer that his lien under the bond of June 1872 might be enforced.

The facts are not denied. The defendant, Hukam Singh, the lessee, contends that as the plaintiff did not sue for the enforcement of the lien when he sued for the money due on the bond, the lien had become null and void after the passing of the money-decree, and plaintiff was not competent to sue for the cancelment of the lease which had been executed in good faith and for legal consideration. The defendant obtained possession prior to the purchase of plaintiff, with whose knowledge the lease was made and mutation of names effected under it, he being a co-partner and sharer in the estate. The suit had been instituted by collusion between plaintiff and the lessors.

The lessors do not appear to have defended the suit. The Subordinate Judge in a brief decision held that the plaintiff's omission to claim the enforcement of the lien was no bar to his present claim, and that the lease had been collusively executed by the lessors and lessee, that it was a transfer, and therefore an alienation prohibited by the conditions of the bond and must be set aside.

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APPEL-LATE CIVIL.

1 A. 433 = 2 Ind. Jur. 177.

Substantially, the pleas in appeal on the part of the defendant are the same as those urged in the Court below.

The decree of the Subordinate Judge cannot, we think, be maintained. It has been held by this Court (1) that "nothing passes to the auction-purchaser at a sale in execution of a decree but the right, title, and interest of the judgment-debtor at the time of the sale." The case cited is not precisely similar to the one before us, but the principle is the same. It was also ruled that when the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree, and further it was held that the holder of a money-decree in the particular case could not avail himself of a condition against alienation contained [436] in his bond to resist the foreclosure. Here, too, the principle would seem to apply. But in the case now before us, the auction-purchaser was the decree-holder, and the sale-proceeds were sufficient to discharge the debt and give a considerable surplus to the judgment-debtors. Under these circumstances, we fail to perceive how the auction-purchaser can fall back upon the collateral security for a debt which no longer exists. But, apart from this, if the lease of May 1873 was prohibited by the hypothecation and conditions of the bond, then plaintiff might have proceeded against the property so hypothecated when he first instituted his suit, and possibly might have impleaded the lessee successfully. He omitted to do so, and his debt having been satisfied, it seems that he has no title as auction-purchaser to question the lease. It was made before he had brought his suit and registered openly: mutation of names was had under it. It is not denied that the plaintiff is a co-partner and sharer in the estate. The lease is for twelve years only and for a portion only of the property hypothecated. There was no attachment of the property when the lease was made. It was for the plaintiff to have established that the lease was fraudulently prepared and executed with a view to injure him. This we do not find that he has been successful in proving. He has not lost the property. He is the proprietor of it. It has not been so alienated as to jeopardise his proprietary right. He has got under his auction-purchase all the rights that his judgment-debtor possessed, subject, however, to the lease which has placed the management of two-thirds of the five biswa share in the hands of a lessee for twelve years. But, as pointed out above, he could not fail to have been aware of the transaction, and deliberately he omitted to sue to enforce his lien, if he could do so, against the lessee, when he brought his claim for the money due under the bond. He has no one to blame but himself, and having satisfied his debt by the purchase of the property, it is too late now to say that the lease was an infringement of the hypothecation of the bond.

We decree the appeal, and reverse the decree of the Subordinate Judge, and dismiss the suit with costs.

(1) In *Khub Chand* v. *Kalian Das*, 1 A. 240.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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JAN. 15.

APPEL-LATE CIVIL.

RAJA BARDA KANT RAI (*Plaintiff*) *v.* BHAGWAN DAS AND OTHERS (*Defendants*). [15th January 1877.]

1 A. 344.

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1. *Interest—Reg. XV of 1793 and Reg. XVII of 1806.*

Reg. XVII of 1806 is not inconsistent with Reg. XV of 1793, as the former refers to *accumulations* of interest, whatever the *rate* may be, and the latter to *rates* of interest.

2. *Conditional decree in redemption suit.*

A mortgagor, suing for redemption, cannot, as a matter of right, claim a conditional decree fixing a time for the payment of money. He should ordinarily be ready with the money; but it is proper and judicious for the Court to insert such a condition, and where the Court of first instance failed to do so, the appellate Court acts properly in inserting the condition.

The plaintiff in this suit brought a suit, tendering payment of Rs. 700, due on two bonds one for Rs. 500 without interest and the other for Rs. 200 bearing interest at 15 per cent. per annum and containing a proviso that it should be tacked on to the mortgage-deed, for redemption and recovery of possession of three pucca houses with land appurtenant thereto, mortgaged by the agent of the ancestor of the plaintiff, under a deed dated 16-1-1795 to a certain lady to whom possession of the property was also given. This lady's representatives, on 4-1-1844 sold the mortgagee's rights in two of the three houses to certain persons. On 28-6-1872 the third house was sold to another lady as the ancestral property of the representatives of the mortgagee since the deed of 28-6-1872 made no reference to the rights of the mortgagor in the third house, legal proceedings were taken against the purchaser of the third house, by the plaintiff's agent and it was decreed by the High Court on 31-3-1874 that she was entitled to possession as mortgage but not as proprietor under the sale-deed of 28-6-1872. The several defendants in possession under the aforesaid deeds set up, in the present suit, pleas of limitation, etc. The Subordinate Judge held that limitation was saved by the deed of 4-1-1844 and by the High Court decision of 31-3-1874 and decreed plaintiff's claim on payment of Rs. 1,000 allowing Rs. 200 as maximum interest on the tacked bond for Rs. 200 under S. 6, Reg. XV of 1793 and Rs. 50 principal plus Rs. 50 interest for necessary repairs, etc. The defendants appealed. The Judge, while confirming the above decision, modified it by making redemption conditional upon the payment of the amount found to be due within a month from the date of the decision of the appellate Court. The plaintiff preferred a special appeal to the High Court. The defendants-respondents filed objections to the Judge's decree.

JUDGMENT.

[346] The plaintiff has appealed only with reference to that part of the judgment fixing a period for payment. We are of opinion that his objection cannot be maintained. As the lower Court's decree stood, the payment might be made so long as the decree remained capable of execution, the Judge's order limiting the period to a fixed one of one month from the date of his decision appears to be proper and judicious; a conditional decree of this nature cannot be claimed as of right by the mortgagor, who

ordinarily should be ready at once with his money, and it scarcely lies in his mouth to question the order of the Court as exercising a discretion in this respect.

The respondents have preferred objections under S. 348, Act VIII of 1859, to the effect that Reg. XV of 1793 does not apply to the mortgage in suit so as to limit the interest in any way, and that the cost of improvements should have been allowed to them, and that a conditional decree should not have been given.

On the last point we see no reason to interfere, the Courts have been in the habit of granting such decrees under certain circumstances, and we cannot say that the order is not justified in this case.

The deed which is the subject of this suit was executed on 16th January, 1795, and the determination of the suit is governed by the law applicable to the province of Benares.

Regulation XV of 1793 was extended to the Province of Benares by S. 2, Regulation XVII of 1806, and we are of opinion that S. 6, Regulation XV of 1793, will govern this case, and **[347]** that the lower Court's decision applying that provision, and only allowing the amount of interest on the loan of Rs. 200, equivalent to the principal, is correct.

By S. 6 of Regulation XV of 1793 " if the interest on any debt calculated according to the rates allowed by this Regulation shall have accumulated so as to exceed the principal, the Courts are not in any case whatever, excepting the cases specified in S. 12," (and this is not one of those cases) " to decree a greater sum for interest than the amount of such principal."

This section was extended to the province of Benares by S. 2, Regulation XVII of 1806, and came into force on 1st January, 1807, that is, it will govern the decision of suits instituted after that date; the Regulation nowhere declares that it shall not have retrospective effect in cases when the cause of action may have arisen prior to that date.

There is nothing in S. 3, Regulation XVII of 1806, inconsistent with its application. That section does no more than declare the *rate* at which interest is to be decreed in cases where the cause of action has arisen before a certain period; S. 3, Regulation XVII of 1806, refers to *rates* of interest; S. 6, Regulation XV of 1793, to *accumulation* of interest irrespective of rates. The two sections should be read together and so applied.

Nor is there anything in S. 6, Regulation XVII of 1806, which affects the question before us. That section declares that the rule by which redemption of mortgaged property takes place when the principal sum lent and simple interest due thereupon have been realized from the usufruct, shall not have retrospective effect in the province of Benares, but we are not called upon to apply that rule in the case before us, which is not a case where there is a question of principal and interest having been realized from the usufruct, but is one where interest is claimed on a loan and is realizable otherwise than from usufruct, and where the interest has accumulated so as to exceed the principal. It is a case to which S. 6, Regulation XV of 1793, is peculiarly applicable. We notice a decision of this Court at p. 194 of the volume for 1867, where the rule in S. 6, Regulation XV of 1793, has been applied. We also consider that the Judge is right in disallowing respondents **[348]** credit for expenses incurred in improvements of the property; they appear to have been unnecessary and not sanctioned by the terms of the mortgage.

We affirm the decree of the lower appellate Court, and dismiss the appeal, but each party will pay their own costs of this appeal.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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APPEL-LATE CIVIL.

MUSAMMAT BHAWANI KUAR AND OTHERS (*Judgment-debtors*) *v.* GULAB RAI AND OTHERS (*Decree-holders*). [30th January 1877.]

1 A. 348 = 1 Ind. Jur. 704.

1. *Decree charging land—Sale of immoveable property.*

The sale, in execution proceedings, of a decree charging lands for its satisfaction, held by the judgment-debtor, is a sale of an interest in immoveable property.

1 A. 348 = 1 Ind. Jur. 704.

2. *Sale of decree charging land—Procedure—C.P.C., Act VIII of 1859, Ss. 235, 252.*

Sales in execution proceedings, of decrees charging lands, are governed by the provisions of the C.P.C., relating to sales of immoveable property.

[1—R., 9 M. 5 (9) ; **1 & 2—R.**, 10 M. 169 (172) ; **1—D.**, 15 A. 134 (135).**]**

The decree-holders attached and brought to sale in the execution-proceedings a decree charging land for its satisfaction—held by the judgment-debtors. The said sale was effected as though the decree, notwithstanding that it charged immoveable property, was itself moveable property. On the application of the judgment-debtors to set aside the sale on the ground that the formalities required for the sale of immoveable property had not been observed, both the lower Courts held that the sale of the decree was a sale of moveable property, and that the want of formalities did not vitiate the sale. The judgment-debtors preferred a special appeal to the High Court.

JUDGMENT.

The High Court ruled the point in the following judgment remanding the case to the Judge for decision on the merits :—

[349] A preliminary objection is taken by the pleader for the respondents under S. 252 of the Procedure Code which provides "no irregularity in the sale of moveable property under an execution shall vitiate the sale, but any person who may sustain any injury by reason of such irregularity may recover damages by a suit in Court." But this assumes that the subject of sale here is moveable property, and that the judgments of the lower Courts are right in that respect. We are, however, clearly of opinion that the right which is the subject of sale under the decree is legally of the nature of immoveable property, and that S. 252 does not therefore apply. As against the appellants the decree is for Rs. 1,593-3-0 together with Rs. 194-10-6, amount of costs, and it orders absolutely that the money shall be recoverable from 5 biswas, 11 biswansis and 2½ kachwansis.

The decree is, therefore, absolutely for money recoverable by sale of immoveable property hypothecated for its payment. The right and interest which it creates is a right in a judgment debt recoverable by sale of immoveable property charged with its payment. The decree thus conveyed to the decree-holders a subsisting interest in the nature of a charge on the hypothecated property, and the sale of their rights under the decree must be held to be a sale of such an interest in immoveable property to which the provisions of the Code for sales of immoveable property will apply.

We reverse the order of the Judge and remand the case to him for decision on the merits, he has erred in considering the sale in this case to be a sale of moveable property.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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JAN. 31.

APPELLATE CIVIL.

STOWELL, MANAGER, UNCOVENANTED SERVICE BANK, LIMITED, (*Decree-holder*) *v.* BILLINGS (*Judgment-debtor*).

[31st January 1877.]

1 A. 350.

1. *C.P.C., Act VIII of 1859, Ss. 285 and 348—Act XIV of 1859—Limitation—Act IX of 1871—Compromise under decree—Instalment—Payment under compromise.*

The receipt of instalments by a decree-holder, out of Court, in pursuance of a compromise made between him and his judgment-debtor and sanctioned by the Court, is not a proceeding to enforce or keep in force a decree.

Nor can a condition in a compromise that on default being made in a certain number of instalments, the decree should be executed in full, prevent limitation from running.

2. *Proceedings under a barred decree.*

Proceedings taken under a barred decree cannot serve to bring subsequent applications within time.

[1—Ap., 3 A. 585; **2—R.**, 2 A. 322.]

A decree-holder, in executing his decree dated 5—1—1869, entered into a compromise with the judgment-debtor agreeing to accept payment by instalments, which was ratified by the Court executing the decree, on 7—9—1869, the case being struck off the execution file on the basis of the compromise. More than three years after the date of the Court's order sanctioning the compromise, subsequent proceedings were taken by the decree-holder to enforce the original decree. The first of these was on 15—3—1873, when the decree-holder applied for a certificate under S. 285, Act VIII of 1859, for executing his decree out of the Court's jurisdiction where the judgment-debtor resided. After notice to the judgment-debtor, the certificate issued on 25—4—1873, but no proceedings were taken under the certificate owing to the judgment-debtor resuming his payment of instalments to the decree-holder direct. The subsequent application was made on 15—1—1876. The judgment-debtor pleaded limitation. The Judge overruled the plea of limitation but dismissed the decree-holder's claim to the interest on the original decree at 12% relying on the compromise of 1869. The decree-holder appealed to the High Court. The judgment-debtor-respondent filed objections.

JUDGMENT.

[351] The Judge holds that as Act XIV of 1859 was in force in March 1873, when the notice to show cause was issued, there was "a proceeding to enforce or keep in force a decree," and therefore the present application made within three years from that date is within time.

[352] But respondent's counsel contends that in 1873, when the above proceedings took place, the decree which appears to be dated 5th January 1869, was dead, and that it was even so if the time be reckoned from the 7th September 1869, when the arrangement referred to was made. He also contends that no arrangement made between the parties though recognised by the Court can enlarge the period allowed by law for the execution of decrees, nor can the terms of a decree be varied by the Court executing the decree, and in support of this contention

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1 A. 350.

he cites the Full Bench ruling of the Calcutta Court, dated 4th September 1869, (1) and a decision of this Court to the same effect (2). This Court referred to the ruling of the Calcutta High Court already referred to and held that the receipts of instalments by a decree-holder out of Court in pursuance of a compromise made between him and his judgment-debtor is not a proceeding to enforce or keep in force a decree, and the Court added that the condition in a compromise that on default being made in a certain number of instalments, the decree should be executed in full, cannot prevent limitation from running. This Full Bench decision of the Calcutta High Court held that such a compromise even though recognised by the Court executing the decree could not enlarge the limitation, and therefore the ruling in that case applies more strictly to the case before us than the decision of this Court. But the principle is the same in both cases.

When the two instalments fell due in May and June, 1872, more than three years had expired since the date of the decree and the fact that there were proceedings in 1873, which would make the application of 1876 within time, is, we think, of no service to the decree-holder. We must look behind the application of 1873 when pressed upon the point of limitation, and as more than three years had elapsed between the 7th September, 1869, and 15th February 1873, the claim to execute the decree then and now is clearly barred.

We are therefore compelled to dismiss the appeal and reverse the order of the Judge, and we must do so with costs as the objections now urged by respondent were taken below.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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APPELLATE CIVIL.
1 A. 360 = 1 Ind. Jur. 851.

CHUNIA AND ANOTHER (*Plaintiffs*) *v.* RAM DIAL AND ANOTHER (*Defendants*). [2nd February 1877.]

1 A. 360 = 1 Ind. Jur. 851.

Court Fees Act, VII of 1870, Ss. 3 (c), 12 and Sch. II, Art. 17, iii.—Suit for declaratory decree—Consequential relief—Decision of questions relating to valuation—Appeal.

S. 12 of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee. But when the question is whether the appellants were right in paying a fee, and under what class of cases their suit or appeal falls for the purposes of the Court Fees Act, this prohibition has no application, and the appeal is maintainable.

The plaint in a suit by a person, whose claim to attached property has been disallowed under S. 246 of the C.P.C., 1859, to establish or to declare his right to such property, may be brought on a stamp of Rs. 10, and need not be stamped according to the market or other value of the property.

[**Not F.**, 13 C. 162; **F.**, 12 C.L.R. 148, 28 C. 334; **Cons.**, 4 M.L.J. 183 (**F.B.**); **R.**, 4 M. 204, 2 A. 720 (**F.B.**), 7 A. 528, 12 A. 129 (**F.B.**), 16 A. 308 (312) (**F.B.**), 23 B. 486, 31 C. 511.]

In a suit, by persons against whom an order had been made under S. 246, Act VIII of 1859, disallowing their claim to the attached property, for a decree declaring their right to the property, the Court fee paid in

(1) 4 B.L.R., (F.B.) 101, Krishna Kamal Singh, D.H. *v.* Hira Sirdar and others.
(2) H.C.R., N.W.P., 1873, p. 100. Abas Imam, Appellant.

respect of the plaint was Rs. 10; subsequent to this, by order of the first Court, a Court fee computed on the market value of the property in suit was paid, and the suit was dismissed. On appeal, the Court fee first paid in respect of the plaint in the suit was paid in respect of the memorandum of appeal. When the appeal came on for hearing, the lower appellate Court ordered the appellants to pay the Court fee demanded by the first Court and to re-present the appeal within three days. The appellants failed to do as directed, and the lower appellate Court dismissed the appeal. A special appeal was then preferred to the High Court.

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APPELLATE CIVIL.
1 A. 360 = 1 Ind. Jur. 851.

JUDGMENT.

[362] It is contended by the respondents that the Court is bound by the provisions of S. 12 of the Court Fees Act and cannot determine whether this suit is one in which specific relief is sought or not, so as to determine under what class of cases it falls for the purpose of the Court Fees Act. We observe, and it has been so held in the Calcutta Court (1), that S. 12 of the Court Fees Act prohibits appeals on questions "relating to *valuation* for the purpose of determining the amount of a fee." There is no question of valuation for the purpose of determining the amount of a fee raised in the appeal before us, for if the appellant is right in his contention, a special and certain fee is fixed for all suits of the nature of the present suit, and no question of valuation arises. We therefore overrule the objection and entertain the appeal.

It appears to us that the appellant correctly contends he seeks a declaration of right and no consequential relief. The Civil Procedure Code declares that a person against whom an order is passed under S. 246 may bring a suit to establish his right. If he obtains a decree in such a suit, he will then present himself to the Court executing the decree by which the order was made, and that Court will be bound to recognize the right declared, and either withdraw or order attachment as the case may be. We set aside the decree of the lower appellate Court, and remand the case to that Court, for decision on the merits. Costs of this appeal to abide and follow the result.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1877
FEB. 10.
APPELLATE CIVIL.

BISHESHUR SINGH (*Plaintiff*) *v.* MUSAMMAT SUGUNDHI (*Defendant*).

[10th February 1877.]

1 A. 366 = 1 Ind. Jur. 777.

Act XVIII of 1873, Ss. 93, 181 and 189—Appeal to Judge—Proprietary right—Revenue—Sub-proprietor—Settlement.

Where, in a suit for arrears of rent blow Rs. 100, the defendant denies the tenancy and sets up the independent title of the sub-proprietor; *held* that the suit was one involving a question of proprietary title (S. 189, Act XVIII of 1873) and that the decision in the suit was appealable to the Judge, though the rent was below Rs. 100.

1 A. 366 = 1 Ind. Jur. 777.

JUDGMENT.

[367] STUART, C.J.—In this case I am clear that there is a question of proprietary title within the meaning of Ss. 93 and 189, Act XVIII of

(1) See *Ganga Monee Chowdhrain* v. *Gopal Chunder Rey*, 19 W.R. 214.

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APPEL-LATE CIVIL.
1 A. 366 = 1 Ind. Jur. 777.

1873, and that the Judge was bound to hear and determine the appeal to him, and that being so, this special appeal was under S. 191 of the same Act competently preferred. The suit is to recover Rs. 5 on account of arrears of rent, and in defence defendant asserts a sub-proprietary right in respect of which a sub-settlement was made with her for revenue, and that she is not a tenant liable to pay rent. Thus a question of title is directly raised, and it is unnecessary to say more. We therefore allow [368] this appeal, reverse the order of the Judge (1), and remand this case for disposal on the merits under S. 351 of Act VIII of 1859. Costs to abide the result.

OLDFIELD, J.—The first and second pleas in appeal are valid. The plaintiff sues defendant as a tenant for the recovery of arrears of rent, and the defendant pleaded that she held the land as a proprietor subject to the payment of revenue, but not of rent. The Collector decided that the settlement officer had determined that she was a sub-proprietor liable for revenue, and he held that this decision of the settlement officer was final and binding until set aside, and he therefore dismissed the suit. The settlement officer has thus in this suit determined the proprietary title of the defendant on the basis of the settlement officer's order. His decision *in this suit* is not the less a decision of proprietary title, because another Court may have already in another case decided the same. His decision no doubt is one of fact, whether the settlement officer has made any such order, but it involves for the purposes of this suit a decision of title when it determines the effect of the settlement officer's order on a title. It is possible that the order may have been wrongly interpreted, or is not binding, though I offer no opinion on this point. An appeal will therefore lie to the Judge, and I would reverse the decree and remand the case, under S. 351 of Act VIII of 1859, for a trial on the merits. Costs to abide the result.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

1877
FEB. 14.
APPEL-LATE CIVIL.
1 A. 363 = 1 Ind. Jur. 818.

ABDUL RAHIM (*Defendant*) *v.* RACHA RAI AND ANOTHER (*Plaintiffs*).

[14th February 1877.]

1 A. 363 = 1 Ind. Jur. 818.

C.P.C., Act VIII of 1859, Ss. 376 and 378—Review of Judgment—Appeal.

1. Though the order granting a review of judgment is final and unappealable, objections to it can be urged in an appeal against the decision passed on review.

2. Where a Court of appeal granted a review of judgment on the grounds—

(*a*) that the appellate Court had failed to inspect certain very material documents that it had summarily discredited, and

(*b*) that it had misappreciated the evidence,

Held that the order granting the review was within the discretion vested in the Court by law.

The decree of the first Court passed in favour of the plaintiffs on 29—6—1875 was reversed and the suit dismissed on 29—11—1875 by

(1) The order of the Judge being that, as the Collector considered the defendant's status had been definitely determined and the value of the suit being less than Rs. 100, no appeal lay to him under S. 189, Act XVIII of 1873.

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APPELLATE CIVIL.

1 A. 363 = 1 Ind. Jur. 818.

the lower appellate Court. On the plaintiffs' application for a review of the lower appellate Court's judgment, the review was ordered, and, after a re-hearing, the appeal was dismissed. The defendant preferred a special appeal to the High Court contending that the review was improperly granted.

JUDGMENT.

[364] STUART, C.J.—I agree with Mr. Justice Pearson that, although an order on an application for a review of judgment is final, objection may be taken in special appeal against that order, and that, therefore, the present special appeal was competently preferred. I am also of opinion with him that the review of judgment was properly granted in this case, and that the evidence on which it was based was material and essential to the just determination of the suit.

In his judgment of the 29th November 1875, the first Subordinate Judge points out the particulars in the way of evidence in regard to which the plaintiffs' case in his opinion was defective, *viz.*, the absence of any sufficient evidence of the arbitration award of the patwari's deposition; and further, in allusion to the circumstances that the plaintiffs had not adduced any parol testimony, he remarks—"Besides this no documentary evidence, such as 'khasra,' 'khatauni,' or rent-roll, has been filed on the part of the plaintiffs, from which it could have been shown that the names of the plaintiffs and their ancestors were ever recorded as shareholders in respect of this grove." All this important information, however, was subsequently supplied, and it was considered by the second Subordinate Judge when the application for a review of his predecessor's judgment (in which application, it is to be observed, it was distinctly offered) was before him, and as the new evidence, which it appeared had been filed with some other record, and the first Subordinate Judge had not, therefore, an opportunity of perusing it **[365]** showed not only good and sufficient reason, but also evident error and omission, the review was properly and justly granted. This special appeal, therefore, fails and is dismissed with costs.

PEARSON, J.—Under the provisions of S. 378, Act VIII of 1859, the order made by a Court to which an application for a review of judgment is preferred, whether for rejecting the application or for granting the review, is final, but I am nevertheless of opinion that objection may be taken in appeal against the decision passed on review on the ground that the review was improperly granted. I proceed, therefore, to consider the pleas in appeal.

In his decision of 29th November 1875, the officiating Subordinate Judge observed that "the Munsif, in proof of the plaintiff's right, had relied on a copy of the arbitration award, dated Aghan Badi 5, 1265 Fasli, wherein the share of Adhar Rai's brothers, *i.e.*, the ancestors of the plaintiffs, has been declared. A copy of the award is, however, not filed on the record in this case, though it may have been filed with the records of the case formerly decided, but there is no trace of the original award, and the Munsif himself admits that it is not signed by the presiding officer. Then, under these circumstances, it is quite useless to rely on such a paper which is not free from suspicion, and no arguments can be adduced in support of its genuineness. The copy of the patwari's deposition also is not filed in this case, and the said copy, without its original, and in absence of the original arbitration award, is of no use." The lower appellate Court's proceeding of the 15th April last states that "the application for review is filed with three copies, and it is urged briefly

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that the aforesaid copies were not perused at the time of the disposal of the appeal case, and that they go to establish the averment of the plaintiffs. It appears on reference to the record that really the above-mentioned copies were not perused at the time of disposing of the appeal case. The reason for the non-production of the said copies on the first occasion as stated by the petitioners is that the copies in question were filed with the record of some other case, and this appears to be a good reason." The application for review of judgment was therefore allowed, and the result has been the confirmation of the judgment of the Court of first instance.

1 A. 363 = 1 Ind. Jur. 818.

Referring to the pleas in appeal, I remark that the adduction of newly discovered evidence is not the only ground on which a [366] review of judgment may be allowed. "Any other good or sufficient reason" is permitted by S. 376, and S. 378 allows a review to be granted when "necessary to correct an evident error or omission, or otherwise requisite for the ends of justice." In this case it would seem that some very material documents on which the first Court had relied had been summarily discredited without being inspected by the lower appellate Court, which, if it did not think proper to call for and inspect the record of the case in which copies of those documents were to be found, might at least have given the plaintiffs permission to file copies of them. The application for review of judgment urged, moreover, that the lower appellate Court, in its decision of the 29th November 1875, had erred in declaring the report of the Commissioner appointed by the Munsif for the purpose of making a local enquiry to be unworthy of reliance, because he was a muharrir of the Munsif's Court, and it is presumable that the lower appellate Court was influenced by this argument in granting the application. On the whole I see no sufficient reason for holding that the lower appellate Court exceeded the discretionary power vested in it by the law in granting the review applied for, or that the reasons assigned by it for its final decision are insufficient in law. I would, therefore, dismiss the appeal with costs.

FULL BENCH.

PRESENT:

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

FULL BENCH.

ABLAKH RAI AND OTHERS (*Plaintiffs*) *v.* UDIT NARAIN RAI AND ANOTHER (*Defendants*). [19th February 1877.]

1 A. 353 = 1 Ind. Jur. 705.

1 A. 353 = 1 Ind. Jur. 705.

Act XVIII of 1873, Ss. 8, 9 and 171—Right of occupancy tenant—Transferability—Sale in execution.

1. *By a majority of the F.B.* The rights of an occupancy tenant are transferable by sale in execution of decree, but only as between persons who have become, by inheritance, co-sharers in such right.

Per Stuart, C.J.—Such right is transferable by sale in execution without any limitation or restriction.

2. *Per Stuart, C.J.*—The right to enforce legal process against property cannot, under any circumstances, be taken away except by express words to that effect.

[R., 10 C.P.L.R. 53 (54); Cons., 2 A. 451 (F.B.); D., 1 A. 547, 30 B. 290 = 7 Bom. L.R. 941.]

Suit to protect a right of occupancy from sale in execution of decree by cancelment of an order passed on the miscellaneous side.

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FULL BENCH.

1 A. 353 = 1 Ind. Jur. 705.

REFERENCE TO THE FULL BENCH.

SPANKIE AND OLDFIELD, JJ. referred to the Full Bench the question whether, having regard to S. 9 of Act XVIII of 1873, the right of occupancy held by occupancy tenants can be sold by public auction in execution of a decree of the Civil Court.

JUDGMENT.

[353] STUART, C. J.—My opinion on the question submitted by this reference is an answer in the affirmative, and that the right of occupancy held by occupancy tenants can be sold by public auction in execution of a decree of the Civil Court. S. 9 of Act XVIII of 1873, after declaring that the rights of tenants at **[354]** fixed rates shall be heritable and transferable, goes on to provide as follows:—"No other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such right." I consider that the words "or otherwise" must be understood to be a general expression controlling the particular words which go before "grant, will" and to mean "or otherwise by the voluntary act or deed *ejusdem generis* of the parties," and that they do not mean to exclude a transference of the right by sale in execution of a decree.

Our attention at the hearing was directed to section 171 of the Act. By that section it is provided:—"In the execution of any decree for the payment of arrears of rent or revenue, or of money, under this Act, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor." If this section should be read in connection with S. 9, the construction I have put on the latter might be said to be strengthened, but it is unnecessary to consider that, as I hold that S. 9 is sufficient for this case, and that whatever else the parties in possession of the right of occupancy may do as voluntary agents, they cannot prevent a transfer by sale of that right under a decree against them, for in my opinion the right to enforce legal process against property cannot under any circumstances be taken away excepting by express words to that effect.

PEARSON, J.—Section 9, Act XVIII of 1873, declares that the rights of occupancy tenants other than tenants at fixed rates shall not be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such rights, which, therefore, if sold at auction in execution of a decree of the Civil Court, can only be sold to such persons, but subject to that restriction may thus be sold.

TURNER, SPANKIE AND OLDFIELD, JJ., concurred in the following judgment:—

We see no reason to think that the Legislature intended to restrict the provision of the second paragraph of S. 9 of the Rent Act to voluntary transfers only. The first paragraph declares **[355]** generally that the rights of tenants at fixed rates shall from the date of the passing of the Act be heritable and transferable. In, as we read them, equally general terms the second paragraph declares that no other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such rights. The term "otherwise" is strictly equivalent to the term in any other way, and must we think include all transfers, whether voluntary or involuntary. It follows that rights of occupancy other than at fixed rates are not transferable by auction-sale in execution of decree to strangers, but may be transferred by such sale to any of the persons in whose favour the exception is specially declared.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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FULL BENCH.

1 A. 355.

PARAS RAM (*Decree-holder*) *v.* GARDNER (*Judgment-debtor*).

[21st February 1877.]

1 A. 355.

Limitation—Act IX of 1871, Sch. II, Art. 167—C.P.C., Act VIII of 1859, S. 246—Execution of decree—Proceeding to enforce—Intermediate suit—Objector.

Where an application to execute a decree against the judgment-debtor's property was interrupted by the claim of an objector, which led to a suit by the decree-holder against the objector, decided against the latter; *held*, on a renewed application by the decree-holder for execution, more than three years from the former application, but within three years from the date of the decree in the above suit,—that the application was not barred under Act IX of 1871, Sch. II, Art. 167.

Held also, that the application under the above circumstances was not a fresh application, but a revival or continuance of the previous application which was interrupted.

Per Pearson, J.—The application was barred.

[**F.**, 5 B. 29, 5 A. 243, 28 M. 50 (**F.B.**); **Expl.**, 23 A. 13; **Diss.**, 10 M. 22; **R.**, 3 A. 484, 16 B. 294, 17 A. 425, 23 C. 397. 13 C.W.N. 521, 18 A. 482 (**F.B.**), 19 A. 71, 23 C. 437, 14 M.L.J. 401 (**F.B.**); **D.**, 7 B. 293, 7 M. 595, 17 C. 268.]

REFERENCE TO THE FULL BENCH.

The Court (TURNER AND OLDFIELD, JJ.) referred for decision by the Full Bench the question whether Paras Ram's application, dated 25th March 1875, for execution of the decree, dated 23rd March, 1871, was an application brought within the period allowed by art. 167, sch. ii, Act IX of 1871, referring to two cases (1) of the Calcutta High Court decided under Act XIV of 1859.

JUDGMENT OF THE FULL BENCH.

[357] STUART, C. J.—We are asked by the reference whether the application of the 25th March 1875, has been brought within the period allowed by art. 167, sch. ii, Act IX of 1871. It was suggested that art. 167 does not apply to such a case, and no doubt it does not come so literally and precisely within the limits provided by the article. But in my view art. 167 does apply, inasmuch as the application of the 25th March 1875, was not a new or fresh act, but was in legal continuance of the application of June 1871, and in my judgment, therefore, art. 167 applies constructively, the three years allowed by the article being reckoned from the 10th August 1872, when Paras Ram's rights as against Debi Das were restored to him.

That the execution of the decree is not barred clearly appears from the dates and legal character of the procedure. Paras Ram, the appellant, obtained his decree on the 23rd March 1871, and he applied for execution of it by attachment and sale of the hypothecated property on the 10th of June 1871, and the 21st of August 1871, was fixed for the sale. In the course of the attachment, one, Dabi Das objected to the sale on the ground that he had bought the property in execution of a decree he held against the same judgment-debtor, and on the 16th of August 1871,

(1) VIII W.R. 98-99.

his objection was allowed. On the 17th of June, 1872, (being within a year from the 16th August, 1871), Paras Ram brought a regular suit against Dabi Das and obtained a decree in his favour on the 10th of August, 1872. On the 25th of March, 1875, Paras Ram filed an application for the execution of his original decree of March, 1871. It is not explained why he allowed the interval to elapse without attempting to use his decree, but he had three years from the 10th of August 1872, and, therefore, as between that date and the 25th of March, 1875, he was clearly within his rights.

The interruption to the execution of his decree was not occasioned by any fault or laches of his own, but was caused by the illegal intervention of Dabi Das. Paras Ram's procedure, therefore, under his decree must be held to have been legally continuous, and he may proceed to its execution.

[358] As to the application of the 25th of March, 1875, being a fresh application having no such connection with what had gone before as we can now take judicial notice of, I cannot so regard it. On referring to it, I find that it recites the whole previous procedure and simply repeats the prayer for execution of the decree which was made in June, 1871. It was, therefore, an application in legal continuance of the former process up to the 10th August, 1872, when Paras Ram obtained his decree in regular suit, and it ought to be granted as being within time.

PEARSON, J.—The application of the 25th March, 1875, may be regarded as an application to the Court to proceed with the former application of the 10th June, 1871, the proceeding under which had been interrupted by Dabi Das' objection and the order allowing it; but if so regarded, is, nevertheless, in substance and effect an application for the execution of the decree of the 23rd March, 1871; and art. 167, sch. 2, Act IX of 1871, is applicable to it, and requires that it should have been presented within three years from the date of the former application above mentioned. It can scarcely be contended that there is no limitation to the time within which the decree-holder was competent to make such an application as that of the 25th of March, 1875; but if the limitation prescribed by art. 167 be not applicable, I do not find any other limitation provided by the law. I see nothing in the law to warrant us in ruling that he was at liberty or bound to make such an application within three years from the date of the decree obtained by him in his suit against Dabi Das on the 15th August, 1872. It might be reasonable and equitable to exclude from the computation of the period of limitation fixed by art. 167 the time during which such a suit was pending, but such a course is not authorized by the law. The absence of any provision for the exclusion of that time may be a defect in the law, and cases may be supposed in which the defect might cause hardship. In the present case the decree-holder delayed for 10 months to bring his suit against Dabi Das, and after obtaining a decree therein delayed for thirty-one months to apply to the Court to proceed with the execution of the decree of the 23rd March, 1871. His suit against Dabi Das was pending less than two months; and the exclusion from the computation of the period of limitation of the time during which it was pending would not **[359]** bring his application within time. In my opinion the lower Courts have rightly held art. 167 to be applicable to his application of the 25th March, 1875, and preclude its entertainment.

TURNER, J.—The application made for the execution of this decree by attachment and sale proceeded to such a point that as against the judgment-debtor a sale was ordered when its further prosecution was interrupted by the intervention of a third party, who succeeded in

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establishing his objection to the satisfaction of the Court executing the decree. The only course open to the decree-holder to procure a revision of the order allowing the objection was by the institution of a regular suit against the objection. This course he adopted, and having obtained a decree setting aside the order allowing the objection and declaring the liability of the property to be brought to sale in execution of the decree he had obtained against the original judgment-debtor, he then applied to the Court executing that decree to proceed with the application for execution which had been interrupted. On the ground that the application we are considering is not a fresh application to execute the decree, but an application to carry out the order which as against the judgment-debtor had become final, and of which the prosecution was interrupted by the allowance of the objection of a third party since disallowed, I am of opinion that the provisions of the Limitation Act relating to applications for the execution of decree do not apply to it.

SPANKIE, J —I accept the view that the application of the 25th March, 1875, must be regarded as one for a continuance of the former proceedings in execution and not as a fresh application for execution within the meaning of art. 167, sch. ii, Act IX of 1871. S. 246, Act VIII of 1859 provides that a suit may be brought to contest an order made under it, and if the suit be duly instituted within one year as required by Act IX of 1871, and the order of the Court in execution be reversed, it appears to me that the decree-holder is at liberty to ask that the order which should have been, but was not, made should issue.

I hardly think that we are called upon to consider whether this view of the case would not do away with limitation altogether. **[360]** All that is contended is that the former application was practically reversed when a decree in the regular suit allowed by S. 246, Act VIII of 1859, reversed the order of the Court executing the decree. It may be said that there are circumstances in the case referred to us, which are unfavourable to the decree-holder and show that he did not use due diligence in bringing his suit or in making his application to revive the former execution proceedings. This may be so, and, if so, it is for the divisional bench to deal with that part of the case.

OLDFIELD, J.—I think we may hold that the last application may be considered as a continuance or renewal of the former application for execution in which the proceedings had been interrupted by the reference to the Civil Court, and were renewed on the second application, the latter will not therefore be an application to which the period of limitation in art. 167 will apply.

ORDER OF THE DIVISION BENCH.

THE DIVISION BENCH, TURNER AND OLDFIELD, JJ., made the following order in the special appeal.—In accordance with the opinion expressed by the majority of the Court, we hold the application within time. Setting aside the order of the Courts below, we remand the application for disposal on the merits to the Subordinate Judge's Court. Costs of the appeal in the Judge's Court and in this Court to abide and follow the result.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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APPELLATE CIVIL.

BINDA PRASAD AND OTHERS (*Appellants*) *v.* AHMAD ALI AND ANOTHER (*Respondents*). [14th March 1877.]

1 A. 368 = 1 Ind. Jur. 741.

Execution of wrong decree—Acquiescence—Validity.

In execution of a decree, the judgment-debtor's property was attached. Claims preferred to this property led to a suit by the judgment-creditor against the claimant and the judgment-debtor, which was decreed with costs. The judgment-debtor was declared not liable for costs. The amount due under the first decree having been partly satisfied by the judgment-debtor's heirs in execution proceedings taken under the second decree, *held*, that the balance of the first decree could not be recovered from them in execution of the second decree, and that no acquiescence in former illegal proceedings could render the illegal execution valid.

1 A. 368 = 1 Ind. Jur. 741.

JUDGMENT.

[370] The respondents are the holders of a decree dated the 28th March 1855, and have applied for its execution against the appellants who are the representatives of one Sheo Din Rai by realization of Rs. 5,865-11-11 from the judgment-debtor's property.

It appears to us that the objection taken by the appellants is valid, that the respondents cannot recover the money under this decree from appellants.

There was a decree dated 9th June 1847 against Sheo Din Rai for a sum of money, and in its execution certain ladies objected to the sale of certain property, claiming it in their own right.

The decree-holder in consequence brought a suit against them and the judgment-debtor, Sheo Din Rai, and it was in this **[371]** suit that the decree dated 28th March, 1855, which is now in execution, was made.

The object of that suit was to have certain property claimed by the ladies declared liable to sale in execution of the decree of 1847, and if the judgment and decree be examined it will be seen that the claim was only decreed against the ladies, and the decree was in effect a declaration that the property was not the property of the ladies, and so far as their claim to it was concerned, it was liable to satisfy the decree of 1847. The decree-holder cannot realize the balance of the decree of 1847 under the decree of 1855, by executing it against those who are the judgment-debtors under the former decree, but this is what he has been doing. The balance still due of the decree of 1847 can only be recovered in execution of that decree, and it is no answer to the objection that respondent has on previous occasions taken out execution in the same way without opposition on the part of the appellants. There has been a grave illegality which no acquiescence in the past can justify.

We decree the appeal and set aside the orders of the lower Courts with costs.

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PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

MUSSAMAT JAGESRI KUAR (*Plaintiff*) *v.* RAM NATH BHAGAT AND ANOTHER (*Defendants*). [14th March 1877.]

1 A. 371 = 1 Ind. Jur. 742.

1 A. 371 = 1 Ind. Jur. 742.

Suit by reversioner --Declaratory decree.

A reversioner is entitled to sue for a declaration that an alienation by the present qualified owner in possession shall not be binding on him after the lifetime of the latter. (15 B.L.R. 83, *F.*)

The plaintiff's mother was entitled to certain property for her life under an award, under which the plaintiff was entitled to succeed to the property after her mother's death. The plaintiff sued her mother and the holder of the decree in execution of which the property had been sold, to have her right declared to the property and to have the decree and sale declared null and void, alleging that the decree had been obtained and executed by collusion between the defendants. The Subordinate Judge of Ghazipur decreed the suit. The first defendant, the decree-holder, appealed from the said decree to the Judge of that place. The Judge, on the strength of the rulings in 11 B. L. R. 171 and 15 B. L. R. 83, dismissed the suit. The High Court overruling the Judge as to the effect of 15 B. L. R. 83 remanded the case.

JUDGMENT.

[372] We are of opinion that the present suit is maintainable. The Lords of the Privy Council (1) expressly except the case of a **[373]** suit brought by a Hindu reversioner from the operation of the general rule.

The appeal is decreed and the suit remanded under S. 351 for trial. Costs of the appeal to abide and follow the result.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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AKBAR KHAN AND OTHERS (*Plaintiffs*) *v.* SHEORATAN AND OTHERS (*Defendants*). [20th March 1877.]

1 A. 373 = 1 Ind. Jur. 778.

1 A. 373 = 1 Ind. Jur. 778.

Reg. VII of 1822, S. 9. Cl. I—Act XIX of 1873. S. 66—Suit for declaration of Zamindari right to cesses—Civil Court—Jurisdiction.

A Civil Court is not precluded by the terms of Reg. VII of 1822, S. 9, cl. I. from inquiring into and declaring a Zamindar's rights to cesses and collections, although not avowed and sanctioned, nor taken into account in fixing the Government jama at the time of settlement, and although they cannot be collected by the Zamindar until so avowed and sanctioned.

(1) Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar *alias* Kattama Natchiar v. Dorasinga Tevar *alias* Gowry Vallaba Tevar, 15 B. L. R.. 83.

The portion of the judgment of their Lordships referred to here was as follows:—

"The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindu female in possession from acts of waste, although his interest during her life is future and contingent. Suits of the kind form a very special class and have been entertained by the Courts *ex-necessitate rei*."

The Officiating Munsif of Azamgarh, in a suit for a declaration of the plaintiffs' rights, as Zamindars, to half the fruit and timber of certain groves, which they alleged they were entitled by ancient custom to receive, found in favour of the existence of the custom and decreed the suit. On appeal by the defendants, the Judge, without going into the existence of the alleged custom, dismissed the suit. The High Court remanded the case.

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ORDER OF REMAND.

[374] It has been held by this Court (1) that a Civil Court is not precluded by the terms of Reg. VIII of 1822, S. 9, Cl. I, from enquiring into and declaring a right on the part of the Zamindar to cesses and collections, although not avowed and sanctioned, nor taken into account in fixing the Government jama at the time of settlement, notwithstanding that until so avowed and sanctioned they cannot be collected by the Zamindar, and there is nothing in the terms of S. 66 of Act XIX of 1873 to a contrary effect. The plaintiffs claim the right and the cess on the old custom, and this question of custom, which has not been distinctly determined, must be tried by the lower appellate Court.

We remand the case for this purpose under S. 354 of Act VIII of 1859, and allow seven days for filing objections to the finding.

1 A. 373 = 1 Ind. Jur. 778.

JUDGMENT.

The Judge's finding on remand having been in favour of the plaintiffs' right and confirmatory of the alleged custom, the High Court decreed the appeal in the following judgment:—

We accept the finding of the lower appellate Court, to which no objections have been preferred, and reverse the decree of the lower appellate Court and restore that of the Court of first instance and decree this appeal with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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SUKHAI (*Defendant*) *v.* DARYAI (*Plaintiff*). [20th March 1877.]

1 A. 374 = 1 Ind. Jur. 779.

Act VIII of 1859, Ss. 256 and 259—Act XXIII of 1861, Ss. 11 and 35—Auction sale—Order cancelling sale—Suit to set aside sale—Appeal.

1. The finality and the validity of an order under Ss. 256 and 259 of Act VIII of 1859 depends on its compliance with the terms of those sections.

2. Where, therefore, an auction sale of landed property was set aside, under S. 257, on the sole objection of the judgment-debtor that the price realized was low, there being no allegation or proof of material irregularity in publishing or conducting the sale, in other words, no objection permissible by S. 256 having been made by the judgment-debtor, *held*, that the Court had failed to do the duty imposed on it by law of confirming the sale, and exceeded its jurisdiction by cancelling the sale.

1 A. 374 = 1 Ind. Jur. 779.

(1) H. C. R., N. W. P., 1870, p. 425.

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3. Under the above circumstances, a suit will lie by the auction purchaser to cancel the order of the Court cancelling the sale. [Allahabad H. C.'s Decision in S. A. No. 1436 of 1876 (Unreported), F.]

[1—Ap., 3 A. 206 (F.B.) ; R., 3 C.W.N. 99.]

The Munsif having cancelled an auction-sale of landed property on the sole objection of the judgment-debtor that the property had been sold for an inadequate price, and the Judge having dismissed the auction-purchaser's appeal from the said order on the ground that the Munsif had no authority to cancel the sale under S. 257, Act VIII of 1859, without irregularity being proved and that the said order must therefore be said to have been passed under S. 11. Act XXIII of 1861, which admits of no appeal by the auction-purchaser who was no party to the decree in execution, the auction-purchaser brought the present suit for confirmation of the auction-sale and establishment of his right of purchase of the property, and for the setting aside of the above orders passed on the miscellaneous side by the Munsif and the Judge, which was dismissed by the Munsif on the ground that his order on the miscellaneous side was final under S. 257 of Act VIII of 1859, and that under S. 11 of Act XXIII of 1861, no suit would lie for setting aside such orders passed in execution of decree; and further, that the auction-purchaser's right only accrues after the sale has been sanctioned and completed, and that therefore, under S. 32 of Act VIII of 1859, the suit could not be heard, as no right had accrued to the plaintiff. The Subordinate Judge, on appeal by the plaintiff, reversed the Munsif's decision. The defendant in special appeal to the High Court impugned the appellate Court's decision on the ground that the order passed on the miscellaneous side, setting aside the sale, was final, and that no suit would lie for its cancelment.

JUDGMENT.

[376] If this matter rested solely on the plea in special appeal, there would be no difficulty in disposing of the case. For if the first Court's order in execution of decree setting aside the sale was final, there could have been no appeal to the Judge, and any order made by him might have been cancelled under S. 35 of Act XXIII of 1861. But here the order made by the Munsif setting aside the sale was not one that could be legally made under S. 257 of Act VIII of 1859, since no material irregularity in publishing or conducting the sale and consequent substantial injury to the objector, by reason of the irregularity, were established. The Munsif's order, therefore, setting aside the sale, because the sale price was inadequate, no material irregularity being proven, was in excess of the power granted to him by the section. But it was certainly not an order made, as the District Judge assumed in miscellaneous appeal, under S. 11 of Act XXIII of 1861, because there was no question arising between the parties to the suit which the Munsif was called upon to dispose of when he made his order. If it had been such a question, there could have been no separate suit. But here the auction-purchaser having fulfilled all the conditions of the sale, calls for confirmation, which is refused on no legal ground by the Court executing the decree. He had bought the property, and all that was wanting was a confirmation of his title. If no application of a legal character was made to set aside the sale, the Court executing the decree, to use the words of the section, *shall* confirm the sale. As in this case no objection permissible by S. 256 had been made, the Court executing the **[377]** decree was absolutely bound to confirm the sale, and as it did not do so but acted in excess of its jurisdiction in refusing to do so, and in cancelling it, it appears that the suit will lie. We are justified in this

opinion by a decision of a Division Bench of this Court of the present appeal, No. 1437 of 1876, decided on the 13th March of the present year*). We, therefore, affirm the judgment of the lower appellate Court and dismiss the appeal with costs.

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APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

RAMANAND, *Judgment-debtor* (*Appellant*) *v.* THE BANK OF BENGAL, *Decree-holder* (*Respondent*). [24th March 1877.]

1877 MARCH 24. — APPEL-LATE CIVIL. — 1 A. 377.

Act VIII of 1859, S. 273—Act XX of 1866, S. 52—Act VIII of 1871, Ss. 53, 54 and 55—Appeal—Execution—Procedure—Repeal.

Orders in execution under Ss. 53, 54 and 55 of Act XX of 1866 are not appealable. Though this Act has been repealed by Act VIII of 1871, the procedure under it has been saved by Ss. 53, 54 and 55 of the latter Act. [7 W. R. 130, and 17 W. R. 512, *cited*.]

[Overruled, 1 A. 583.]

JUDGMENT.

[378] This is a miscellaneous regular appeal from an order made by the Subordinate Judge of Cawnpore in execution of a decree, and a preliminary objection is taken by the respondent's counsel that the appeal cannot be heard inasmuch as no appeal lies from such an order.

The circumstances appear to be these. The judgment-debtor, being indebted to the Bank of Bengal in a very considerable sum, upwards of Rs. 76,000, made an agreement for the liquidation of the debt under S. 52 of Act XX of 1866, which agreement was duly registered. It is here to be observed that although that Act was repealed by Act VIII of 1871, the procedure for such cases as the present is thereby expressly saved and is provided by the subsequent Ss. 53, 54 and 55 of the Act. Under S. 53 of that Act, the Bank obtained a decree against the judgment-debtor, and as that section provides that such a decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code

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* An auction sale of property was set aside by the first and appellate Courts on the execution side. The auction purchaser sued to set aside these orders and for the establishment of his right as auction purchaser to and for possession of the property. He also claimed mesne profits from date of sale to date of possession.

Both the lower Courts assumed on insufficient grounds that there was fraud in the sale by reason of inadequacy of price and other irrelevant circumstances, but held that the suit was precluded by the orders passed on the execution side under Ss. 256 and 257 of Act VIII of 1859. On appeal, the High Court (PEARSON AND TURNER, JJ.) remanded the case for trial on the merits observing:—

"The order passed by the Munsif on the 10th March 1875, setting aside the sale, and that passed by the Judge on the appeal from it on the 5th June 1875, did not, it would seem, proceed on the ground of any material irregularity in publishing or conducting the sale, and cannot, therefore, in reference to the provisions of S. 257 of Act VIII of 1859 bar the present suit, which the plaintiff is entitled to have tried on the merits. He cannot indeed obtain in this suit all the relief he asks for; but if he should succeed in showing that the sale made to him was a valid one which should have been confirmed, he would be entitled to a decree annulling the order above mentioned, and declaring his right to obtain from the Munsif an order confirming the sale, a certificate of the nature described in S. 259, and delivery of the property which was the subject of the sale in the manner provided by S. 263 or S. 264 of Act VIII of 1859."

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of Civil Procedure, he was arrested under a warrant issued pursuant to S. 273 of Act VIII of 1859, in execution of the decree, and on the 23rd of October 1876, he applied for his discharge under S. 8 of Act XXIII of 1861. Subsequently the Bank were called upon to show cause, on the 4th November 1876, why they should not proceed against their judgment-debtor's property and he himself be discharged, and such cause having been shown to the satisfaction of the Court, the judgment-debtor's application was refused, and he himself sent back to prison. Against this order, the present appeal has been preferred.

1 A. 377.

S. 55 of the Act of 1866 expressly provides that "there shall be no appeal against any decree or order made under Ss. 53, **[379]** 54, or this section." It would thus appear that the preliminary objection taken at the hearing of this appeal was well founded. The respondent's counsel in support of his objection referred to two Calcutta cases respectively (1). But to my mind the law is too clear to admit of any doubt on the subject, and it is quite unnecessary to refer to any other rulings. The objection is, therefore, allowed, and the appeal is dismissed with costs.

OLDFIELD, J.—I concur in the proposed order.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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NANAK RAM (*Plaintiff*) *v.* MEHIN LAL (*Defendant*).

[10th April 1877.]

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1 A. 487 = 2 Ind. Jur. 420.

1 A. 487 = 2 Ind. Jur. 420.

1. *Suretyship--Consideration.*

When the contract between the principal debtor and the creditor is completed by the exchange of a loan and a bond, a surety bond subsequently given by the surety is without consideration and void.

2. *Legal position of a surety.*

Observations on the ——————(Per *Stuart*, C.J.)

3. *Legal character of "Illustrations" to sections of Indian enactments—Indian Contract Act, S. 127, Illustration (c).*

Per Stuart, C.J. Illustrations form no part of the Act, and are not absolutely binding on the Courts. They are open to the objection of being opposed to the canons of construction, which prevail in the English Courts for the interpretation of statutes. Thus it has been ruled in England that "the intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute"—*Fordyce* v. *Bridges*, 1 H. L. Cases 1=11 Jur. 157; and "the Court knows nothing of the intention of an Act except from the words, in which it is expressed applied to the facts existing at the time." *Logan* v. *Courtown (Earl)* 13 Beav., 22=20 L.J. Chanc., 347; "the language of a statute, taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing the enactments," *Philpott* v *St. George's Hospital*, 6 H. L. Cas. 338=2 Jur. N. S. 1269.

[3—R., 20 M. 481 (483), 34 C. 941 (950)=6 C.L.J. 237=11 C.W.N. 959.]

JUDGMENT.

[488] STUART, C.J.—This is a special appeal from Farukhabad in a suit against a surety in a bond transaction which was dismissed by the Munsif of Chibramau in that district, his judgment having in regular

(1) Petition of Peare Lal Sahoo, 7 W. R. 130; 17 W. R. 512.

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appeal been confirmed by the Subordinate Judge. There had been a previous suit by the same plaintiff against his principal debtor and the same surety, in which a decree was made against the principal debtor alone, but which decree was not brought by appeal to this Court. The present suit, on the other hand, claims to enforce the surety's libility without showing that the previous decree against the principal debtor had been executed and was **[489]** unproductive of recovery to any extent and quite unavailing, and it is not easy to understand what could have been the real motives of the parties and their own true belief as to their relative position in the transaction, in all respects.

The present appeal is a disagreeable illustration of the crude, meagre, and unsatisfactory manner in which special appeals are, I regret to say, usually brought before us. The paper books supplied to us, the Judges, in the present case contain nothing but the very loose although not erroneous judgments of the two lower Courts, the record itself is scanty of facts and of law, and at the hearing I failed to get any sufficient information from the pleaders on either side on the one question on which the whole case depends, *viz.*, the real position of the surety. For although this is a special appeal raising only, according to the theory of the procedure, a question of law, my difficulty was not a legal one, but simply a doubt as to a plain and simple matter of fact, *viz.*, whether Mehin Lal the surety in point of fact interposed in the transaction between Nanak Ram and Kalka Prasad the debtor for the benefit of the latter or otherwise. Under these circumstances, before disposing of the case, I thought it necessary to send for the record in the first suit between Nanak Ram and Kalka Prasad, and thus obtained some additional information. The case was also again put on the cause-list that the pleaders for the parties might have an opportunity, with this additional record before us, of throwing further light on the still somewhat obscure position of the surety, but with little success, the pleaders for the defendant, respondent, verbally and simply contending that Mehin Lal was the surety for the benefit of the plaintiff, and that, therefore, his surety-bond had been without consideration, while the pleader for the appellant unintelligibly suggested that he was really the surety for both parties, and that as the friend of both he had come forward to remove any dissatisfaction on the part of the lender, who had in the meantime parted with his money, and that that was a state of things which could not but be agreeable to the borrower. The case was thus left for our judgment in a condition far from satisfactory, and I am not sure that I yet quite understand the real truth of the matter, but it would I am convinced be idle to attempt any further investigation of the facts by a remand or otherwise.

[490] From all the materials now before us the facts would appear to be these. One Kalka Prasad borrowed and received the sum of Rs. 95 from the plaintiff Nanak Ram, and gave a bond for the same, the material parts of which are as follows :

"I, Kalka Prasad, son of &c., do hereby declare that I have borrowed Rs. 95 of the Queen's coin, half of which is Rs. 47-8-0, from Nanak Ram, son of &c., Mehin Lal, son of &c., being my surety, that I hereby promise that the said money together with interest at two per cent. per mensem shall be paid up in the course of three years without any objection whatever ; that until the money is paid one kachha house and a field, No. 489, called Barnawala, measuring 20 bighas kham, and situated in Harballahpur, also called Uddhanpur, in pargana Chibramau, the boundaries of which are noted at foot, and also four bullocks, one of which is dark blue and the other three white coloured, and two she buffaloes of black colour, all of which belong to me, shall remain hypothecated in this bond, and that I shall not be competent to sell or mortgage or give them in gift to any one."

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As to the surety, although he did not sign this bond, it purported to determine his liability as follows :

"I, Mehin Lal, surety, do hereby declare that if the money due to the creditor should not be recovered from the property of Kalka Prasad the principal party who borrowed the money, I, the surety, shall pay the money out of my pocket to the creditor."

This bond was duly executed by Kalka Prasad the borrower and is dated the 14th November 1872, and duly registered, it having been presented for registration by him alone, but as I have stated it was not signed by the surety. But Nanak Ram the lender, or according to the theory of the plaintiff's pleader, both parties, the lender as well as the borrower, being content to leave things in the position just described, Mehin Lal the surety again came forward with a new guarantee or surety-bond in his own name alone, and that document is in the following terms :

"I, Mehin Lal, surety, son of &c., do hereby declare that whereas a bond for Rs. 95 has been executed on the 14th November 1872, by Kalka Prasad, son of &c., agreeing to repay within three years with interest at two per cent. per mensem in favour of Nanak Ram, son of &c., but that the said Nanak Ram notwithstanding the hypothecation of the property of Kalka Prasad in the said bond is not fully satisfied, I, the surety for Kalka Prasad, therefore agree and give it in writing that if Nanak Ram fails to recover the amount of the bond with interest from the property of Kalka Prasad, the principal debtor, I, the surety, shall pay from my own pocket the amount of the bond executed by Kalka Prasad with interest entered therein to Nanak Ram. I have therefore executed these few presents by way of a security-bond to be a document."

[491] This instrument was duly executed by Mehin Lal and it is dated the 16th November 1872, that is two days after the execution of the first bond by Kalka Prasad the borrower, and it is admitted to be a contract of guarantee within the meaning of S. 126 of the Contract Act. Such being the state of the transaction in November 1872, the plaintiff appears to have waited till the three years had expired and then to have resolved on taking proceedings for the recovery of his money. It is, however, difficult to understand the course he adopted. He brought a suit, the first suit, against his debtor and the surety, but claiming therein solely on the basis of the first bond which had not been signed by the surety, and passing by the additional guarantee which had been given by the surety two days after the date of the first bond. Why this should have been appears to me to be inexplicable, for the plaint in the first suit was filed on the 23rd November 1875, the plaintiff and his pleader therefore must have had full knowledge of all that the surety had done, and that in their view the two instruments formed but one security. But so it was. It is not therefore to be wondered at that this first suit was, in the Munsif's Court, dismissed as against the surety, the claim having been decreed against Kalka Prasad alone, and this decision was on appeal affirmed by the Subordinate Judge on the 15th March 1876. The decree, however, so made against Kalka Prasad has not been executed, but on the 29th April following Nanak Ram instituted a second suit against Mehin Lal the surety alone, and now before us in special appeal, basing his claim on the separate guarantee or surety-bond executed by Mehin Lal, the surety, on the 16th November 1872. No explanation appears to have been offered why the surety had not been made a defendant in the first suit on this liability, and at the hearing of this appeal no objection on that score was taken, and it is unnecessary to say more on the subject at present, confining our attention to, as matter of law, Mehin Lal's liability as surety under the document now sued on.

The Munsif in his judgment describes the surety-bond as "apparently without consideration" and he then proceeds as follows : "Consideration as defined in S. 127 of the Contract Act (IX of 1872) means' anything done or any promise made for the benefit **[492]** of the

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principal debtor.' In the present instance, the execution of the new contract or the promise made therein was not so made for the benefit of the principal debtor (Kalka Prasad), he having received the consideration money and thus satisfied his appetite for and the final cause of his loan, two days previously. The execution of this new contract and the promise made therein can rather be said to have been made for the benefit of the creditor than that of the principal debtor. This new contract of guarantee being thus proved to be without consideration, under the provisions of the aforesaid section of the Contract Act, is void and hence not enforceable." The lower appellate Court upheld this judgment in the following words: "I find that the Munsif's finding is correct, undoubtedly the bond sued on was a nullity under clause (*c*), S. 127 of Act IX of 1872; and previous to the institution of this suit the defendant does not appear to have denied the bond which forms the basis of the claim. The objections urged in appeal are not worthy of consideration."

In special appeal to this Court it is now in substance argued that the judgments of the lower Courts are wrong, that their reading of the Contract Act is erroneous, and that the consideration for the defendant's engagement as surety and his liability in that behalf to the plaintiff are clear. S. 127 of the Contract Act is expressed in these terms: "Anything done, or any promise made for benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee." Now having regard to the wording of the two instruments under consideration, the first bond and the subsequent additional security by the surety, and to the circumstance that the position of a surety in such a pecuniary transaction is ordinarily that he interposes in behalf of and for the benefit of the debtor, such a contention in special appeal would appear to be not unreasonable. There are other circumstances, however, which weigh against it. In the first place it must not be forgotten that on the 16th November 1872, when the surety executed and delivered his separate engagement, the money had already passed from the hands of the lender to Kalka Prasad his borrower, and on a contract which made the latter safe for at least three years, and he had therefore nothing to fear from any dissatisfaction or objection that might subsequently have occurred to **[493]** his creditor Nanak Ram, so far as he, the borrower, was concerned, therefore any additional engagement on his behalf by a surety was legally unnecessary. On the other hand, Nanak Ram, feeling dissatisfied with the security he had obtained from his debtor, and knowing that his hands were tied for three years, must naturally have desired some further security: and with this feeling he appears to have had some communication with Mehin Lal, the result being the document now under consideration. Again having, in the absence of any sufficient information from the pleaders in this appeal, looked into the evidence in the first suit (and I consider I am not only entitled but bound to do that for the sake of explanation and the possible clearing up of any doubts as to the true position of the surety), it appears to me to favour the suggestion I have just offered against the appellant's argument. The plaintiff himself was examined in that suit, and he stated on oath as follows: "I have got another document executed by Mehin Lal. I know this bond (the bond executed by Kalka Prasad and formerly sued upon) to be the principal and not that bond (the bond now sued upon), and therefore I did not sue on the basis of the latter. I had the other bond executed to secure my debt, the other bond has been executed with the consent of Mehin Lal and myself. After the execution of the said other bond I and the security were satisfied. It was recorded in the other bond that it has been executed as

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a security for Kalka Prasad for the sum of Rs. 95 borrowed by him." Two other witnesses were examined; one Nabi Baksh, the person employed to write both documents, states in regard to the first bond that "Mehin Lal stood as security of his own accord," and again this witness states that "on the 16th November 1872, both parties came to me, and that Mehin Lal asked me to write another deed of security which I accordingly did, and Mehin Lal made it over to Nanak Ram," and he adds that Nanak Ram himself joined in the request to him to write the additional document as he did not look upon the first bond as sufficient. And this evidence is in substance corroborated by that of another witness, Ram Ghulam. Now although to my mind the real truth of the case is not without doubts and difficulties, I think the fair construction to be put on these disclosures, including as they do the plaintiff's own account of his and Mehin Lal's relative position in the **[494]** transaction, and remembering also, I again say, that the original debt had been irrevocably paid over to Kalka Prasad on a bond for three years, I say the fair conclusion is that Mehin Lal acted as surety not on behalf of the principal debtor, who needed no assistance of the kind, but as surety for the benefit of Nanak Ram the lender alone, and, if so, there was undoubtedly no consideration within the meaning of S. 127 of the Contract Act. Against the conclusion, indeed, there appears to be nothing in the case excepting the language of the two documents themselves and any general inference to be deduced from the ordinary position of a surety in transactions of this kind. The original bond of the 14th November 1872, was not signed by Mehin Lal, but I think its terms may fairly be referred to as *pro tanto* indicating the person on whose behalf he engaged as surety, and in that instrument Kalka Prasad describes, or is made to describe, Mehin Lal as "*my* surety." And again in the additional document deliberately executed by Mehin Lal himself, he on the recital of the first bond and of Nanak Ram's dissatisfaction, describes himself as "I, the surety *for Kalka Prasad*." All this it is perfectly fair to notice in the way of argument, although too much importance should not be attached to the terms of vernacular instruments of such a nature. Their language is very much under the control of the person who is employed to write them, and he no doubt chooses his words without particular regard to any peculiar or occult legal meaning of his own. In the present case we have seen that the writer of these instruments was examined as a witness, and the gloss suggested by his evidence is somewhat different from, if it does not go to contradict, the terms in which he wrote the bonds. He says that the money was paid into the hands of Mehin Lal and was by him delivered to Kalka Prasad, and that afterwards both parties came to him and asked him to write the second document, the meaning of which appears to me to be that notwithstanding the phraseology of the two deeds, Mehin Lal was not only the mere go-between, but the actual messenger and representative of Nanak Ram in the business. He, Mehin Lal, therefore, cannot be regarded as having been surety for the benefit of the principal debtor but really for the satisfaction and benefit of Nanak Ram the lender. His suretyship, therefore, was without consideration, and in fact a mere *nudum pactum*.

[495] I must not conclude this judgment without offering a few remarks on a subject which has been much dwelt upon in this case, I allude to those "illustrations" which the Government of India in its Legislative capacity have thought fit of late years, and no doubt with the best and most considerate motives, to add to its Legislative enactments. These illustrations, although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the Courts. They merely go

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to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct. In this country, where the administration of the law is for the most part conducted by persons who are not only not professional lawyers, but who have had no legal education or training in any proper or rational sense of the term, the Legislature acts with wisdom and salutary consideration for the interests of justice by putting into the hands of judicial officers appliances such as the illustrations in question for their guidance and direction in the performance of their duties. But, for myself, I can truly say I have never experienced their utility, and I fear they sometimes mislead, and I observe they are more regarded in the Subordinate Courts in these provinces, and even by the pleaders of this High Court, than is the paramount language of the Act itself, of which, however, as I have remarked, they, strictly speaking, form no part. With respect to the present case, plainer language than that used in S. 127 of the Contract Act it would be difficult to imagine, and why it should have been thought proper to illustrate it at all I do not very well comprehend. Appended, however, to S. 127, are three illustrations (*a*), (*b*), and (*c*); and illustration (*c*) is as follows: "A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void." This illustration appears to have received much more attention in the lower Courts than S. 127 itself. In fact the lower appellate Court goes entirely upon it, and at the hearing of this appeal it was almost entirely relied on notwithstanding repeated attempts on my part to point out that it was the meaning of S. 127 itself and not the illustration that was material. The illustrations (*a*) and (*b*) appear to be correct enough, although I do not think they were wanted for the elucidation of the section, but this illustration (*c*) is so vague and bald as to be open to **[496]** misapprehension. Brevity and succinctness are no doubt very desirable qualities in the expression of a law, but they do not necessarily argue distinctness, and in my experience I know of nothing more dangerous than unnecessary brevity in the statement of a proposition in the law of contracts. Now this illustration (*c*), as it stands, may be either good or bad law, if it means that the party C without any privity, and in fact merely as a volunteer, agreed to pay for the goods in default of B, and no other act or fact in the way of consideration appearing, then no doubt the agreement would be void, and the illustration would be right. But it does not of itself show that. It assumes the absence of consideration, without any definition of the term other than that given in S. 127 itself, and so far it is calculated to mislead. To be of real service to those for whose assistance these illustrations are intended, they ought to be pellucidly clear in their phraseology and, if possible, I had almost said infallibly sound in their law. But for the purposes of the High Courts of this country these illustrations are not only not required in any sense, but they are frequently the cause of embarrassment, and I would infinitely prefer to have the bare and simple language of the Act itself, without any appendages of the kind. I am afraid, too, that they are open to the objection of being opposed to the canons of construction which prevail in the English Courts for the interpretation of statutes. Thus it has been ruled in England that "the intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute"—*Fordyce* v. *Bridges* (1); and "the Court knows nothing of the

(1) 1 H. L. Cas. 1=11 Jur. 157.

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1 A. 487 = 2 Ind. Jur. 420.

intention of an Act, except from the words in which it is expressed applied to the facts existing at the time"—*Logan* v. *Courtown* (*Earl*) (1); "the language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing the enactments"—*Philpott* v. *St. George's Hospital* (2).

In the present case it is satisfactory to know that any ambiguity that this illustration (*c*) may fairly, or unfairly, be considered to be characterised by, has not prevented us from applying the [497] plain language and the very clear meaning of S. 127 of the Contract Act, and we now do that by dismissing the present special appeal with costs.

SPANKIE, J.—Both parties admit that the instrument on which the suit is based is a contract of guarantee as defined in S. 126 of the Indian Contract Act of 1872. The first plea will not hold, as it has been found that the money was not advanced to the obligor of the bond executed two days before the guarantee on the strength of such contract of guarantee. Both instruments (and this circumstance disposes of the second plea) show that there was no consideration in respect of the contract of guarantee. The creditor did not promise to do anything, and did not do anything, for the benefit of the principal debtor, whereby there was a consideration for the surety's giving the guarantee. It is clear that two days after the bond had been executed, and the money advanced to the principal debtor, the creditor feeling anxious about the sufficiency of the security, took the contract of guarantee from the surety. In this deed the surety simply promises to make good any deficiency if the property hypothecated by the obligor of the bond does not satisfy the debt. But the creditor agreed to do nothing, and promised nothing, in return. I therefore think that the suit could not be maintained, and hold that the decision of the lower appellate Court should be affirmed.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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FULL BENCH.

BADRI PRASAD (*Plaintiff*) *v.* MUHAMMAD YUSUF AND ANOTHER (*Defendants*). [12th April 1877].

1 A. 381.

1 A. 381. *Effect of an order under S. 246, C.P.C. (1859).*

When an enquiry has been duly held under S. 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code (namely, by a suit brought within one year from the date of the order), it is as final and conclusive on all persons, who are parties to it, as any other final order or decree of a Court of Justice. Until it has been overruled in a regular suit, brought in virtue of the permission expressly given by the Code, no Court is at liberty afterwards to go behind the order, and enquire whether the Court which disallowed the objection had correctly appreciated the evidence as to possession, or had come to the conclusion as to possession erroneously. In other words, the effect of the order cannot be affected by the propriety or otherwise of the decision at which the Court, which investigated the claim, arrived as to the fact of possession.

And as the Code declares that, in the suit brought to contest the order, the claimant must prove his *right*, it follows that the order, if not set aside, is conclusive as to the right.

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(1) 13 Beav. 22=20 L.J. Chanc. 347.
(2) 6 H. L. Cas. 338=3 Jur. N. S. 1269.

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And lastly, such an order is binding on the successful party, whether he is a plaintiff or defendant in the suit; so that what he cannot assert as plaintiff he cannot plead as a defendant.

[F., 1 A. 541, 2 A. 455, 8 M. 506, 14 B.372, 18 A. 413=A.W.N. (1886), 129, 22 B. 640; R., 9 B. 35, 18 B. 260, 20 B. 270, 22 B. 875; D., 1 C.W N. 701.]

One I got his name entered in the revenue records on 8—3—1866 as half-sharer of a grove, the other half being claimed by R.R. Subsequent to this, attachment of I's half-share was effected. On this, R.R appeared as a claimant of the whole share, repudiating I's right to, or possession of any portion of it. On 30—4—1870, the Munsif disallowed the claim of R.R. and on 30—5—1870, the share of I was purchased by the plaintiff at an execution sale and he was put in possession of it on 4—7—1870. Subsequent to this, the defendants, on 19—7—1870, purchased at a Court-sale, R. R.'s rights in the whole grove, and were put in possession on 25—2—1871. On the petition of the plaintiff dated 20—9—1870, the Munsif passed an order recording that the plaintiff's possession by right of purchase of I's share, prior to the sale of R.R's interest, could in no way be affected by the purchase of the defendants. Meanwhile, the defendants realized the rent of the grove, and succeeded in getting the Settlement Officer (on 26—5—1874) to record their actual possession over the whole grove, qualifying the defendant's possession as to half by the mention that it was held on behalf of the plaintiff, who was referred to the Civil Court to obtain enjoyment of his right. A suit was filed in the Munsif's Court by the plaintiff for establishing his right among other things, to possession of half of the grove. The Munsif holding that the order of 30—4—1870 was final and conclusive unless set aside within the period allowed by law, decreed in favour of the plaintiff. The Judge decreed the defendant's appeal, but remanded the case to the first Court, for a finding as to the nature and extent of I's rights, purchased by the plaintiff. The plaintiff appealed to the High Court.

REFERENCE TO THE FULL BENCH.

The Division Bench of the High Court (STUART, C.J., and TURNER, J.) referred the question contained in the subjoined order of reference to the Full Bench:—"We are inclined to think that when a Court executing a decree has investigated a claim under S. 246 and determined it against an objector, the decision is final, and binds the objector's right, unless, within the time limited, he sues to establish his right. As such a ruling would apparently conflict with the decision in special appeal No. 751 of 1874, we refer the question to the Full Bench."

JUDGMENT.

[386] TURNER, J. (STUART, C.J., SPANKIE AND OLDFIELD, JJ. concurring).

The 246th section of the Code of Civil Procedure declares that when a claim is made to immoveable property attached in execution of a decree as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate it, and if it shall appear that the property was in the possession of the party against whom execution is sought, as his own property, at the time when the property was attached, the Court shall disallow the application. This follows the clause out of which the question before the Court arises. The order which shall be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given, shall be at liberty to bring a suit

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to establish his right, and the Limitation Act prescribes that such a suit must be brought within one year from the date of the order.

Two questions were principally raised at the hearing, one as to the effect of the order, the other as to the pertinency of the enquiry, whether the order was passed on a correct decision of the issue as to possession.

Now it appears to us that when an enquiry has been duly held under S. 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code, it is as final and conclusive on all persons who are parties to it, as any other final order or decree of a Court of Justice. Until it **[386]** has been over-ruled in a regular suit, brought in virtue of the permission expressly given by the code, no Court is at liberty afterwards to go behind the order, and inquire whether the Court, which disallowed the objection, had correctly appreciated the evidence as to possession, or had come to the conclusion erroneously, that possession was with the judgment-debtor. Consequently, at the hearing, we expressed our opinion that it was immaterial to the determination of the question submitted to us, whether or not the Court which had investigated the claim had formed an erroneous judgment on the question of possession.

The effect of the order cannot be affected by the propriety, or otherwise, of the decision at which the Court, which investigated the claim, arrived as to the fact of possession.

We proceed, then, to consider what is the effect of the order. Inasmuch as the code declares that, in the suit brought to contest it, the claimant must prove his *right*, we understand the Legislature to have intended that the order until reversed is conclusive as to right.

It is not a novelty in Indian Law that possession, which is *prima facie* evidence of title, should be accepted as justifying a record of title unless and until the record is amended in pursuance of a decree obtained in a regular suit brought within a limited time.

Thus Settlement Officers, when engaged in preparing the record of rights under Regulation VII of 1822, were directed to enquire into present or very recent possession, and to frame their record in accordance with the result of that enquiry, and if the parties affected appear before them, and an award is made, that award is final and conclusive, unless, within three years from the date of the award, the party who is aggrieved by it, institutes a regular suit to question it. We are unable to distinguish the principle on which the case cited at the argument was decided from the principle which should guide the Court in determining the point now before it. It appears not unreasonable that, to give some little security to titles which, in this country, are exposed to much peril, as titles derived from auction sales in execution of a decree, the Legislature should have required any person who makes a claim to attach property, **[387]** to come in within a limited time, and vindicate his rights if he have any, or thereafter to be barred from asserting them.

The argument that limitation does not apply to a defendant is not in our opinion pertinent. The question is, whether or not the defendant is not bound by an order which he did not contest within the time allowed by law. In our judgment, having failed to prove his right within that time, he is precluded from asserting it, by an order which has become final.

PEARSON, J.—"The finding of the Court, under S. 246 of Act VIII of 1859, whether the attached property is in the possession of the party against whom execution of decree is sought, as his own property and not on account of any other person, or is in the possession of some other person

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in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, or whether it is not in his possession or in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators paying rent to him, or that being in his possession, it is not so on his own account, or as his own property, but on account of, or in trust for, some other person, appears to me to be an adjudication of proprietary right on the basis of possession. The order which may be passed on such finding is declared not to be subject to appeal, and would not, I conceive, be contestable at all, but for the express permission which is given by the concluding words of the section to the party against whom an order may be given to bring a suit to establish his right. Those words show that the matter in dispute between the decree-holder and the claimant is not, by reason of the finding and order under S. 246, so absolutely a *res judicata* as not to be open to re-adjudication in a suit brought by the party against whom the order was passed to establish his right. But in the event of no such suit being brought, the matter in dispute must be held to have been finally disposed of by the finding and order under S. 246, and to be absolutely a *res judicata*."

The learned Judge then distinguished the circumstances of the present case from those in special appeal No. 751 of 1874, in which as the judgment continued "there had been no adjudication on [388] the basis of possession, in respect of the proprietary right in the property, which therefore could not be regarded as a *res judicata*; while the order disallowing the claim on the ground of a lien was beyond the scope of the Munsif's jurisdiction under the section."

The DIVISION BENCH (STUART, C.J., and TURNER, J.,) made the following order:—In accordance with the ruling of the majority of the Full Bench of this Court, we must allow the appeal, and reversing the decree of the lower appellate Court, restore that of the Court of first instance, with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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APPELLATE CIVIL.
1 A. 425=2 Ind. Jur. 115.

DAIA CHAND AND OTHERS (*Defendants*) *v.* SARFRAZ ALI AND OTHERS (*Plaintiffs*). [19th April 1877.]

1 A. 425=2 Ind. Jur. 115.

1. *Mortgage—Redemption suit—Limitation prior to Act XIV of 1859.*

Before the enactment of Cl. 15, S. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property. So that, assuming the factum of a mortgage prior to that enactment, it would be unnecessary to enquire when the mortgage was effected; and, when there is an acknowledgment prior to 1859, the proof of the mortgage itself would be unnecessary.

2. *Acknowledgment of subsisting right.*

An acknowledgment, to save limitation, must be of a subsisting right, and not of a right already barred.

3. *Act XIV of 1859, S. 1, Cl. 15 and Act IX of 1871, Sch. II, Art. 148.*

The provisions of Cl. 15, S. 1, Act XIV of 1859, relating to suits against a mortgagor for the recovery of the immoveable property mortgaged, were modified by Art. 148, Sch. II, Act IX of 1871, principally in this respect, that the acknowledgment in writing of the mortgagor's title or right of redemption, from the

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date of which a new period of limitation is allowed to commence, is required to be made within the period of limitation originally prescribed and reckoned from the date of the mortgage. (See 1 A. 117).

[1—R., 12 C. 267, U.B.R. Civil (1892—96), 462; Not F., 82 P.L.R. 1903; 2—D., 9 C. 616; R., 16 M. 220, 17 B. 173.]

APPELLATE CIVIL.

On appeal to the Full Bench from the decision of a Division Bench, this case had been, at an early stage, remanded to the Court of first instance for decision on the merits. (See 1 A. 117 at p. 85, *supra*). The facts of the case, so far as they are necessary for this appeal, are as follows :—

1 A. 425 = 2 Ind. Jur. 115.

In a redemption suit, the plaintiffs in this case, the representatives of the mortgagors, relied on an acknowledgment of the title of the mortgagors contained in an entry in the settlement records of 1841, which was attested by the mortgagees' representatives, the defendants in this suit. The lower Courts differed as to whether the acknowledgment was sufficient without proof that it was made within 60 years from the date of the alleged mortgage. On special appeal to the High Court the defendants contended that the lower appellate Court had wrongly placed the onus of proof as to the acknowledgment of 1841, it being incumbent upon the plaintiffs to show when the alleged mortgage was effected, and that the said acknowledgment was made within the statutory period, and that it was not necessary for defendants to prove that such acknowledgment did not operate to renew the period of limitation, the finding of the lower appellate Court as to the said acknowledgment having been made within sixty years from the date of the mortgage being purely conjectural, and without any evidence on the record to show when the mortgage was effected.

JUDGMENT.

[426] PEARSON, J.—The provisions of Cl. 15, S. 1, Act XIV of 1859, relating to suits against a mortgagee for the recovery of immoveable [427] property mortgaged, were modified by Art. 148, Sch. ii, Act IX of 1871, principally in this respect, that the acknowledgment in writing of the mortgagor's title or right of redemption, from the date of which a new period of limitation is allowed to commence, is required to be made within the period of limitation originally prescribed and reckoned from the date of the mortgage; the reason of the modification is, I conceive, discoverable by reference to S. 29 of the last mentioned Act, which declares that at the determination of the period limited to any person for instituting a suit for possession of any land, his title to such land shall be extinguished. The intention of the legislature was to allow a further period of limitation to run from the date of an acknowledgment, not of rights already extinct, but only of rights still subsisting.

Before the enactment of Cl. 15, S. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property. In 1841, therefore, when the acknowledgment, found in the settlement record of that year, was made by the defendants in this suit, or their forefathers, that they held the property in suit as mortgagees, there was nothing in the law to preclude the mortgagors from suing for the redemption of the mortgage. In other words, the right acknowledged was a right not extinguished by lapse of time, but still subsisting, the acknowledgment fulfils the intention and satisfies the requisition of the clause in Art. 148, Sch. ii, Act IX of 1871, modifying the provisions of Cl. 15, S. 1, Act XIV of 1859, and renders it unnecessary to enquire and ascertain when the mortgage, acknowledged in 1841, was actually made.

From this point of view, it is immaterial whether the first two pleas

in the appeal now before us are good. The plea of *res judicata* set forth in the last ground of the appeal is certainly not established.

The only question remaining for trial was whether the property in suit was mortgaged to the defendants' ancestors by the ancestors of the plaintiffs. That question has been determined in the affirmative by the lower appellate Court whose finding on the point is not impugned by the special appellants.

[428] I would affirm the lower appellate Court's decree, and dismiss the appeal with costs.

SPANKIE, J.—I am of the same opinion.

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APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

AGRA SAVINGS BANK, LIMITED (*Defendant*) *v.* SRI RAM MITTER (*Plaintiff*). [20th April 1877.]

1 A. 388 = 2 Ind. Jur. 23.

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APRIL 20.
APPEL-
LATE
CIVIL.
1 A 388=
2 Ind. Jur.
23.

1. *Act XXIII of 1861, S. 11—Barred suit—Excess payment made by mistake in execution of decree.*

Per Stuart, C.J.—A suit will lie to recover an excess payment made by mistake in execution of a decree, and is not barred by S. 11 of Act XXIII of 1861, the question in such a suit being a matter outside the decree and not relating to its execution.

Per Pearson, J.—contra.

2. *Jurisdiction to entertain such suit.*

Such a suit, being one as for damages within the meaning of S. 6 of Act XI of 1865, is cognizable by a Small Cause Court, and not by a Civil Court.

[Diss., 2 A. 61 (F.B.); Cons., 5 A. 94.]

The Munsif dismissed the suit instituted by the plaintiff against the defendants, for the recovery of the sums alleged to have been paid by the plaintiff to the defendants under a mistake in excess of the sum due in satisfaction of a decree of the Small Cause Court, on the ground that it was barred by the terms of S. 11 of Act XXIII of 1861, being a question relating to the execution of decree between the parties to the suit in which the decree was passed. But the Judge decreed the plaintiff's appeal, holding that the question involved in the suit was not one which could be raised in execution of decree. The defendants preferred a special appeal to the High Court.

JUDGMENT.

[389] PEARSON, J.—I am of opinion that the suit is barred by the provisions of S. 11 of Act XXIII of 1861. The money now claimed by the plaintiff in this suit was claimed and realized from him in execution of a decree which the defendant had obtained from the Small Cause Court. Whether it was rightly so claimable and realizable was a question to be determined by the Court executing the decree, and cannot be made the subject of a separate suit. The precedent cited (1) by the lower appellate Court in support of the contrary opinion does not support it. I need not **[390]** discuss the other questions raised by the pleas in appeal. The appeal should in my opinion be decreed with costs, the lower appellate

(1) 4 B. L. R. 111.—*Ekowri Singh and others* v. *Bijay Nath Chattapadhya.*

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Court's decree being reversed, and that of the Court of first instance being restored.

STUART, C. J.—The impression made upon me at the hearing of this appeal was that, contrary to my sense of justice, we were bound to hold that the suit was barred by S. 11 of Act XXIII of 1861; I say contrary to my sense of justice, for it seemed to be monstrous that the law should forbid a remedy in such a case as this when money had been paid in excess of a decree by mistake, and only because, by inadvertence or otherwise, the blunder had been omitted to be noticed in the execution department, yet the language of S. 11 seemed to me to exclude all recovery by separate suit, when it says "all questions regarding the amount of any mesne profits, which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest, which may be payable in respect of the subject-matter of a suit between the date of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit," and the question before us appeared to be one relating to a sum which had been paid in discharge, or satisfaction of the decree, or the like, and was also a question relating to the execution of a decree.

But on reconsideration, I have arrived at the conclusion that such is not a right application of S. 11 to the present case, and that, therefore, we need not do injustice in deference to a literal and arbitrary construction of that section. The provisions of S. 11, should, I think, be confined to matters within limits of, and not outside, the decree, and money paid in excess of the amount decreed is, in my opinion, a matter outside the decree.

I have looked into the records in this case, and I find that the amount due under the decree was Rs. 516-8-3, but that by mistake the amount actually recovered was Rs. 592-11-0, the difference in **[391]** excess, Rs. 76-2-9, being the sum now sued for. These figures do not appear to be disputed, and they show that Rs. 76-2-9 not only never formed any portion of the decree, but could in no construction of it be items connected with it. It was simply a sum of money that was improperly, erroneously and illegally obtained under the guise of the process of execution, and with regard to which no order could be made in the execution department. The present suit was, therefore, the necessary remedy. These views I find are supported by two Calcutta rulings, in which it is laid down that S. 11 of Act XXIII of 1861, does not enable any party to recover in execution anything, except that which has been given by the decree, and that the "question" as used in S. 11 must relate to something comprised in the decree, and that any other cannot be a question relating to its execution, *Ekouri Sing and others* v. *Bijay Nath Chattapadhya* (1), following *Haromohan Chaudhrani* v. *Dhumari Chaudhrani* (2). It is true that the ruling appears to be opposed to a Full Bench decision of the Madras High Court, *Arunchilla Pillai* v. *Apava Pillai* (3), by a majority of three Judges to two, but, for myself, I prefer the reasoning of the Chief Justice (Sir C. Scotland, C.J.) and Mr. Justice Innes, which, so far as it goes, is in accordance with the principle of construction recognized by the Calcutta ruling to which I referred.

(1) 4 B. L. R., Ap. C. 111. (2) 1 B. L. R., Ap. C. 138.
(3) 3 Mad. H. C. R. 188.

Respecting, therefore, the competency of this suit, I agree with the Zilla Judge. But I differ from him when he says that the suit is cognizable by the Civil and not by the Small Cause Court, for, in my judgment, the claim is in the nature of damages within the meaning of S. 6 of Act XI of 1865, and this conclusion seems to be in conformity with several Calcutta rulings (1).

I would, therefore, annul the judgment of the lower appellate Court, and dismiss the suit on the ground of want of jurisdiction, but without prejudice to the plaintiff suing in the Small Cause Court, and for that purpose direct the plaint to be returned to him. It is unnecessary to say anything as to the plea of limitation.

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CRIMINAL JURISDICTION.

PRESENT :

Mr. Justice Spankie.

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CRIMINAL JURISDICTION.
1 A. 379 = 1 Ind. Jur. 743.

THE EMPRESS OF INDIA *v.* RAMESHAR RAI. [23rd April 1877.]

1 A. 379 = 1 Ind. Jur. 743.

Crim. Pro. Code, 1872, S. 297—Separate offences—Offences of fabricating false evidence and voluntarily assisting in disposing of stolen property—Penal Code, Ss. 192, 193, 414.

Where the accused voluntarily assisted in concealing, or disposing of, or making away with stolen property, and was also found to have concealed it in the field of an enemy of his, with a view that it might be found there and that he might be apprehended and charged with theft, *held*, that the Magistrate acted properly in convicting and punishing the prisoner for the two separate offences of fabricating false evidence, under S. 192, I.P.C., and of voluntarily assisting in disposing of stolen property, under S. 414, I.P.C.

Application under S. 297, Crim. Pro. Code 1872.

JUDGMENT.

[380] SPANKIE, J.—It is admitted that the pins were stolen property. It was brought home to the prisoner, Rameshar Rai, that he had voluntarily assisted in concealing, or disposing of, or making away with this property, which he knew, or had reason to believe, to be stolen property, and he was punished for this offence. He also is found to have concealed the property in the field of one Sedari, an enemy of his own, with a view that it might be found in his (Sedari's) house and field, and that he might be apprehended and charged with the theft. There is also a strong presumption that he instigated one Bhagi to conceal pins in Sedari's house. It is argued that if the disposal of the property was committed with the object of placing it, or causing it to be placed, in Sedari's field to bring him into trouble, one offence only and not two distinct offences were committed. But I cannot accept this view of the case. It may be that the Magistrate was of opinion that there was not sufficient evidence to show that the offence fell under S. 411, *viz.*, that there was a dishonest receiving of stolen property within the meaning of the word "dishonesty" as defined in the Penal Code. He therefore applied S. 414. In the commission of an offence under this section, it is sufficient that the accused be proved to have voluntarily assisted in concealing, disposing of, or making away, with property which he knew, or had reason to believe, was stolen property. The fact that he did so, **[381]** convicts him of an offence against

(1) 2 B.L.R., Ap. C. 172, 2 B.S.N., 13 and 10 W.R., 75; and 9 W.R., 336.

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property under chapter xvii of the Penal Code. He may then, or at the time, have entertained the idea that by placing it where he did, he would cause evidence to be found whereby he hoped that Sedari might be convicted of the theft of the property so concealed by him. But he nevertheless committed an offence under S. 414 of the Code against the property. Also he fulfilled the condition of the offence as defined in that section. It did not matter where he concealed it. He should not have concealed it at all, or caused it to be concealed voluntarily, either in Sedari's house or land, or elsewhere, if he knew or had reason to believe that it was stolen property.

In concealing it as he did in Sedari's field, with the intention found by the Magistrate, the prisoner committed another and distinct offence against public justice under chapter xi of the Penal Code, as he intentionally fabricated false evidence to be used in a judicial proceeding. He was punished under S. 193. The offence possibly was one more nearly coming under S. 195 of the Penal Code. There could be no doubt that in hiding the pins in Sedari's field intending that they might be found and that the circumstance of their being found in Sedari's field might appear in a judicial proceeding, and that this circumstance might lead the Magistrate to believe that he, Sedari, had been connected with the theft, under S. 192 would be and is fabricating false evidence, and is a distinct offence from the offence of voluntarily assisting in disposing of the stolen property. I see no reason to interfere, and dismiss the petition.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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1 A. 392.

BASANT RAM (*Plaintiff*) *v.* KOLAHAL AND OTHERS (*Defendants*).

[2nd May 1877.]

1 A. 392.

Hundi—Option of holder.

The holder of a hundi, or in other words, of a bill or note, is not bound, in the event of its dishonour, to sue all the parties liable to him under it, but he may, at his option, select his defendant or defendants, as he may judge best, for recovery of the money.

The plaintiff in this suit was the payee of a hundi drawn by two of the defendants who resided at Basti, on the third defendant, Ram Kishen, who managed a branch of the firm at Calcutta. After due presentation and acceptance of the hundi by the third defendant at Calcutta, the latter became insolvent before the hundi matured. The payee of the hundi, accordingly, sued all three defendants for the recovery of the amount which he had paid to the first and second defendants on obtaining the said hundi.

The Court of first instance finding that the hundi had not been paid and that the three defendants carried on the same business together within its jurisdiction, decreed the suit against them; but the lower appellate Court dismissed the suit on the ground that the Court of first instance could not without the sanction provided by S. 4, Act XXIII of 1861, pass a decree against the defendant who resided beyond its jurisdiction. A special appeal was preferred by the plaintiff to the High Court.

JUDGMENT.

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[393] If it had been necessary to make Ram Kishen a defendant in this case, the procedure should have been as provided by S. 4 of Act XXIII of 1861, and the sanction of the proper Court in Calcutta obtained, but we do not consider that it was necessary to implead him at all even if he had not declared his bankruptcy, which it appears he did, when the hundi was presented to him for payment. The holder of a hundi, or, in other words, of a bill or note, is not bound, in the event of its dishonor, to sue all the parties liable to him under it, but he may, at his option, select his defendant or defendants as he may judge best for recovery of the money. This is the law of England, where, although the holder of a bill may have issued the writs, or a writ, against all or any of his debtors, he is not bound to sign judgment against them all, but may select any one or more of them, and I am not aware that the law is different here. Besides, in the present case, the two defendants, Kolahal Ram and Gobind Ram, were those who got the whole Rs. 600 from the plaintiff, and it would have been sufficient to have proceeded against them, and to have left their bankrupt representatives in Calcutta alone, especially as his declared bankruptcy, which was tantamount of itself to a refusal to pay, gave the plaintiff a cause of action against the other two. This view of the law also avoids objection on the ground of misjoinder.

[394] We set aside the decrees of both the lower Courts, and remand the cause under S. 351 of Act VIII of 1859, for trial of the suit on its merits against the two defendants, Kolahal Ram and Gobind Ram, for the whole amount claimed under the hundi. The costs of this appeal to abide the result.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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1 A. 762.

HURST (*Plaintiff*) *v.* THE MUSSOORIE BANK (*Defendant*).

[3rd May 1877.]

1 A. 762.

Real property—Legacy—Husband and wife.

When property is devised to a married woman, so as to be "absolutely for her sole use and benefit, and free from the control, debts and liabilities of her husband," its conversion into any other form of property does not change its character and conditions, even though such conversion may be made in anticipation of the legacy.

Accordingly, where a married woman entitled to such a legacy purchased real property by borrowing the purchase money from her husband in anticipation of her legacy (and subsequently discharged the loan with moneys obtained by the assignment of her legacy), *held* that although the deed of conveyance of the real property did not recite that it was for her separate use, the property was still of the same character, and subject to the same conditions, as the legacy, and was therefore not liable for the debts of her husband.

At the request of Joseph Hurst, the village of Mohkampur, which he agreed to purchase, was not conveyed to him, but to his wife, by a deed of sale dated 14—11—1868, for Rs. 6,000. The purchase-money was paid by Joseph Hurst by a cheque on the defendant-Bank drawn against a cash-credit loan he had with the Bank. Simultaneously with the registration of this deed of sale, a power of attorney, appointing Joseph Hurst manager

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of the property on his wife's behalf, was also registered. In suit No. 155 of 1874, the defendant-Bank held a decree against Mr. and Mrs. Hurst. In suit No. 185 of 1874, the same Bank held a decree against Hurst and his brother-in-law. In suit No. 56 of 1876, a third party held a decree against Mr. and Mrs. Hurst. On 31—3—1876, the village of Mohkampur was attached in execution of the decree in suit No. 155 of 1874, and the sale of the same was ordered to be held on 20—5—1876. On Mr. and Mrs. Hurst satisfying the decree in part and executing an agreement to pay the balance, this sale was postponed *sine die*. The said village was again attached on 13—7—1876, in execution of the decree in suit No. 185 of 1874, and the date for sale was fixed for 20—9—1876. The objection of the plaintiff Mrs. Hurst, made on 20—8—1876, being disallowed, the property was purchased with notice of her claim by one Beresford at the execution sale held on 20—9—1876. Meanwhile, on 18—3—1876, the plaintiff instituted the present suit against the defendant-Bank, claiming the reversal of the order of 9—8—1876, and all subsequent acts and orders made under it and praying for a declaration of her right to the possession of the property as full proprietor (and in proprietary right), basing her suit on the deed of sale dated 14—11—1868. The lower Court fixed as an issue, among others, "Was Rs. 6,000, the price paid for Mohkampur, part of the plaintiff's legacy under her father's will or not?" On this sole issue, the suit was dismissed. The plaintiff appealed to the High Court.

JUDGMENT.

[764] STUART, C.J.—This is a regular appeal from a decree of the Subordinate Judge of Dehra Dun dismissing the plaintiff's claim to property called the estate of Mohkampur in virtue of her separate and exclusive right as a legatee under her father's will, and by which he bequeathed to her a sum of Rs. 12,000. The will was dated the 16th February 1864, and there was a codicil dated **[765]** the 24th February 1865. The testator, J. N. Heseltine, the plaintiff's father, died on the 8th March 1865. The nature and terms of the will had been the subject of a previous suit with respect to a mortgage directed by it to be made, in which the plaintiff's rights as a legatee came to be considered. This suit came up in regular appeal to this Court, and was heard by Oldfield, J., and myself, and determined by our dismissing the appeal and suit on grounds and for reasons which we fully explained in our judgments (1).

(1) APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

Reported under a special order of the Hon'ble the Chief Justice.

VAUGHAN *v.* HESELTINE. [8th June 1874.]

1 A. 753.

1 A. 753. STUART C.J.—This is a regular appeal from the Court of the Subordinate Judge of Dehra Dun in a suit by the plaintiff, Vaughan, against the defendants, Heseltine and Hurst, to recover Rs. 19,247-8-0, principal and interest alleged to be due on a mortgage on certain property called the Ellenborough Hotel estate, under the following circumstances: The plaintiff, Mr. Charles Frederick Vaughan, sued as one of the executors of the late Mr. J. N. Heseltine, who died on the 8th March 1865, leaving a will dated the 16th February 1864, and a codicil thereto bearing date the 24th February 1865. By the will the testator disposed of his estate and effects, and various legacies were left to different parties, and among others two sums both of Rs. 6,000, Rs. 12,000 in all, on certain conditions and contingencies to the testator's grandchildren, Joseph Hurst and Isabella Hurst, but in the event of their deaths, as therein explained, he directed the said two sums **[757]** of Rs. 6,000 to be paid "unto my

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The record in that previous suit containing the proceedings in the lower Court and this Court was put in as evidence in the present suit, and it thus appears that the facts which gave rise to the present litigation are these: On the 14th November, 1868, Mrs. Hurst, the plaintiff, purchased the estate of Mohkampur from one Mary Wood, the price, as stated in the sale-deed (and correctly stated, for there can be no doubt on this point), being Rs. 6,000. This sum was not at once paid down in cash by the plaintiff, although it does not appear to be disputed that she, and she alone, was the actual vendee, the money having been found by Mr. Hurst, the plaintiff's husband, she, the plaintiff, claiming that it was on the credit of her legacy that the sale to her took place. Subsequently to this purchase, that is, on the 25th November, 1869, the plaintiff purchased from a Mrs. Walsh a certain property called Ashton Cottage, the consideration being Rs. 2,000, which had apparently been raised in the same

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daughter Mrs. Charlotte Hurst, the mother of Joseph Hurst and Isabella Hurst, for her absolute use and benefit, and her receipt for the same, whether covert or sole, shall be a sufficient discharge for the same." The will appointed the testator's son, Robert Henry, and his son-in-law, Joseph Hurst, one of the defendants, to be executors thereof, and by a separate nomination he appointed the plaintiff "and the Administrator-General of Bengal for the time being" to be trustees of the will for the carrying out the trust thereby declared, and by the 20th clause of the will the testator made the usual provision for the continuance of the trust in the event of death or failure. By clause 9 of the will the testator specially devised the Ellenborough Hotel estate to the use of "my said Robert Henry, his heirs and assigns, upon condition that he or they do, upon being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing payment of the sum of Rs. 16,000, &c." Such were the provisions of the will on these points; but the codicil, which is of considerable length, altered and revoked the will in various particulars, and among other things it altered the will as to the trustees as follows: "And whereas by the 19th clause of my said will I have nominated and appointed the said Charles Frederick Vaughan, in the said will styled Mr. Charles Vaughan, and the Administrator-General of Bengal for the time being to be trustees of my said will, now I do hereby revoke such said appointment, and I do nominate and appoint the Official Trustee of Bengal for the time being to be sole trustee of my said will for the purpose of carrying out the trusts therein and herein declared, and I declare that my said will shall accordingly be so read and construed as if the said Official Trustee of Bengal for the time being had in my said will been named and mentioned instead of the said Mr. Charles Vaughan and the said Administrator-General of Bengal for the time being." There was therefore to be but one trustee and that "Official Trustee of Bengal" in place of Mr. Vaughan and the Administrator-General of Bengal as provided by the will. The codicil then goes on to revoke the said 20th clause of the will, and also the clauses providing for the legacies to the grand-children, "and in lieu and instead thereof," codicil provided as follows: I do hereby give and bequeath to my daugh-[758]ter Charlotte, the wife of my said son-in-law Joseph Hurst, and mother of my said grandchildren Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely, for her own sole use and benefit, free from the control, debts, and liabilities of her present or of any future husband with whom she may hereafter intermarry; and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough Hotel estate, situate at Rajpur aforesaid, under the terms and conditions of the 9th clause of my said will, such said payment to my said daughter Charlotte to begin and commence from the receipt by the trustee of this my will of the second instalment of Rs. 3,000 provided for in the said 9th clause of my said will, and to continue until the said sum of Rs. 12,000 shall be fully paid and satisfied from and out of the said fund, and any balance that may remain due after payment of the last of such instalments shall be paid and satisfied out of the general assets of my estate." We may presume that the testator had good and sufficient reasons for this change in his testamentary arrangements, and the circumstances which gave rise to this suit may well suggest what these reasons were. They are at least intelligible. But it will be observed that, while the codicil revoked the appointment of trustees as made by the will, it contained no express revocation of the testator's direction to his son to execute and deliver the mortgage itself for Rs. 16,000, and in fact, on the 2nd March 1866, which was within a year from his father's death, the son did, with the apparent approval of all concerned, including the plaintiff himself, execute a mortgage-deed of the Ellenborough Hotel

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way as the previous Rs. 6,000 for the purchase of Mohkampur. The two sums amounted to Rs. 8,000, which sum Mrs. Hurst swears in her deposition she repaid to her husband, first by endorsing over to him a draft for Rs. 7,875, being the sum, as explained by the plaintiff, to have been netted for her legacy, and by cash payment from herself of Rs. 125. The Subordinate Judge appears to sneer at and discredit this last circumstance, although it is not apparent why he should do so. For myself I do not see why it should be considered an "odd circumstance" that the plaintiff, situated as she was, could not command Rs. 125 on her own account, and there is not a particle of evidence to show that it was not her own money. The poor woman had suffered in pocket sufficiently already, for she tells us, and the fact plainly appears in the record of the **[766]** other suit to which I have adverted, that after a good deal of negotiation she disposed of her legacy of Rs. 12,000 to Mr. Vaughan one

1 A. 753. estate in favour of Joseph Hurst and Mr. Vaughan, and who, it will be recollected, were the trustees originally appointed. It is not disputed that the testator's estate was ample for all his testamentary purposes, and that there would be little or no difficulty in raising the Rs. 16,000 on the security of the Ellenborough Hotel estate. But some delay occurred, and it would appear that at the end of 1869 or beginning of 1870, Mr. Vaughan, the plaintiff, commenced negotiations with Mrs. Hurst for the purchase of her legacy, the result of which was that he, being an executor of the will, purchased for the price of Rs. 8,000 a legacy of Rs. 12,000. Vaughan himself states that he does not **[759]** recollect by whom the proposal for the purchase was made, but in the opinion of the Subordinate Judge it came from himself. This was the crisis of the suit in the Court below, and the Subordinate Judge's decision was that such a transaction could not stand, and he dismissed the suit with costs. Without pronouncing any judicial opinion on the question, which from what I am about to explain we are not called upon to do, I may be permitted to say that such negotiations between the executor of a will and a legatee are very questionable and improper, and if this case had been argued before us on the basis of the lower Court's judgment, it is I think probable that we would not have found much fault with it. But at the hearing of the appeal before us the counsel for the respondent, disregarding the appellant's argument on the merits of the Subordinate Judge's decision, took the objection that the mortgage deed which is the basis of the suit is invalid, and affords no cause of action to the plaintiff, on the ground of its not being conformable with the true construction of the will and codicil, and I am of opinion that this objection is well-founded. Although in the form of a suit to recover on a mortgage of a portion of the estate, it is really in the nature of one for the administration *pro tanto* of that estate, and it is important to consider what were the testator's wishes and intentions. I observe that in the mortgage-deed itself the codicil is referred to by date, and is there described as "in no way revoking that portion of the 9th clause of the will hereinbefore recited," but whether this was the idea of the mortgagor himself or the opinion of his legal advisers or draughtsmen, it is in my judgment altogether erroneous. The direction to the son contained in the will was to execute and deliver a mortgage-deed to the trustees, that is to Mr. Vaughan and the Administrator-General of Bengal. The appointment, however, of these gentlemen was expressly revoked by the codicil, and a single trustee, in the person of "the Official Trustee of Bengal," was appointed in their stead. It is impossible therefore to contend that the mortgage, as actually made, was an administration *pro tanto* of the testator's estate according to his true intentions. The objection is indeed an obvious and substantial one, and it is extraordinary that the codicil to the will on which it is founded should have been overlooked, not only by the Subordinate Judge himself, but by all the parties before him.

[760] Without prejudice therefore to any suit which may be instituted for carrying out the intention of the testator with respect to the direction to mortgage, or generally for the proper administration of the estate, I could dismiss this appeal, and dismiss the present suit; but seeing that the objection allowed by this judgment was not taken in the Court below, without costs. The Mussoorie Bank, however, who are the holders of a mortgage by the testator himself, and who have been obliged to intervene as co-defendants and co-respondents, are entitled to their costs, and these the plaintiff, appellant, must pay.

OLDFIELD, J.—The plaintiff in this suit, C.F. Vaughan, is one of the executors to the will of J.N. Heseltine. The defendant, R.H. Heseltine, is the son of J.N. Heseltine, and also one of the executors. The suit is to recover, as one of the executors, Rs. 19,427-8-0 principal and interest, on a mortgage-deed of the Ellenborough Hotel estate. It appears that, under the will and codicil of the late J. N. Heseltine, the

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of the executors of her father's will, for Rs. 8,000. This, as remarked by me in the previous suit, was a very improper transaction on Mr. Vaughan's part, and it might have been set aside if she had been so minded and it had been worth her while, but no question of the validity of this transaction arises in the present case. I only now allude to the circumstance for the purpose of showing that the sum she thus obtained for the legacy was the precise amount of her purchase of Mohkampur and Ashton Cottage, and the question as to the identity of that payment, as regards its legal character as well as its amount, with her legacy, or whether the payment had been made by her husband from its own resources, or what must be taken to be such, is the first question that has to be considered. The next question is one of law, *viz.*, whether, if the money was hers and not her husband's, it could be used and dealt with by him in the way stated by the Subordinate Judge.

The Subordinate Judge correctly states that the first of these is the one important question, although very inconsistently with that he thus expresses himself in his judgment: "That he (the plaintiff's husband) got the legacy money there is no doubt, but there is equally no doubt in my mind that he received it as any other husband would do money coming to his wife," adding, with apparent inconsistency, that "the issue

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estate known as the Ellenborough Hotel estate was devised to the use of his son R. H. Heseltine, defendant, respondent, upon condition that he should execute and deliver to the trustees under the will a mortgage of the said estate for securing to the said trustees payment of Rs. 16,000, to be paid by equal yearly instalments of Rs. 3,000 each, the first to be paid at the expiration of one year after the death of the testator, a sum of Rs. 12,000 to be paid out of the above sum to testator's daughter Charlotte Hurst, and the rest as otherwise devised. The will and codicil further made R. H. Heseltine, defendant, J. Hurst, and C. F. Vaughan, plaintiff, executors, and the Official Trustee of Bengal for the time being the sole trustee for the purpose of carrying out the trusts named in the will. After the death of the testator the mortgage-deed on which this suit is based was executed by R. H. Heseltine in favour of the other two executors, Hurst and Vaughan, and the latter now sues to recover under it. 1 A. 753.

The claim was dismissed by the lower Court on a preliminary objection, and the appeal rests on the same ground, which has been fully discussed in the judgment of the Chief Justice. It is unnecessary for me to notice this point, as I am of opinion that the appeal must be dismissed on a ground taken before us by the respondent's counsel, that the mortgage-deed is absolutely void, and **[761]** the claim on it unmaintainable. The title of the parties to the mortgage-deed and to execute the mortgage rests solely on the will and codicil of J. N. Heseltine and if these be examined it will be found that they convey no power to execute such a mortgage. The will directed by the 9th paragraph that the Ellenborough Hotel estate was devised to "R. H. Heseltine his heirs and assigns, upon the condition that he or they do on being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing to the said trustees, their executors, and administrators, payment of the sum of Rs. 16,000 hereinbefore bequeathed to them upon trust, &c.," and by the codicil the Official Trustee was appointed sole trustee, while R. H. Heseltine, Hurst and Vaughan were appointed executors.

There has been no conformance with the terms of the will and codicil in the execution of the mortgage-deed the basis of this claim, which is executed, not in favour of the trustee, but of two out of three executors. The intention of the parties was to carry out the condition of the will and codicil, but these gave no power to execute such a mortgage-deed, which has been made contrary to the will and codicil and under a mistake as to the facts on the part of the parties to it, that they were thereby carrying out the conditions of the will and codicil. Such a deed is invalid and can convey no right to the property to the plaintiff. The claim therefore must fail.

There is one plea raised in appeal which is to be noticed, whether the Manager of the Mussoorie Bank was properly made a party to the suit, and I consider he was, inasmuch as holding an alleged prior mortgage on the property, he had an interest in asserting its priority in this suit which included a claim to bring to sale the property.

I would therefore, though on different grounds, affirm the decision of the lower Court, and dismiss the appeal, but without costs as regards all the defendants except the Manager of the Mussoorie Bank who should get his costs.

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drawn which need be considered is, Was this Rs. 6,000, the price paid for Mohkampur, part of Mrs. Hurst's legacy under her father's will or not?" and he decides that it was the husband's money and not the plaintiff's. There is a confusion of mind and want of legal knowledge in all this on the part of the Subordinate Judge which I by no means desire to rebuke, for Mr. Alexander has done his best according to his light, although I could have wished that he had not been so dogmatical in the expression of his views. He ought to have known that Mr. Hurst could not deal with the legacy "as any other husband would do with money coming to his wife," and that he could not defeat her rights under her father's will by any transaction of his own. His judgment appears to me to be altogether beside the case, and shows that he totally misapprehended the plaintiff's position and her rights under her father's will.

[767] That the Rs. 6,000 paid for Mohkampur was her money and not her husband's, is, I think, very plain. In the first place, the Subordinate Judge himself says that Mr. Hurst got hold of the legacy money, in the next place the respondents, defendants, argued their case here, as they appear to have done in the Court below, on the assumption that it was her legacy that had been used in raising the purchase-money for Mohkampur, but that by conversion into cash it had changed its character and came under the control of her husband. Such a contention was totally unfounded in law, and I only refer to it now for the purpose of pointing out that, on the defendant's own showing, the money raised and paid by Mr. Hurst was really the plaintiff's and not his. But the plaintiff herself was examined in the Court below, and her evidence is before us. The Subordinate Judge puts his gloss upon it, but I feel bound to reject this as altogether uncalled for. The plaintiff's evidence is not in any way contradicted or disputed, and I see no reason whatever for disbelieving it. It will be seen that it is clearly compatible and consistent with all we know of the facts. We have seen that her father made his will in 1864 and died in 1865, and the time that elapsed between the date of the purchase of Mohkampur is amply accounted for by the litigation and negotiations which had in the meantime been going on, and which prevented the payment to her of her legacy until the time mentioned by the Subordinate Judge. She states in her deposition as follows: "My husband paid the money for me: I was negotiating the sale of my legacy with Mr. Vaughan, the executor: Mr. Vaughan sent me a cheque for the amount, *viz.*, Rs. 7,875, on the Delhi Bank, and I endorsed the whole of it over to my husband: after this receipt I concluded the sale-negotiations for Ashton Cottage, which I had been carrying on for some time previously: the price of Ashton Cottage was Rs. 2,000: I paid Rs. 7,875 to my husband by the cheque, and Rs. 125 in cash: I sold my legacy for Rs. 8,000 and Mr. Vaughan made me go shares in the expenses, so I only got Rs. 7,875." And further on in cross-examination she says, "I bought the village (Mohkampur) in anticipation of my legacy money."

Then as respects the Mussoorie Bank's bond she says: "Mr. Hurst signed the deed shown me because the loan was to him, not because he had any right in the property." And in regard to Mrs. **[768]** Dick's mortgage she deposes: "The deed shown me was signed by Mr. Hurst and myself: I never read the deed in question, so I cannot tell how the words 'moveable and immoveable' came into it: I did not get the loan, Mr. Hurst got the loan." The Subordinate Judge makes some unfavourable comments on this evidence, but it is, I consider, unsafe to argue, as he does, against the conduct of a wife situated, as the plaintiff was, under the influence and control of a needy husband. I believe she spoke the

truth when she said she had not read this deed, and I also believe that she was totally unaware that she was transferring by it any rights of hers acquired by means of her legacy. In fact she could not legally have joined in any such mortgage-deed without making the usual ackowledgment required of married women before the officer appointed by law for that purpose (see Act XXXI of 1854, Ss. 3, 4 and 5), and it is not pretended that any such formality was observed on the occasion.

From all these considerations I conclude and thoroughly believe that the Rs. 6,000 paid for Mohkampur was raised on the security of, and was in fact paid out of, the plaintiff's legacy, and from no other source; and that being so the plaintiff's legal rights are not as stated by the Subordinate Judge. I have looked into the record of the previous suit, and I find it there recorded that the bequest of the legacy to the plaintiff in her father's will and codicil is expressed in these terms: "I do hereby give and bequeath to my daughter Charlotte, wife of my said son-in-law, Joseph Hurst, and mother of my said grand-children Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely for her own sole use and benefit free from the control, debts, and liabilities of her present or of any future husband with whom she may hereafter intermarry, and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte, on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough Hotel estate." The effect of such a testamentary disposition is to give the plaintiff not only separate and exclusive use of the legacy money, but sole and absolute control over its disposal. The law on this subject is clearly stated by Mr. Joshua Williams, Q. C., in his "Principles of the law of Real Property," 7th ed., 1865, p. 207 (an able and reliable work of great authority in England, although the author is still [769] alive), as follows: "Not only the income, but also the corpus of any property, whether real or personal, may be limited to the separate use of a married woman. Recent decisions have established that a simple gift of real estate, either with or without the intervention of trustees, for the separate use of a married woman, is sufficient to give her in equity a power to dispose of it by deed or will without the consent or concurrence of her husband. The same rule had long been established with respect to personal estate." Property is thus sometimes settled to wives so as to prevent even its anticipation by them. But it will be observed that there is no such clause in the will of the plaintiff's father. She did anticipate the legacy by accepting the Rs. 6,000 her husband raised for her on its security, and she was entitled to do this nor by so anticipating did she in any way change the legal character and conditions of the legacy itself, for that, as I have said, could in no wise be defeated by any contrivance on the part of her husband or any of his creditors.

The facts and evidence to which I have adverted, and which bring me irresistibly to this conclusion, appear to me to be clear beyond any doubt, and I see no necessity for a remand.

I have only to add that, if the plaintiff's husband took his loan from the Mussoorie Bank, either in ignorance of, or with the knowledge of plaintiff's exclusive rights under her father's will, he and the Bank must settle it between themselves, but in no case can the one or the other make any claim on the plaintiff, or make use of her money, should they succeed in getting it into their hands without her own deliberate consent given in the manner required by law.

I would allow the appeal and, reversing the judgment of the Subordinate Judge, decree the plaintiff's claim. No other conclusion could

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satisfy not only the legal necessities but the justice of the case. The respondents must of course pay all the costs, those of the lower Court as well as the costs of this appeal.

SPANKIE, J.—The subject-matter of the dispute between the parties and the facts of the case are clearly set forth by the Subordinate Judge. The lower Court considered that the first issue laid down by him decided the case. That issue was, Was the sum of Rs. 6,000, the [770] price paid for Mohkampur, part of Mrs. Hurst's legacy under her father's will or not? Ordinarily speaking, the Judge remarks, when we look at a transaction like the one which took place between Mr. and Mrs. Hurst, we should say that the husband had bought the estate, entered his wife's name as purchaser for reasons of his own, and that the endorsement of a cheque or draft made over to him some eighteen or nineteen months afterwards had nothing to do with the matter whatever. The lower Court comes to the conclusion that the money was Hurst's own, and had no connection with the Rs. 7,875, the proceeds of the legacy, paid over to him nineteen months after the purchase. The Subordinate Judge comes to this finding on the evidence of Mrs. Hurst which he considers contradictory and improbable. He holds also that Mr. Hurst got possession of the legacy as any other husband would do money coming to his wife.

It is contended in appeal that mauza Mohkampur is the separate and absolute property of the appellant, Charlotte Hurst, and the Court was wrong in finding that her husband, Hurst, was the true owner. Secondly, that the purchase-money of the village in question, though paid in the first instance by appellant's husband, was eventually paid by appellant, who made over her legacy of Rs. 8,000 to her husband in satisfaction of the loan by means of which the said village had been originally purchased by her. Thirdly, that it is not shown that the legacy was paid for any other purpose. Fourthly, that the reason by the lower Court for its decision are fallacious and erroneous, and do not support the conclusion upon which that decision is based. Fifthly, that the amount entered in the lower Court's decree as pleader's fee is improperly calculated.

The suit appears to me to have been insufficiently tried, and Charlotte Hurst's evidence to have been set aside on apparently too slight grounds. There is no reason to doubt that she had the legacy in prospect when the purchase was made, a legacy to herself, and for her own use and benefit and quite independent of her husband's control. With this prospect before her it was not unlikely that she might contemplate the purchase of immoveable property, and it was not improbable that her husband should have found the money for her in the first instance, and have received it back from her on payment of the legacy. She stated that, when the village was bought, they were well off as compared with their present [771] position, and were then perfectly solvent. She appears to have given her evidence freely. It was not damaged in cross-examination or by the Court when the Judge examined her. She may have been flurried by the Court, but I certainly do not trace in her evidence confused and contradictory statements. These statements at least remain uncontradicted. The other party produced no evidence at all. If the lower Court thought that Charlotte Hurst's evidence was not satisfactory, she should have been allowed the opportunity of bringing forward some proof in corroboration of it. It would seem, however, that the Subordinate Judge was of opinion that the husband must needs have the control of the legacy, and that it was paid to him as any other money coming to his wife would be paid. This, in fact, was doubtless pressed

upon him at the hearing, and indeed was contended here by respondent's pleader, Mr. Quarry. There is no doubt that, when from the terms of the gift, settlement or bequest, the property is expressly, or by just implication, designed to be for a woman's separate and exclusive use (for technical words are not necessary), the intention will be fully acted on, and the rights and interests of a wife sedulously protected in equity. There is no difficulty in this case as to the words used. The will of J. N. Heseltine gives the money to Charlotte Hurst "absolutely for her sole use and benefit, free from the control, debts and liabilities of her present or any future husband." The money is to be paid to her "on her sole and personal receipt." These words exclude the marital rights of a woman's husband, and the property will be regarded as being for her exclusive use.

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1 A. 762.

So far then Charlotte Hurst, having certainly the exclusive control of this money left to her, might not unreasonably, as remarked above, have entertained the idea of buying Mohkampur, and as her statements remain uncontradicted there was *prima facie* no reason to doubt the truth of the claim. There are, however, alleged to be certain circumstances, such as the condition of Hurst's affairs for some time past, and the fact that he had treated Mohkampur as his own, regarding which it would have been desirable that further inquiry should have been made. Hurst himself should have been examined, and he should have been questioned regarding the alleged advance to his wife of the sum necessary to pay for Mohkampur, and also respecting the mortgage of that village, amongst other proper-
[772]ties, to Mrs. Dick. On the other hand, the defendant should have the opportunity of showing from any other evidence that he could produce, that the money used was not Mrs. Hurst's. The defendant, indeed, should have had evidence ready on this point, as it was in issue on the day fixed for trial. I do not understand why it was not produced if at hand, and if this suit were dismissed now the defendant would have himself to blame. But I would prefer, having regard to the fact that there are some suspicious circumstances in the case, that there should be further inquiry, and would remand the case to the Subordinate Judge in order that he should try and determine whether the purchase of Mohkampur was made by Charlotte Hurst on her own account and with money advanced by Hurst as a loan, which she subsequently repaid to him, or whether Hurst was the real purchaser and owner, and the money paid was his own.

The determination of this issue in a satisfactory way would, I think, dispose of the case. The remand might be under S. 354, Act VIII of 1859. On return of the finding a week might be allowed for objections, and on the expiration thereof the appeal would be disposed of.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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MAY 8.
APPELLATE CIVIL.
1 A. 428 = 2 Ind. Jur. 146.

NEHALO (*Appellant*) *v.* NAWAL AND OTHERS (*Respondents*).

[8th May 1877.]

1 A. 428 = 2 Ind. Jur. 146.

Act IX of 1861, Ss. 1 and 6—Guardian—Fresh application.

The refusal of a previous application for the guardianship of a minor, under S. 1, Act IX of 1861, does not preclude a Court from entertaining a subsequent application for the same purpose.

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APPEL-
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1 A. 428 =
2 Ind. Jur.
146.

An application to the Judge of Meerut, under Act IX of 1861, for the custody and guardianship of a female minor, was refused, and no appeal from this order was preferred. Another application to the Judge praying that the Court might appoint the petitioner guardian of the minor, and remove the minor from the custody of persons who were arranging an improper marriage for her, was made by the minor's first cousin. The Court considered that it was precluded, under the terms of S. 6, Act IX of 1861, from entertaining any fresh application whilst the order on the previous application remained undisturbed, and rejected it.

The petitioner appealed to the High Court.

ORDER.

[429] We consider that this application can be entertained under the terms of S. 1, Act IX of 1861, and we reverse the Judge's order, and direct him to enquire into the application and pass an order according to law. The costs will abide the result.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1877
MAY 9.

APPEL-
LATE
CIVIL.

1 A. 394.

SITAL AND ANOTHER (*Defendants*) *v.* MADHO (*Plaintiff*).

[9th May 1877.]

Hindu Law—Father's powers—Self-acquired property—Exclusive gift to one son—Factum valet (Acts done not void).

An exclusive gift of self-acquired immoveable property made by a Hindu father to one of his sons, to the prejudice of the rest, is not invalid. The prohibition of such a gift, that may be inferred from the Hindu Law books, rests on moral or spiritual grounds, and cannot affect the gift itself when made.

[R., 10 B. 528, 10 M. 251, 20 A. 267 **(P.C.)]**.

JUDGMENT.

[394] SPANKIE, J.—The plaintiff and defendant, Sadho, in this suit are the sons of one Sital, also a defendant.

The property in dispute is a dwelling-house purchased by Sital in 1861, and transferred by gift on the 13th September, 1875, by him to Sadho.

[395] The plaintiff sues to avoid the deed for gift in favor of Sadho, and claims a declaratory decree for a moiety of the house, on the ground that his father was not permitted by the Hindu law to make a gift of immoveable property to one son to the injury of the other.

The defendant Sadho contends that the plaint discloses no ground of action, and the property in suit having been acquired by Sital, he was at liberty to dispose of it as he pleased.

The Munsif held that, if the Hindu law did not allow the gift, the plaintiff had good cause of action. On the point of law it was not necessary to express an opinion, as the High Court determined it, laying down that the exclusive gift of self-acquired property to one son, when there were other sons, is illegal: *Mahasukh* v. *Budri* (1).

In appeal the Judge affirmed the decree, holding himself bound by the precedent cited by the Munsif (1), and believing that it represented

(1) H. C. R., N. W. P., 1869, 57.

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1 A. 394.

the commonly received doctrine in these provinces, though the Calcutta Court had taken a diametrically opposite view of the law (1).

The defendant in special appeal urges, as in the first Court, that the property having been self acquired by Sital, he was quite competent to make a gift of it in favor of one son, to the exclusion of the other.

The case cited as having been determined by this Court refers to no authority expressly. The learned Judges observe that the texts of the law support the doctrine that a man's immoveable property, although self-acquired, is not within his power of disposal so absolutely, by gift in his lifetime, as to enable him to give it all to one son, or grandson, in exclusion of the rest. The Court also remarked that they had not to deal with the case of an unequal division of immoveable property, for the gift was an exclusive gift; as the learned Judges do not cite their authorities, we do not consider ourselves bound by the decision.

[393] The learned pleader for the appellant, Pandit Ajudhia Nath, referred to various authorities and precedents of this, and the presidency Court. Some of the cases cited (2) are not absolutely conclusive on the point before us. The judgment of the judicial committee of the Privy Council in *Rungamma, appellant* v. *Atchama, respondent* (3) determined a question relative to a second adoption of a son, the first adopted son being still alive. It appears, however, to recognise the competency of a father to dispose of property that was not ancestral, by an act "*inter vivos*" without the consent of all his sons, and so far the principle would extend to the case before us, the other case cited *Nana Narain Rao, appellant* v. *Huree Punth Bhao, Sree Newas Rao, and Balwant Rao, respondents* (4) does not touch the matter now in dispute. It establishes a will which disposed of the testator's self-acquired property unequally amongst his sons, but it does not go beyond this. The case decided by the Agra Sudder Dewany Adawlat in 1861, is of no authority (5). It refers to no texts, and does not enter into the point, or any argument.

The precedent of the Calcutta Court, "*Muddun Gopal Thakur and others*" (6), refers to a case in which the plaintiff's grandfather originally acquired the lands in dispute. He had several wives and several sons. By deed of gift he gave the property in dispute to the plaintiff's father, and provided for all his sons by other deeds of gift. The plaintiff's father made a deed of sale of the property in favor of the defendant. It was held that, according to the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself; also that landed property acquired by a grandfather, and distributed by him amongst his sons does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it by gift or sale, without the consent and to the prejudice of the grandsons. In this decision the texts and authorities are directly referred to, and the question is exhaustively treated. The other case cited from the Weekly Reporter, **[397]** (7) "Bawa Misr," follows this judgment:—The question, however, was, whether the father could, by will, make an unequal distribution of his self-acquired estate amongst his heirs. But the principle of the Court's ruling would apply to the suit before us, and both the decisions put the same interpretation on the texts in the Mitakshara, that we are

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(1) 10 W.R., 247, *Bawa Misr v. Raja Bishen Prokash Narain Singh.*
(2) Mitakshara, Chap. I, p. 27, sec. 1, Chap. I, secs. 5. 10, 11; 4 M.I.A. 103; 9 M.I.A. 96; 6 W. R., 71; 10 W. R. 287; Agra S. D. A., 1861, 223; H. C. N. W. P., R. A., No. 150 of 1874, dated 11th May, 1875.
(3) 4 M.I.A. 1.
(4) 9 M.I.A. 96.
(5) S.D.A., Agra, 1861, 223.
(6) 6 W.R., 71.
(7) 10 W.R., 287.

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1 A. 394.

disposed to do. Para. 27, chapter I, S. 1, declares that it is a settled point that property in the paternal or ancestral estate is by birth. The father is declared to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor, since it is ordained that though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons, they who are born, and they who are yet unbegotten, and they who are still in the womb require the means of support, and no gift or sale should therefore be made. The respondent's pleader relies on this passage as being an absolute declaration that any such gifts or sale of self-acquired property is illegal. But the words do not go quite so far as this. Such a sale or gift *should* not be made without convening all the sons. It would be wrong, and contrary perhaps, to the spirit of the Hindu law, to make such a sale or gift that might prejudice the rights of the sons, or tend to limit their means of support, but there is no declaration that the transaction would be absolutely void. The father, it is true, is to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor. But even this control appears to be limited. In S. 5 of the Mitakshara, in which the equal rights of father and son in ancestral property are discussed, para 9 declares the grandson's right of prohibition if his unseparated father is making a donation, or a sale of effects inherited from his grandfather. But he has no right of interference if the effects were acquired by the father; on the contrary, he must acquiesce because he was dependent. Para 10 goes on to explain the difference. Although the son has a right of birth in his father's and his grandfather's property, still, as he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must [398] acquiesce in the father's disposal of his own acquired property, but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction, but then only if the father be dissipating the estate.

In noticing the apparent contradiction between para. 27, S. 1, chap. I, and paras. 9 and 10, S. 5, chap. I, the learned Judges who decided the case of Muden Gopal (1) remark that the apparent conflict is reconciled if the right of the sons in the self-acquired property of the father is treated as an imperfect right, incapable of being enforced at law. The words "should not" and "shall not" imply a prohibition, but not an absence of power to do the prohibited act. The learned Judges add that a colour is further given to this construction, by a passage in the Mitakshara on the administration of justice, chap. IV, S. 1, para. 10. Macnaghten's Hindu Law, vol. 1, p. 227, where the author, in stating who are capable of maintaining actions, says: "In case of land acquired by the grandfather, the ownership of father and son is equal, and therefore if the father make away with the immoveable property so acquired by the grandfather, and if the son have recourse to a Court of justice, a judicial proceeding will be entertained between the father and the son." But the right of suit is not mentioned as extending to the case where a father alienates his own self-acquired immoveable property.

In the regular appeal (2) cited by the appellant's pleader as having been determined in 1875 by this Court, the learned Judges have also remarked on these apparent contradictions, and they observed that the only

(1) 6 W. R., 71.

(2) Unreported.

rational mode which has been suggested of reconciling the apparently contradictory doctrine is to suppose that para. 27, S. 1, refers to acquisitions of immoveable property made by the father with the use and by the aid of ancestral funds. The community of interest which the son has with the father in the grandfather's property is the foundation of the restriction of the father's power in respect thereof. But the son has no community of interest with the father in property acquired by him independently of ancestral funds, and consequently there can be no restriction **[399]** on the latter's freedom in dealing with it. But with due respect to the learned Judges who made these remarks, the true reason appears to be this, that as long as the father lives, the control remains with him. The sons, as we have seen, are dependent on the father. In chap. I, S. 5, para. 7, which declares "the dependence of sons," is affirmed in the following passage, "while both parents live, the control remains, even though they have arrived at old age," must relate to the effects acquired by the father or mother. This other passage "they have not power over it" (the paternal estate) "while their parents live," must be referred to the same subject (self-acquired property). In Ss. 9 and 10, which we have already quoted above, the dependency on the father, and the predominant interest of the father in self-acquired property, is what restricts the son from exercising any interference with its disposal. This view of the question is borne out by a passage in chap. VIII of the Smriti Chandrika, a work of special authority of the Madras School, where the interest of the son in the father and grandfather's property is treated of. In para. 21 it is asked how could there exist such inequality while the son possesses a right by birth in both his grandfather's and father's property. The reply is, that in the case of the grandfather's property, the ownership, and also the independent power, are both equal in the father and son, whereas in the case of the father's property, while he is alive and free from defect, he alone possesses independent power, and not the son.

We, however, are prepared to rest the reconciliation of the apparent contradiction, on the ground that there is nothing more than a prohibition implied in para. 27, S. 1, chap. I. There is no express declaration that a gift or sale so made is *ipso facto* void, because the donor or vendor has no power to make it, and we also consider that the rulings of this Court on other points of Hindu law have recognized the principle that, though prohibition of certain acts may be implied, yet, where it is not declared that there is absolutely no power to do them, those acts, if done, are not necessarily void. This recognition is partially supported by Sir Thomas Strange, who admits a certain discretion on the part of the father to deal with self-acquired property, and also by a passage in Macnaghten's Principles of Hindu law, chap. I, where he lays down, as the result of **[400]** all authorities, "that with respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility."

Vide chap. IX on partition

Entertaining this view of the point in dispute, and finding, as we believe, that authority and precedent are with us, we have no hesitation in holding that the decision of the Judge is wrong, and that this exclusive gift by Sital the father, to his son Sadho, of the house in dispute, was not illegal under the Hindu law, and the facts not being disputed, the claim should have been dismissed. We accordingly decree this appeal and dismiss the claim, by reversing the judgments of the Court below, with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1877
MAY 18.

APPEL-LATE CIVIL.

BALLABH DAS (*Plaintiff*) *v.* SUNDER DAS AND OTHERS (*Defendants*).

[18th May 1877.]

1 A. 429.

1. *Hindu Law—Joint family—Effect of the introduction into it of strangers.*

The Joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connexion among its members by blood, relationship and marriage. Property held in such co-parcenership will be joint family property; the introduction of strangers in blood by auction purchase, necessarily breaks up the family relationship.

1 A. 429.

2. *Assent of co-parcener to gift.*

When the constitution of the family as an undivided family is modified, and the character of the property as joint and undivided family propertyis destroyed, by the introduction of a stranger as auction purchaser of a share of the property, the consent of the co-parcener, which, under Hindu law, would be necessary to validate a gift by a member of the family, would no longer be necessary, and a gift made without such consent would not be invalid.

[2—F., 2 A. 898; R., 21 B. 797, A.W.N. (1908), 200.]

Defendants 2 and 3 and two others constituted an undivided Hindu family owning certain ancestral property in equal shares. The rights and interests of the two members other than defendants 2 and 3 in that property were purchased at an auction-sale by defendant 1, a stranger. Subsequent to this, the remaining members of the original undivided Hindu family (defendants 2 and 3) made a verbal gift of their property to the plaintiff whose application for mutation of names in his favour was rejected. Hence this suit by the plaintiff for partition and possession of her share. The plaintiff got a decree in the Munsif's Court.

On appeal, the Officiating Judge, relying on Elberling on Inheritance, para. 281, p. 132, and Macnaghten's Principles of Hindu Law, vol. 2, p. 224, ruled that a gift of any portion of joint ancestral property without prior division, and in the absence of the assent of all the co-sharers, is invalid under Hindu law, dismissed the suit. The plaintiff appealed to the High Court.

JUDGMENT.

[430] We are of opinion that the Judge has not properly considered the effect of the auction-purchase of the respondent on the constitution of the joint family and the joint property; that purchase by introducing a stranger as owner of the rights and interests of two of the members of the original undivided Hindu family broke up the constitution of the family as an undivided Hindu family. The joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connexion among its members by blood, relationship, adoption, and marriage. Property held in such co-parcenership will be joint family property, the introduction of strangers in blood by auction-purchase necessarily breaks up the family relation.

Sir J. Strange, writing of the joint family, says "in the property *thus descended* so long as they remain undivided, the family possesses a community of interest;" and the context shows that a descent of heirs is meant.

[431] We may refer also to a passage in West and Buhler, Part II, ii, and the rules under which partition which operates in respect of the undivided family takes place, show that an undivided family is constituted in the sense indicated.

The gift to the plaintiff is therefore not invalid on the ground held by the Judge.

1877
MAY 18.

APPELLATE CIVIL.

1 A. 429.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

AMBIKA DAT (*Plaintiff*) *v.* SUKHMANI KUAR AND ANOTHER (*Defendants*). [25th May 1877.]

1877
MAY 25.

APPELLATE CIVIL.

1 A. 437 = 2 Ind. Jur. 179.

1. *Hindu Law—Joint and undivided ancestral property—Definement of shares—Insufficient evidence of partition—Enjoyment of profits.*

The fact that there was a definement of shares followed by entries of separate interests in the revenue records, with respect to some portion only of the family property, is an important piece of evidence towards proving separation of title and interests; but it will not necessarily amount to such separation. It must be shown that there was an unmistakeable intention on the part of the shareholders to separate their interests, and that the intention was carried into effect.

1 A. 437 = 2 Ind. Jur. 179.

2. *Evidence of partition.*

The best evidence would be separate enjoyment of profits and separate dealings with the property.

[1—R., 4 B. 157, 12 C. 96; Cons., 10 A. 490 = 8 A.W.N. 203.]

In a suit by the plaintiff in 1874 against the defendants, widows of the plaintiff's deceased cousin, Debi Prasad, for possession of certain landed property, ancestral and acquired, with other estate, of which the defendants were in possession, the plaintiff alleging that his deceased cousin and himself were members of a joint and undivided Hindu family, and that the plaintiff as nephew of Debi Prasad was entitled to succeed to Debi Prasad's estate, relied on by the defendants and the Subordinate Judge found that the compromise of 1872, asserted by the plaintiff to have been only a nominal proceeding, really took effect, and, so far as it related to all the property held thereunder, dismissed the suit, but with respect to the half share of mauza Sandhi, the Subordinate Judge gave the plaintiff a decree, holding that, notwithstanding the definement of shares in the property, which occurred in 1854, owing to a temporary rupture in the family, the enjoyment of the profits of the said property remained joint. The plaintiff appealed to the High Court with respect to the portion of the claim dismissed, and the respondents filed objections under S. 348 of Act VII of 1859 to the finding of the Subordinate Judge.

JUDGMENT.

[438] TURNER, J.—On the question of the character of the family whether in union or divided there is not much reliable evidence either way. It is for the defendants to make out a sufficient case showing partition, but with the exception of the facts that there was a quarrel between Maneshar Ram and Dhaneshar Ram (1) in 1854, and that they then defined their interests in the property which they then held, and which at their

(1) *Maneshar Ram*—Debi Prasad's father; *Dhaneshar Ram*—Plaintiff's father.

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MAY 25.

APPELLATE CIVIL.

1 A. 437 = 2 Ind. Jur. 179.

deaths came to be recorded in the same way in their sons' names, there is really no reliable evidence. There is nothing definite to show the very important fact that the definement of shares was ever followed by separate enjoyment of profits.

The fact that there was a definement of shares followed by entries of separate interests in the revenue records in some estate only is an important piece of evidence towards proving separation of title and interests, but it will not necessarily amount to such separation; it must be shown that there was an unmistakable intention on the part of the shareholders to separate their interests, and that the intention was carried into effect. The best evidence is separate enjoyment of profits and dealings with the property; and if we find through a long course of years nothing to show that the definement of shares which took place in 1854 has been acted on, and that the parties continued to enjoy the property on the [439] same footing as before, it is but reasonable to suppose that, although they may have taken some steps towards separation, from some cause or other—it may be a reconciliation—the intention to separate was abandoned.

It appears to be the fact that Dhaneshar Ram, who was devoted to religion, never managed his own affairs: the management was in the hands of Maneshar Ram, apparently both before and after 1854, and until Maneshar's death. Maneshar was succeeded in the management by Debi Prasad, who continued to be sole manager during and after the cessation of plaintiff's minority and until he died in 1872. Had what occurred in 1854 operated as a separation, we think it probable that something would have been done to relieve Maneshar of the management, and it would not have been continued in Debi Prasad while Dhaneshar was alive, nor is there any satisfactory evidence to show any separate enjoyment of profits or separate dealings with the property. There are no accounts which show it; such as there are point the other way, the oral evidence is indefinite and contradicted by oral evidence on the side of defendants, and the documents which show purchases, &c., in Debi Prasad's sole name cannot be relied on to show either separation or union of interest, for he was manager of the entire property and head of the family, and the plaintiff was a minor, and transactions might have been done in his name in his capacity as a manager.

On the other hand we have the statement of Debi Prasad himself, made on the 5th July 1871, to the effect that there was no kind of separation, and the profits of the villages were without any specification considered by him to be the common property of himself and Ambika Dat. We do not see any reason why this statement should be distrusted because it was given for the purpose of the income-tax assessment. We consider the last plea in appeal as to costs is so far valid, that each party should pay their own costs, and with this modification we shall affirm the judgment of the lower Court and dismiss the appeal, each party paying their own costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner and Mr. Justice Oldfield.

1877
MAY 28.
APPEL-LATE CIVIL.

PARAM SINGH (*Defendant*) *v.* LALJI MAL (*Plaintiff*).

[28th May 1877.]

1 A. 403.

1 A. 403

1. *Fraud—Claim to relief from effects of—"In pari delicto potior est conditio possidentis."*

The doctrine that *in pari delicto potior est conditio possidentis*, or that the Court, finding a man embarrassed by a deceit to which he was himself a party, will not interfere to relieve him from its consequences, cannot be applied in this country without qualification. Where a party to a fraudulent agreement entered into for the purpose of defeating the claims of third parties, wants to be relieved from its effects by showing its real character, the claims of justice, equity, and good conscience will be satisfied by safe-guarding the interests of third parties, who have prejudicially altered their position on the faith of the agreement. And no harm is done by allowing the real character of the agreement to be proved as between the parties to it or their representatives.

Where, therefore, for the purpose of defeating the claims of third parties, a person created, in favour of another, evidence of a fictitious title,—by way of a conditional sale, foreclosure proceedings, a judgment collusively allowed to be passed thereon, and execution proceedings terminating in the delivery of possession of the property mortgaged,—whereby he effectively defrauded one of his creditors, he was nevertheless allowed, in a suit between himself and the other party to the agreement, to prove its real character, and to claim back possession from the other party.

2. *Cause of action in such a case :—*

In such a case, the cause of action against the party to the fictitious agreement, who has obtained possession, arises when he disavows its real character and seriously maintains his possession.

3. *Estoppel by plea in another suit :—*

In such a suit, neither of the parties is estopped, as between themselves, by the pleas which they, or either of them, had raised, in a suit brought against them by a third party for the declaration of the real character of the agreement. [13 M.I.A. 351 and *Bowes* v. *Foster*, 27 L. C. N. S. 262, *F.*]

4. *Limitation in suits for declaration or for cancelment of a bond.*

Where the only relief claimed is a declaration or cancelment of a document, the period of limitation will be that provided for such suits; but where such relief is only ancillary, and possession of immoveable property is claimed, the twelve years' rule will apply.

5. *Limitation as against a trustee.*

Limitation will begin to run against a trustee, when he disavows the trust and sets up an independent title.

[1—Diss., 11 B. 709; **Not F.**, 7 C.P.L.R. 50, 23 B. 406, 27 C. 231; **R.**, 3 B. 30, 1 C.P.L.R. 171, 4 A.W.N. 128, 33 C. 967 = 10 C.W.N. 650 = 4 C.L.J. 22; **4—R.**, 16 B. 186 (190); **5—R.**, 6 M. 54 (59).**]**

JUDGMENT.

[405] TURNER, J.—"The respondent was the owner of a ten biswa share in each of the mauzas Mayola, Dudhrajpur, and on the 24th December 1853, he executed a deed of conditional sale transferring these properties to the appellant for an alleged consideration of Rs. 1,000, repayable with interest at twelve per cent. in four years. The deed declared that possession had been given to the conditional vendee. In 1860, the appellant caused a notice of foreclosure to be issued, and on the 28th June 1861, he obtained an *ex parte* decree for possession.

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On the 18th July 1861, Nathmal Das obtained a decree for money against the respondent, and in execution of that decree he attached the rights and interests of the respondent in the property above mentioned. The appellant intervened, and on his objection the property was released on the 26th January 1865. Nathmal Das then instituted a suit to contest the order. He alleged that the conditional sale-deed of December 1853 was fraudulent and collusive. The appellant and respondent were both made parties to this suit. The appellant appeared and contended that the mortgage was valid and he also pleaded the foreclosure and decree obtained in 1861. The respondent did not appear. The Principal [406] Sadr Amin held that Nathmal Das had failed to establish his case, and dismissed the suit, and on appeal his decree was affirmed.

The first occasion on which the appellant applied for execution of his decree of the 8th June 1861, was on 25th April 1864. On the 28th June 1864, it was ordered that notice should issue, and the amin's fee be deposited. It does not appear whether notice was served; the proceedings were struck off the file on the 11th July 1864, because the amin's fee had not been deposited.

The next applications were made on the 19th June 1865, and on the 10th August 1866, but the decree-holder did not proceed with them. On the 24th June 1869, another application for execution was put in and notice issued. On the 10th July, the decree-holder informed the Court that, inasmuch as arrears of revenue were still due, he did not desire to obtain possession, and prayed that the proceedings might be struck off the file. On the 13th July 1869, the respondent put in a petition in which he alleged the decree was collusive, and that the applicant was, in fact, a trustee for him.

On the 2nd March 1870, the appellant presented another application for execution, but immediately afterwards, he informed the Court he did not desire to proceed with it, and that, if any settlement took place, a sulehnamah would be filed.

At last, in 1872, the appellant seriously took proceedings to execute his decree and obtained possession. The respondent resisted the application. He alleged, as he alleges in this suit, that in order to prevent his eldest son, by his first marriage, from obtaining the property, he had arranged with the appellant, his intimate friend, to make a pretended transfer of the property to him, and that in pursuance of this arrangement he executed the deed of conditional sale of December 1853 that in fact no money passed as consideration for the deed, that in 1856 the appellant, at his instance, executed a deed acknowledging the respondent's title to the property, that the decree of 1861 was also obtained to conceal the true ownership of the property, and that he had all along remained in possession and dealt with the property as his own to the knowledge of the appellant. The Munsif allowed the objection, and dismissed the application for execution. The Principal Sadr Amin reversed [407] the Munsif's order, and the High Court affirmed the Principal Sadr Amin's order, on the ground that it was not competent to a Court executing a decree to annulthe decree. The appellant consequently obtained possession.

The respondent then instituted the suit which is now before this Court in appeal. He averred that the deed of conditional sale had been executed without consideration, and with a view to defeat a claim which he thought might be made by his son by his first wife, that in prosecution of the design to conceal the ownership of the property he contrived the foreclosure proceedings, and the suit which customarily follows such

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proceedings, that in fact it was not intended the property should pass to the appellant, that he was a mere trustee, *ismfarzi*, for the respondent, that the respondent had, notwithstanding the proceeding above referred to, remained in possession of the property, and exercised acts of ownership, until by the execution of the decree, in fraud of the respondent, the appellant obtained possession. The respondent also relied on the terms of an agreement, which he asserted had been executed by the appellant on the 16th January 1856, and which is in the following terms:—

"I, Param Singh, son of Bhup Singh, by caste Jat, and resident of mauza Jahangirpur, pargana Thakurdwara, do hereby declare that whereas Lalji Mal, a resident of mauza Mayola, has executed in my favor an *ismfarzi* deed of conditional sale, dated the 24th December 1853, in respect of a ten biswa share in each of the mauzas Mayola aforesaid and Dudhrajpur in pargana Thakurdwara, because Ganga Ram, the son of the said Lalji Mal, by his first wife, deceased, quarrels with him, and is trying to get the said share from him. I record and agree that even if I, as a matter of expediency, obtain a decree by suing on the said deed of conditional sale, or if I should try directly or indirectly, privately or through the Court, to take or obtain possession of the property entered in the said deed of conditional sale, or if any of my heirs should wish to take or obtain possession, I, or my heir or successor, shall not, according to the agreement, be competent to be the owner of the said property, and that should I in contravention of the terms of this agreement obtain possession, or endeavour to obtain possession, **[408]** all the proceedings connected with the sale and the foreclosure shall be deemed invalid according to this instrument. I have, therefore, executed this agreement that it may serve as evidence."

(Sd.) PARAM SINGH, with his own pen.

The stamp paper on which this agreement is written bears an endorsement to the effect that it was purchased by the appellant a few days before the date of agreement.

The appellant replied that the *ex parte* decree obtained on the 8th June 1861, the order obtained by him when objecting to the execution of Nathmal's decree, the dismissal of the suit brought against him by Nathmal, and the rejection of the respondent's objection when he took out execution of the decree of 1861, estopped the respondent from maintaining the suit, and that the claim, involving the supersession of the conditional sale-deed executed in 1856 and the decree of 1861, was barred by limitation. On the merits, the appellant pleaded that the deed of conditional sale had been executed for the consideration therein expressed, and he denied the execution of the agreement of 1856, and accounted for the stamp endorsement by asserting that in 1869, he had been attacked by Kesri, the brother-in-law of the respondent, and had been robbed of a bundle of papers from which a blank paper, bearing a stamp, might have been extracted and the agreement fabricated. The Subordinate Judge overruled the defences set up on points of law, and on the issues of fact, while he considered the appearance of the agreement suspicious, he considered the proof of its execution, on the whole, trustworthy, and apart from the agreement, adopting the reasons given by the Munsif in support of his order in April 1873, the Subordinate Judge declared he entertained no doubt that the deed of conditional sale, the foreclosure, and decree for possession, were obtained by collusion, and he pointed out that this was admitted by Azmat Ali, a witness, who had been summoned by the appellant. The Subordinate Judge, considering that both parties had been

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parties to a fraud, nevertheless held that the appellant ought not to obtain the benefit of the further fraud he had practised on the respondent, and, therefore, he passed a decree in favour of the respondent. In appeal, it is contended on the part of the appellant that the suit is not maintainable in that the respondent cannot be allowed to set up his own fraud, but is bound [409] thereby; that the decree of June, 1861, having become final, the suit is barred; that inasmuch as the claim involves the setting aside of the decree of 1861, it is barred by limitation: that the execution of the deed of conditional sale for consideration is proved: that the alleged agreement of 1856 is false and fabricated; and that the decree of 1861 was not obtained in collusion with the respondent.

Before entering on the question of law, it will be more convenient to determine the question of fact raised in the appeal. We see no reason to dissent from the conclusion at which the Subordinate Judge has arrived as to the facts of the case. * * * * * *

* * * * * *

On the facts, then, found by the Court below and by this Court, is the respondent entitled to relief? That the suit is not barred by limitation is clear. The cause of action alleged by the respondent is the possession obtained by the appellant in 1875. According to the averments of the respondent, no cause of action accrued to him until the appellant disavowed the trust, and proceeded to obtain possession of the property against the will of the respondent. The mere proceeding to keep alive the decree would not be a disavowal of the trust. The appellant seriously sought to execute his decree in 1872, and limitation ought not to be computed from an earlier date than that application; if the suit is to be regarded as a suit not merely for possession, but for a declaration that the conditional sale deed was not intended to pass the property, and that the decree should not operate to injure the right of the respondent, in which view of the suit, six years is the period prescribed; or if, by rejecting as surplusage the claim for the invalidation of the conditional sale deed, the suit be, as we think it should, a claim for possession, the period of limitation is 12 years, to be computed from the date on which possession was obtained in execution of the decree of 1861, which could not have happened till the Munsif's order was reversed by the Judge in 1873; consequently, in either view, the suit instituted in July 1875, was not barred by limitation.

We have next to determine whether, on the facts found, the respondent was entitled to maintain the suit. Four several issues [410] arise on this point. Is he estopped by the execution of the deed of conditional sale from asserting that it was executed, not to secure the repayment of a loan, but for the purpose of creating an apparent title in the appellant? Is he estopped by the decree obtained after foreclosure in 1861? Is he estopped by the judgment in the suit brought by his creditor against the respondent and the appellant? and, lastly: Is he estopped by the circumstance that he is obliged to have recourse to the Court for relief, by reason of his attempt to hinder, or defeat, the possible claim of a third party?

In this country where *ismfarzi* transactions are so common, and when they have been so commonly recognized by the Court, we should establish a dangerous precedent were we to rule that, under all circumstances, a party is bound by his deed, and concluded from showing the truth. That the respondent may show that nothing was due on the deed, that certainly, if he were defendant, he would not be estopped from showing the real truth of the transaction, we have authority in *Ram Saran Singh* v. *Musammat Ram Peary* (1), where the defendant, a widow,

(1) 13 M.I.A. 551.

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was allowed to prove, in answer to a claim brought by her brother on a deed of conditional sale, that the deed was concocted by her and her brother to defeat the claim of her husband's heirs. If the party to a deed is to be precluded from questioning his solemn act, much injustice would be wrought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced must be proportioned to the degree of care and intelligence which the natives of the country in practice bring to bear upon their transactions. What is ordinarily known in these provinces as a deed is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity, and good conscience require no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument: **[411]** but where the question arises between parties, or the representatives in interest of parties who, at time of the execution of the instrument, were aware of its intention and object, and who have not been induced to alter their position by its execution, we consider that justice, in this country, will be more surely obtained by allowing any party, whether he be plaintiff or defendant, to show the truth. We hold that the respondent is not estopped by the deed from showing the nature of the transaction.

In the precedent already cited, it was also ruled that a pleading by two defendants against the suit of another plaintiff cannot amount to an estoppel as between them, still less can it be held that a defendant is estopped by a plea which he does not raise, but which is raised by a co-defendant. The dismissal of the creditor's suit on the appellant's plea, does not then estop the respondent from questioning the truth of the plea.

Nor is the decree of 1861 a bar to the suit. The question now raised is whether or not the respondent suffered judgment to go by default in that suit on the understanding that the decree would not be executed without his consent, or, if executed, that the property would be restored to him. This neither was, nor could have been, determined in the former suit; consequently, the respondent is not estopped by the decree of 1861. But, if it be held that he is so far bound by the decree, that he cannot contend that the appellant was not entitled to possession in virtue of the mortgage and foreclosure, the respondent is, in our judgment, entitled to insist upon the agreement, and on the strength of it to recover back possession from the appellant, unless he is precluded by the plea which we have still to determine.

The doctrine that *in pari delicto potior est conditio possidentis*, or that the Court finding a man embarrassed by a deceit, to which he was himself a party, will not interfere to relieve him from the consequences. must not be accepted without qualification. The English Court of Exchequer in *Bowes* v. *Foster* (1) allowed a plaintiff to recover from the defendant goods which he had deposited with **[412]** the defendant, in order to defeat or hinder the claims of creditors who might sue out execution, although the plaintiff had, for the purpose of deceit, furnished the defendant with evidence of a sale by handing to him a priced invoice of the goods and a receipt for the price; the Court held that, inasmuch as in fact no sale had taken place, the plaintiff was entitled to recover. In the case before the

(1) 27 L. J., N. S., 262.

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Court, the respondent furnished the appellant with a deed of conditional sale which did not, by itself, operate to pass the property in the lands therein mentioned,the foreclosure made the sale absolute,the decree awarded possession, but had not the decree been executed, the property would have remained the property of the respondent; the parties, *ex-hypothesi*, did not intend that the property should pass, but that by the deed, foreclosure, and decree, a semblance of title should be created in the appellant. If this be so, the case before us does not appear distinguishable from *Bowes* v. *Foster* (1); but, if it be distinguishable, on the ground that by the deed, foreclosure, or decree, or by all of them, the property passed, then, it appears to us, the respondent is entitled to rely on the agreement. The respondent may then say, let it be granted that a conditional sale was executed in favor of the appellant, that a right of foreclosure was about to accrue to him. he promised me that if I consented to allow the foreclosure to proceed, and a decree in the subsequent suit to pass by default, he would not execute the decree, or if he did execute it, he would deliver possession to me. I accordingly neither opposed foreclosure, nor pleaded to the suit, and I now claim re-delivery of the property. It appears to us that, under such circumstances, the parties could not be held to be *in pari delicto*, and the respondent would be entitled to succeed.

We have arrived at this conclusion, not without considerable hesitation, and if the value of the property is sufficient, and the appellant desires it, we consider that leave to appeal to the Privy Council should be granted. We affirm the decree of the Court below, but, under the circumstances, we direct each party to bear his own costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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APPELLATE CIVIL.
1 A. 400 = 2 Ind. Jur. 66.

MAJOR-GENERAL SHOWERS (*Defendant*) *v.* SETH GOBIND DASS (*Plaintiff*). [28th May 1877.]

1 A. 400 = 2 Ind. Jur. 66.

1. *Act VIII of 1859, S. 248—Khalisa Mahal or Revenue paying land—Execution—Sale by Collector.*

Land granted "revenue free" for a few years, after which it would be "revenue paying," must, even when it is "revenue free," be considered as revenue paying land for the purposes of S. 240 of the C.P.C. Execution sales of such lands should, therefore, be conducted by the Collector and not by the Civil Courts.

2. *Irregularities in publication of Court Sale.*

Where it appeared that the place where the sale was to take place was not described with sufficient distinctness, and the proclamation was not made on the spot; *held*, that these were irregularities that rendered the Court Sale invalid.

The Civil Court having overruled the objection of the judgment-debtor that the land attached and advertised for sale by it at the instance of the decree-holders-respondents was forest land which formed a grant from Government under a deed describing the property as "Khalisa Mahal" subject to the payment of revenue after a term of years, and that under S. 248, Act VIII of 1859, the sale should be effected through the Collector, and having the sale effected, the judgment-debtor prayed that the sale might not be confirmed by reason of the irregularities in the

(1) 27 L. J., N. S., 262.

conditions of the sale. The Court disallowed the petition. The judgment-debtor appealed to the High Court.

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1 A. 400=2 Ind. Jur. 66.

JUDGMENT.

[402] We are disposed to hold that the irregularities in publishing and conducting the sale are such as to render it invalid.

The place where the sale was to take place was not described with sufficient distinctness, nor was proclamation made on the spot as required, and there is no reason why the requirements of the law in this respect should have been omitted. But we further hold that the sale should not have been conducted by the officer of the Civil Court, but should have been held by the Collector, the estate being land paying revenue to Government within the meaning of S. 248 of Act VIII of 1859.

The property is a jungle grant situated in the eastern Dun, which, at the time of the sale, had been granted to, and was in possession of General Showers. It was granted under the rules for such grants, which were subsequently formally embodied in the deed of 21st February 1877. Under the terms of the grant, no revenue was payable by the grantee for the first three years, but became payable for the fourth or following years. But because no revenue was payable at the time of actual sale, we cannot hold with the Judge that the estate was not a revenue paying estate within the meaning of the section.

The term "paying revenue" in S. 248 is used in contradistinction to "revenue free" and will apply to all lands known as "Khalisa." The Government treated this estate as such, for it is so described in para. XI of the deed of grant, and such lands have always been so regarded, as may be implied from para. 20 of the present rules, dated the 7th October 1876, for grant of waste lands. When the land granted on such terms as these is considered to be a mahal, as defined in S. 3, Cl. I, of Act XIX of 1873, and subject to all conditions attaching by law to such terms, the remission of revenue for a few years on the land will not alter its general character as **[403]** Khalisa, or revenue paying, the revenue still remains assessed. It often happens that Government remits the revenue of revenue-paying estates for several years, on various grounds, but the estates do not cease to be considered revenue-paying, so far as to be subject to the conditions attaching by law to such estates.

We decree the appeal with costs, and set aside the order of the Judge, and set aside the sale.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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MAY 28.
APPELLATE CIVIL.
1 A. 431=2 Ind. Jur. 146.

GIRDHARI AND OTHERS (*Plaintiffs*) *v.* SHEORAJ AND OTHERS (*Defendants*). [28th May 1877.]

1 A. 431=2 Ind. Jur. 146.

Redemption suit—Collective mortgage of lands situate in separate districts—Incidental questions—Regulation VII of 1825.

Where the representatives of the original mortgagors, who had made a collective mortgage of lands situated in the Mirzapur District and within the family domains of the Maharajah of Benares, (the latter being within the exclusive jurisdiction of Courts established under Reg. VII of 1825), sued for the redemption of the mortgage, so far as it concerned the lands situate in the Mirzapur District,

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held, that it was within the competency of the Mirzapur Court to decide incidentally, for the purposes of the suit, questions relating to mortgaged property held by the defendants in the family domains, the extent of it in their possession, and its profits, in order to make up the accounts of the entire mortgage, so as to ascertain if the entire mortgage debt has been satisfied, and if, therefore, the plaintiff has a right to recover the mortgaged property situated in Mirzapur.

JUDGMENT.

[431] The subject of the mortgage to which this suit refers is land situated in the district of Mirzapur, and land in par-**[432]**gana Bhadohi, in the family domains of the Maharaja of Benares, and Regulation VII of 1825 has provided a special jurisdiction for the trial of suits for land in these domains.

1 A. 431 = 2 Ind. Jur. 146.

This suit was brought in the Court of the Subordinate Judge of Mirzapur by all the mortgagors, or rather the parties who now represent the original mortgagors, for redemption of the entire property mortgaged, and authority was asked, under S. 13 of Act VIII of 1859, to try the suit in the Civil Court of Mirzapur in respect of the property situated in the family domains, but this was refused, as the High Court found that such authority could not be given in the existing state of the law.

Two of the plaintiffs who were only interested in the mortgage to the extent of the property in the family domains then withdrew from the suit, and the others proceeded with their claim to redeem the portion of the mortgaged property situated in Mirzapur, and they have obtained a decree from the Subordinate Judge for possession of the mortgaged property in Mirzapur on the basis of the satisfaction of the entire debt charged on the two properties.

The Judge, in appeal, has reversed the decree and dismissed the suit, holding that the trial will raise questions affecting property in the family domains in respect of which he has no jurisdiction, instancing in this view, and in the way of objections, the question whether the mortgagees were in possession of certain lands in Katehri (in the domains), and without which the accounts cannot be made up.

We do not consider that this objection to the trial of the suit is valid.

The plaintiffs were at liberty to forego, as they have done, suing for possession of the property situated in the family domains, and the suit as now brought is only for immoveable property in the district of Mirzapur: the suit does not seek to recover land in the domains, nor is there any claim raised in this suit of a nature exclusively cognizable by Courts established under Regulation VII of 1825. S 5 of Act VIII of 1859 gives the Mirzapur Court jurisdiction to entertain the suit in respect of the immoveable property in Mirzapur, and that jurisdiction could not be ousted be-**[433]**cause, in the course of the trial of the suit, it may be necessary incidentally to decide, for the purposes of the suit, questions relating to mortgaged property held by the defendants in the family domains, the extent of it in their possession, and its profits, in order to make up the accounts of the entire mortgage so as to ascertain if the entire mortgage-debt has been satisfied, and if, therefore, the plaintiff has a right to recover the mortgaged property situated in Mirzapur.

We reverse the decree of the lower appellate Court and remand the case, under S. 351, Act VIII of 1859, for trial on the merits.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

1877
JUNE 5.

APPELLATE CIVIL.

1 A. 440.

LUCHMAN RAI AND OTHERS (*Defendants*) *v.* AKBAR KHAN AND OTHERS (*Plaintiffs*). [5th June 1877.]

1 A. 440.

1. *Claims to cesses by Zemindars—How to be enquired into.*

Where Zemindars claim from their tenants various kinds of cesses on the ground of custom, (*a*) the existence of the custom as to each cess must be tried as a separate issue; (*b*) parol evidence given, generally, as to the existence of the custom must be tested by ascertaining the grounds on which the opinion of each witness is based.

2. *Evidence of custom.*

The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts, that the custom had been enforced.

3. *Custom to be definite.*

A custom, to be good, must be definite.

[2—Ap., 10 A. 585 (586).**]**

The plaintiffs, Zemindars, sued for a declaration of their ancient rights, as against all the tenants of a certain village, to appropriate all trees of spontaneous growth and the fruits of other trees planted by the tenants; and to receive as manorial tribute two ploughs annually, as also an offering of certain quantity of poppy-seed, hemp, bhusa, cowdung cakes and other farm produce on the occasion of the marriage of the lower-caste-tenant, with a further right to levy as dues from the said tenants a proportionate quantity of sugarcane juice prepared by each sugar manufactory, and the presentation of a certain number of sticks of sugarcane on a certain day in each year to the plaintiffs. The lower Courts decreed the suit on vague and general parol evidence as to the existence of the said custom.

ORDER OF REMAND.

[441] TURNER, J.—It is to be regretted that the Courts below have not inquired more fully before affirming the existence of customs of which some, although no doubt they at one time obtained in certain parts of the country, appertained to the feudal system and are disappearing with that system.

In such cases it is peculiarly incumbent on the Courts to try the existence of the custom regarding each cess as a separate issue, and to test the parol evidence given generally as to the existence of the custom by ascertaining on what grounds the opinion of each witness is based. The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances in which the alleged custom has been acted upon,and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced.

[442] It should also have been specifically determined on what castes or classes of tenants custom imposes a cess claimed, if the existence of

1877 JUNE 5. — APPELLATE CIVIL. —

the custom is proved. Again, a custom to be good must be definite, the size of the pot of sugar and the basket of cow dung is left uncertain, as are also the times of rendering these alleged dues.

That the claims may be more thoroughly tried, we set aside the decrees of both Courts, and direct the Court of first instance after framing specific issues to re-try the suit. The costs incurred hitherto will abide and follow the result.

1 A. 440.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

1877 JUNE 7. — APPELLATE CIVIL. —

DALIP SINGH (*Plaintiff*) *v.* DURGA PRASAD (*Defendant*).

[7th June 1877.]

1 A. 442.

1. *Registration of receipts—Act VIII of 1871 (Registration).*

A receipt for payments made towards a bond, bypothecating immoveable property, must be registered under S. 17, Act VIII of 1871.

2. *Inadmissibility of unregistered receipt—Registration Act, S. 49.*

An unregistered receipt is not admissible in evidence to prove the payment, under S. 49, Registration Act.

3. *Admissibility of parol evidence, though receipt inadmissible.*

In such a case, parol evidence is nevertheless admissible—Evidence Act, S. 19 (*e*).

[1—**Diss.**, 3 M. 53, 9 A. 108 (**F.B.**); **Not F.**, 4 B. 235; **F.**, 6 A. 335; **R.**, 24 B. 609, 100 P.R. 1902.]

In a suit to recover a sum of money alleged to be due on a bond hypothecating immoveable property, by sale of the said property, the defendant produced a receipt for a portion of the amount alleged to have been signed by the plaintiff and claimed credit to that extent. The first Court finding the receipt to be genuine allowed the set-off claimed and decreed for the balance. The lower appellate Court reversed the decision of the Munsif and decreed the suit in full. The defendants preferred a special appeal to the High Court.

ORDER OF REMAND.

[443] PEARSON, J.—We are compelled to concur in the ruling of the lower appellate Court that the receipt for Rs. 477 should have been registered, and not having been registered, is inadmissible as evidence of the payment. But the lower appellate Court's further ruling that the oral evidence of the payment adduced by the defendant is inadmissible is opposed to illustration (*e*), S. 91 of the Indian Evidence Act. We therefore direct the lower appellate Court, under S. 351 of Act VIII of 1859, to find upon the oral evidence whether the alleged payment is proved to have been made, and to submit its finding when the parties may take objections within a week.

The Subordinate Judge having returned a finding against the defendant on the parol evidence, the Court passed the following final judgment.

JUDGMENT.

[444] No objection being taken to the finding of the lower appellate Court on the point referred to it, we accept that finding and dismiss the appeal with costs.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

1877
JUNE 9.

On Appeal from the Court of the Commissioner of Seetapore in Oudh.

PRIVY COUNCIL.

THAKOOR HURDEO BUX *v.* THAKOOR JAWAHIR SINGH.

[9th June 1877.]

3 Cal. 522=3 Suth. P.C.J. 427=3 Saraswati's P.C.J. 704.

3 Suth. P.C. J. 427=3 Cal. 522=3 Saraswati's P.C.J. 704.

1. *Privy Council Appeals Act—Construction.*

The words "Court of highest civil jurisdiction in any Province" in Act II of 1863, have reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases; and a Subordinate Court under the Oudh Civil Courts Act (XXXII of 1871) cannot admit an appeal to the Privy Council even where its decision is final.

Note.—In the Privy Council Appeals Act of 1874, the words "Court of final appellate jurisdiction" were substituted.

2. *Talukdar under Act I of 1869 (The Oudh Estates Act).*

A person, who has been registered as a talukdar under Act I of 1869 and has thereby acquired a talukdary right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised in the taluk for another and be liable to account accordingly. [5 I. A. 198, *Appr.*]

[R., 14 C. 493 (**P.C.**), 5 Bom. L.R. 983 (990); **D.**, 17 C. 311 (**P.C.**).**]**

JUDGMENT.

[427] SIR BARNES PEACOCK.—This is an appeal from a decree of the Commissioner of Seetapore, in Oudh, dated the 10th June 1872, affirming a decree of the Settlement Officer of that district, dated the 21st December 1871.

When the appeal was called on for hearing, Mr. Doyne, the learned Counsel for the respondent, took a preliminary objection, and contended that the Commissioner had no legal authority to admit the appeal. In support of his contention, he referred to the Oudh Civil Courts Act (No. XXXII of 1871), and to Act No. II of 1863. By S. 4 of the former Act five grades of Civil Courts in the Province of Oudh were established, of which that of the Judicial Commissioner was the highest. By S. 15, cl. 3 of the same Act, an appeal from a decree of the Commissioner, when an appeal is allowed by law, lies to the Judicial Commissioner; but by S. 4, it was enacted that if the Court of First Appeal confirms the decision of the Court of First Instance, such decision shall be final.

By S. 1 of Act II of 1863, which was a general Act to regulate the admission of appeals to Her Majesty in Council from the Courts in the non-regulation provinces in India, the right of appeal was limited to final judgments, decrees, or orders, made on appeal or revision by the Court of highest civil jurisdiction.

It was contended on the part of the appellant that, as the judgment of the Commissioner affirming the judgment of the Settlement Officer was final, and no appeal lay from it to any Civil Court of higher jurisdiction, the Court of the Commissioner was, as regards this case, the Court of highest civil jurisdiction in the province. It should be remarked that, in the Privy Council Appeals Act of **[428]** 1874, which was passed after the appeal in the present case was allowed, and which repealed Act

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No. II of 1863, the words "Court of Final Appellate Jurisdiction" are used in place of the words "Court of Highest Civil Jurisdiction."

Their Lordships are of opinion that the Court of the Commissioner was not in this case the Court of Highest Civil Jurisdiction in the province within the meaning of Act II of 1863, notwithstanding the decision of the Commissioner was final. If the Commissioner had reversed the decree of the Settlement Officer, his decision would not have been final, but an appeal might have been preferred to a higher Court of Civil Jurisdiction in the province—*viz.*, to that of the Judicial Commissioner.

In their Lordships' opinion, the words "Court of Highest Civil Jurisdiction in any province," in Act II of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. If the Court of the Commissioner was the Court of Highest Civil Jurisdiction in the province, within the meaning of that section, because an appeal from his decision in the particular case did not lie to a higher Court in the province, a Court of Small Causes would be equally a Court of Highest Civil Jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal.

When the preliminary objection was made their Lordships recommended the appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*, and that course was assented to by the learned Counsel on both sides and adopted.

Under the special leave a petition of appeal has now been duly lodged, and referred to the Judicial Committee.

The suit was brought by Hurdeo Bux, the appellant, and Purbut Singh against the present respondent. Purbut Singh has not joined in this appeal.

The plaintiffs in their plaint stated that during the King's time the talookas of Bassaindeeh and Sijaolia formed one talooka, and that the fathers of the parties were seven brothers descended from a common ancestor; that four of them separated and partitioned talooka Sijaolia from Bassaindeeh; that talooka Bassaindeeh formed the share of Havanchal Singh, father of Hurdeo Bux, plaintiff, Fateh Singh, father of Purbut Singh, plaintiff; and Bhawani Singh, father of Jawahar Singh, the defendant; that the plaintiffs' fathers, being seniors, used to make collections from the estate and to manage household expenses, including those incurred in marriage and funeral ceremonies; that the father of the defendant treated them as his superiors, and never interfered in the affairs of the estate; that defendant's father was junior, and was treated by the plaintiffs' fathers as if he were their own son; that they (the plaintiffs' fathers) got the kubooleut executed in his name, with a view to avoid inconvenience to themselves, and to connect him with offices, but they all lived in commensality, and defrayed their expenses out of the income of the said talooka; that after the death of the fathers of the parties the old practice prevailed between them up to date; that they had been living together and their expenses paid out of the profits of the same estate; that the plaintiffs had continued to enjoy the possession of the talooka while the defendant had been the kubooleutdar; that as the defendant was kubooleutdar the sunnud had been granted to him; that for one or two months, the defendant had, under the sunnud, given rise to enmity, and intended to dispossess them, and put a stop to the profits enjoyed by them

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for the time past, and wished to deprive the real owners of their right, while the said sunnud did not contemplate to destroy the rights of the plaintiffs; that in the arbitration case of Bisheshur Bux and Gunga Bux, talookdars of Sorara, the defendant had, in his own deposition, stated that in case of his (defendant's) **[429]** brothers claiming their shares he would not decline to give them their shares; that the defendant had altogether forgotten this written admission. Wherefore the plaintiffs prayed that, after proper enquiry, orders be passed that they be not deprived of their right.

In their written statement dated the 6th October 1865, at p. 32 of the Record, they stated that they had been compelled, by an order of the Criminal Court, dated the 15th September 1865, to give up possession, but that previously to that time they had held continuous possession. They prayed that under the conditions laid down in the sunnud, in cl. 2, Circular 2 of 1861, the Government of India, letter No. 23, dated the 19th October 1859; and Circular No. 6 of 19th June 1861, justice be done to them, and that they might not be deprived of their right.

The defendant, in his written statement, alleged that the talooka in dispute was the solely acquired property of his ancestors, and particularly of his father; that there had all along been only one kubooleut; that he had held possession without any one as co-sharer; and that he of his own free-will had been assisting his near relations with food, etc., without their having any right; and that a summary settlement had been made with, and a Government sunnud granted to him alone (see Record, p. 41).

The Settlement Officer did not enter into the question whether the property was the self-acquired property of the defendant's father or was the joint ancestral property of the three brothers mentioned in the plaint, but he dismissed the suit upon the sole ground that the defendant was protected by Act No. I of 1869. He stated that he considered himself bound by the opinion of the Financial Commissioner in the late Supreme Court of Landed Estates Jurisdiction, in which, upon a petition presented by the plaintiff relating to another matter, the Financial Commissioner stated, "That the defendant was protected by his sunnud; that the plaintiffs could get nothing, and that it was perfectly useless their continuing litigation" (Record, pp. 95, 96).

The plaintiff Hurdeo Bux appealed from that decision to the Commissioner, who, without giving any reasons, dismissed the appeal, stating that the suit had been dismissed in accordance with the invariable practice of the Courts since re-occupation. (Record, p. 100). Subsequently, upon an application by the plaintiff to the same Commissioner for a certificate that the case was a fit one for appeal to the Privy Council, the Commissioner made the following remarks:—

"I have had this case before me several times since the receipt of the files, and I have consulted the Judicial Commissioner on the points as to which I have felt doubts.

"The case is before me on an application from the appellant for a certificate that it is a fit suit for appeal to the Privy Council. I have no hesitation in granting this certificate, for, though the order of this Court passed in appeal, and, which it is now proposed to contest, is one so obviously in conformity with the previous practice of the highest Courts of Appeal in this province, that it hardly admitted of dispute, and did not require to be supported by any lengthy argument at the time it was written, since that time several cases have been before their Lordships, the orders passed in which have considerably modified the view of the law applying to talookas in Oudh previously taken by the Courts of the

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Financial and Judicial Commissioners; and, though I do not find any case so clearly in point as to require me to hear an application for review, a course which has been suggested by the appellant, the case is clearly one in which he should be allowed every facility for bringing it before a higher tribunal.

"The certificate will, therefore, be granted, and this Order will be filed with the Record."

The suit was commenced long before Act I of 1869 was passed, *viz.*, as far back as the 28th August 1865, but the judgment of the Settlement Officer, the Court of First Instance, was not pronounced for upwards of six years afterwards. [430] Some of the proceedings which were taken in the meantime are detailed in the judgment of the Settlement Officer, and well might he describe them as "most extraordinary!"

The lands to which the suit relates were included in that part of Lord Canning's Proclamation of March 1858, which declared that the proprietary right in the soil was confiscated to the British Government which would dispose of that right in such manner as to it might seem fitting.

By the Government letter of the 10th October 1859, set out in the 1st Schedule to Act I of 1869, it was declared that every talookdar, with whom a summary settlement had been made since the re-occupation of the Province, has thereby acquired a permanent hereditary and transferable proprietary right in the talooka for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the talooka.

By S. 3 the Governor-General in Council desired that the Chief Commissioner of Oudh should have ready a list of the talookdars upon whom a permanent proprietary right had then been conferred.

Previously to that letter, *viz.*, on the 24th April 1858, a summary settlement of the lands had been made with the defendant. He was consequently included in the list of talookdars, and a sunnud was granted to him. After the passing of Act I of 1869 he was also registered in List No. 1 under Act No. I of 1869, S. 8, and also in List No. 5 (Oudh "Government Gazette," August 7th, 1869).

The order for the summary settlement with the defendant was made by Colonel Barrow, the then Special Commissioner. The defendant, in his application for the summary settlement, stated that he had no partner other than the plaintiff Hurdeo Bux.

On the 4th April 1866, pending the investigation of the case, the then Officiating Settlement Officer, Mr. Wood, the Court of First Instance, wrote to Colonel Barrow, the Commissioner of the Lucknow Division, a letter, of which the following is a copy (p. 85):—

"SIR,

"You doubtless recollect Thakoor Jawahar Singh, of Bassadhee, who was rewarded for his loyalty during the late disturbances.

"2. I find that you, as Special Revenue Commissioner, on re-occupation directed that the Thakoor was to be admitted to engage for his talooka.

"3. In statement A, the Thakoor admitted to you that his cousin, Hurdeo Bux, was his sole co-sharer. Notwithstanding this admission, you directed that settlement was to be made with Jawahar Singh. Do you recollect whether you intended such settlement with him alone, as Sadur Malgoozar, as a matter of convenience,* and that Hurdeo Bux, the acknowledged co-sharer, was to be recognized at this settlement according to the nature of the rights?

"4. An early answer will oblige."

* Circular 6 of 1862, par. 6.

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To that letter Colonel Barrow, on the 6th April 1866, sent the following answer : —

" SIR.

" Referring to your letter without No., dated 4th instant, in the case of Thakoor Jawahar Singh, of Bassadbee. I have the honor to request you will be so good as to forward to me the Summary Settlement file with Special and Chief Commissioners' orders thereon, as it will enable me better to remember the circumstances, if I see what was written.

"2. It is within my recollection that settlement was made solely with Jawahar Singh, because he had given active assistance to Government in 1858."

Subsequently, on the 25th September 1866, Colonel Barrow wrote to the Settlement Officer as follows (p. 86):—

"SIR,

"I have now received the vernacular papers of the summary settlement of the estate of Jawahar Singh, of Bassadbee, and regret they do not afford much information.

"2. Jawahar Singh was one of those who early tendered allegiance after the rebellion, and afforded active assistance to the British Government. I have little doubt but that, in consequence of this, the estate was conferred on his name alone, and it was the meaning and intention of the settlement of 1858, not only to have but one head in each estate, but that those estates should remain for ever undivided. This latter condition, as you are aware, was departed from under the orders of the Governor-**[431]** General making all estates heritable and transferable, under which order talookdars can now divide and will away their villages as they like. It is a question, though, whether any one can or not be admitted to share in a talook.

"3. The policy of the summary settlement was to create and maintain large and undivided estates, a system, I believe myself, admirably suited to this country, but, as that is no longer possible, there can be no reason why sharers should be barred, and provision ought to have been made for their cases by those who departed from one of the principles of the settlement of 1858-59."

Upon the receipt of that letter, the Settlement Officer being, as he stated, at a loss how to proceed, recorded a memorandum dated 23rd October 1866, and forwarded it on the same day to the Commissioner of the Seetapore Division for orders. The following is a copy of the memorandum (Record p. 87) :—

" At length I have received Colonel Barrow's reply to my letter of the 4th April last. The delay arose from his not having received the Summary Settlement file from the Financial Commissioner's Office.

" As I am at a loss how to proceed with this case, I submit the proceedings for the orders of the Commissioner, as to whether such a claim is cognisable or not under existing circulars.

" I must state that, in the case marginally noted,* it was proved beyond a doubt that a division of the talooka was effected about twenty years prior to annexation, when four of the seven brothers held their share jointly in common, and three held their share in like manner. The Commissioner will see *that the parties to the suit had lived together as an undivided family up to last year*, when, through an accident (the Sadar Monsarim's Report, under Circular 37 of 1864), a dispute broke out, and Jawahar Singh broke off his connection with his cousins.

" I beg to refer the Commissioner to the vernacular papers filed by the plaintiffs, including an attested copy of Jawahar Singh's statement as an arbitrator in the case marginally noted,† wherein he admitted the plaintiffs' right to separate their shares if they desired it.

" As I am seeking the Commissioner's instructions in the case, I withhold the expression of my opinion on the merits of the claim.

" *October* 23*rd*, 1866."

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* *Darrao Singh, etc.* v. *Khurram Singh.*
† *Bisheshur Bux* v. *Gunga Bux.*

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Three months after the date of the memorandum the Commissioner sent it to the Financial Commissioner in a letter dated 22nd January 1867, as follows (p. 88) :—

"SIR,

"I have the honour to submit for orders a memorandum, dated 23rd October 1866, with annexures from the Officiating Settlement Officer, Seetapur, respecting the claim of Hurdeo Bux to a share of Talooka Bassadhee, for which Jawahar Singh holds a sunnud.

"2. Some of the villages held by Jawahar Singh under the sunnud are ancestral, some acquired, while others again, having been decreed to Jawahar Singh at regular settlement, are not covered by the sunnud. Jawahar Singh admitted before Colonel Barrow, on the 21th April 1858, that his cousin, Hurdeo Bux, was his sharer. This admission was made on the Summary Settlement Statement, and manifestly referred to the whole estate, and not as Jawahar Singh now pleads, to a single village. Further, in the case of Gungt Bux and Bisheshur Bux, Jawahar Singh deposed, on the 7th July 1859, that it was the custom in his family to allow partition, if any sharer desired it, and several partitions were made prior to annexation, showing that this has erroneously been considered a talook.

"3. The Settlement Officer made a reference in this case to Colonel Barrow when Commissioner of Lucknow (*vide* his replies, No. 597 of the 6th April 1866, and No. 1913 of 25th September 1866), which show that Jawahar Singh has some special claims, as having been one of the first to tender his allegiance, and as having rendered active assistance to Government; but, as the Settlement Statement of April 1858 contains a distinct admission by Jawahar Singh that Hurdeo Bux was his sharer, the question arises (*vide* paragraph 6 of Settlement Circular No. 6 of 1862) whether the settlement in the name of Jawahar Singh only and the grant of a sunnud to him bars the claim of Hurdeo Bux to a share? I recollect that a case was referred to Government in 1862, in which it was held that a settlement had been made with a Ranee as Sudder Malgoozar only, but the particulars may have differed in some respects."

To that letter the Officiating Financial Commissioner on the 26th January in the same year sent the following reply (p. 90) :—

[432] "SIR,

"In reply to your No. 31 of the 22nd instant, I have the honour to state that the proceedings show that Hurdeo Bux got maintenance in the Nawabee; but nothing on the record tends to distinctly prove *that he had proprietorship over any particular portion of this estate in the Nawabee*, but, at present, it will not be necessary to enter on the subject of what Hurdeo Bux should get as a relative, the Chief Commissioner having under consideration new rules that will provide for talookdars' relatives who are barred by the sunnud. In the meantime, it would not, perhaps, be a bad plan to give the management of the villages—to the jumma of which Jawahar Singh objects—to Hurdeo Bux, if he accepts the assignment, as he would appear to do.

"2. The general question between the two must remain pending in the Settlement Court until the issue of the new rules. All proceedings are, accordingly, returned."

In the succeeding April the Settlement Officer again applied for instructions, and the Financial Commissioner replied that "no orders could be passed until the measures then under consideration in regard to the claims of co-sharers in talookas should be completed." (See judgment of Settlement Officer, p. 94.)

In consequence of these orders the proceedings appear to have been suspended until the 13th December 1871, when the plaintiffs presented a petition praying for final orders. In the meantime Act I of 1869 had been passed. The then Settlement Officer took up the case, and on the 21st December 1871 held, as before stated, that the plaintiffs' claim was barred by that Act.

Their Lordships cannot help remarking upon the irregularity of many of the above proceedings. They cannot attach any weight to Colonel Barrow's recollection to which he refers in his letter of the 6th April 1866. If any information from Colonel Barrow was considered necessary he

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ought to have been examined as a witness. The Settlement Officer who was acting as a Judge ought not to have written to him to know what his recollection was upon the subject of the summary settlement. His answer was not evidence, and cannot, any more than the opinion expressed in his letter on the 25th September 1866, be properly used in forming a judicial opinion on the case. Indeed, Colonel Barrow does not appear to have always entertained the opinion that the settlement was made with Jawahar Singh for his benefit alone. for in his Minute, dated 11th April 1868 (Record, p. 115, and see p. 193), he says:—

"I have been much troubled by this case in many ways, and Jawahar Singh, by his bad faith with his relation, *who had lived with him as an undivided family in the Nawabee*, is only leading to his own discomfiture. I would have him look to the summary settlement which was made with him and Hurdeo Bux. *Perchance that may yet be carried out.*"

Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavour to form their opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments or for instructions or orders directing them as to the course which they, as Judges, ought to pursue. As properly remarked by the Chief Commissioner in his Circular No. 6. p. 39: "The Courts are open to all and must be guided by their own rules."

Colonel Barrow had no authority to stay until the issue of new rules the proceedings then pending judicially before the Settlement Officer. It does not appear whether new rules were ever issued. The Settlement Officer in his judgment treats the measures referred to by the Financial Commissioner as having acquired the force of law by Act I of 1869.

If the Settlement Officer had acted at once upon his own judgment, instead of referring for instructions or orders, the probability is that his judgment would have been given before Act I of 1869 was passed, and in that case he might have come to a different conclusion.

Be that as it may, their Lordships must deal with the case as they now find it.

The question is: Is the plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. I of 1869?

[433] In support of the appeal the case of *Thookarain Sookraj Koowar* v. *The Government and others*, 14 Moore's Indian Appeals, p. 112,* was referred to.

In that case the plaintiff's husband, the younger branch of the great Oudh family of Bhinga, had up to the time of the annexation of Oudh been in the undisturbed and absolute possession of an estate called Deotaha, which had been united in the time of the native Government with the large talook of Bhinga, of which the Rajah of Bhinga, the representative of the elder branch of the family, was the talookdar, the plaintiff's husband paying to the talookdar his proportion of the jumma assessed upon the whole talooka.

Upon the making of the summary settlement in 1858-59, after the suppression of the Mutiny, the plaintiff was about to apply to the British Government for a summary settlement of the Mehal which belonged to her husband, and which had descended to her. She was, however, dissuaded by the Rajah of Bhinga from so doing, he fully acknowledging in writing her right, and suggesting that, as she was old, she had better leave the protection of her interest to him, and pledged himself that her

* 3 Suth. P.C.J. 1.

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possession of the mehal should be respected and safe. The summary settlement was accordingly made with him alone. Subsequently one-half of the Rajah's estates was confiscated to Government in consequence of the discovery of some concealed guns, whereupon he pointed out for confiscation the entire mehal of the appellant, as part of the one-half of his estates, and the plaintiff's estate called Deotaha was taken by Government, and the greater part of it made over to Oudh loyalists as a reward for good services.

It was contended that the summary settlement and the Government letter of the 10th October 1859 constituted the talookdar the absolute owner of the whole estate, including the appellant's estate, Deotaha, and consequently that it passed to Government under the confiscation against him. It was, however, held by the Judicial Committee that the settlement and letter had no such effect.

In delivering judgment Lord Justice James, speaking of the Government letter of the 10th October 1859, said (p. 127): "In English language it gave the registered talookdar the absolutely legal title as against the State and against adverse claimants to the talookdary; but it did not relieve the talookdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the appellant was the acknowledged *cestui que trust* of the registered talookdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered. It would be a scandal to any legislation if it arbitrarily, and without any assignable reason, swept away such rights, and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the laws or regulations of Government Acts in force in Oudh; and that the cruel wrong of which this lady has been the victim is due to the misapprehension of the law by the Commissioner. It is almost superfluous to add that the lady being clearly, as she was, the equitable owner, the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."

An under proprietary right being the interest to which the appellant was entitled at the time of the annexation of Oudh was, therefore, awarded to her, notwithstanding the summary settlement and the Government letter.

In that case there was a written agreement by the talookdar prior to the summary settlement to respect the rights of the widow if she would allow him to obtain the summary settlement. In the present case, however, there was no written agreement by the talookdar prior to his obtaining the summary settlement, but merely a representation by him that he had no partner except the plaintiff.

[434] In the case of the widow of *Shunkur Sahai* v. *Rajah Kashi Pershad*, decided in the Privy Council, 29th July 1873,* there was also no written agreement signed by the talookdar, but merely a representation made by him at the time of his applying for a summary settlement, followed, apparently, by other admissions. In that case the widow of Shunkur Sahai was entitled as co-partner with Rajah Kashi Pershad to one-third share in seven villages. The summary settlement of 1858 was made with the Rajah as talookdar of twenty-six villages, including the seven in which the plaintiff was interested. In his application for the

* 3 Suth. P.C.J. 4.

settlement he stated that in 1264 Fuslee the summary settlement was made as to the seven villages in partnership with both him and the widow at one-third as the share of the widow and two-thirds for himself. (See Record on that case, p. 45.) In the settlement proceedings it was ordered that the settlement of the seven villages with others should be made with the Rajah as talookdar, and that the widow should be recorded as a co-partner. The settlement was accordingly made with the Rajah alone, and he alone engaged for the revenue. (Same Record, pp. 46 and 47.) The sunnud of the talookdary, including the seven villages, was under the letter of 10th October 1859 granted to the Rajah alone. The Rajah disputed the widow's claim, and she sued for proprietary and also for under-proprietary rights. It was held by the Court of First Instance that her suit for the former was barred, by the sunnud being in the name of Rajah Kashi Pershad only; and that she could not recover under-proprietary rights because any title she might have had must have been to proprietary rights. It was held by the Financial Commissioner that the widow was entitled to one-third of the profits of the seven villages when the annual accounts should be made up. Upon appeal to Her Majesty in Council it was held by the Judicial Committee that there was ground for holding that the summary settlement and the subsequent order of 1859 conferred talookdary rights on the widow. but that she was entitled to one-third share of the profits of the seven villages.

That case so closely resembles the present in many particulars, and the remarks of the Judicial Committee are so applicable to it, that their Lordships will read an extract from the Judgment which does not appear to have been yet reported. They say :—

"The construction which their Lordships would put upon the words 'and that the name of Shunkur Sahai's widow be recorded as a share-holder' is not that the Settlement Officer gave, or intended to give, the widow the right of making a summary settlement as talookdar but simply desired to place on record for her benefit her admitted beneficial interest in some and some only of the villages which made up the settled talook."—Printed Judgment, p. 13.

* * * * * *

"Mr. Capper seems to have admitted as to the seven villages that though the appellant had not been in independent possession of one-third of the collections, yet that the Rajah might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit because her agent had failed to produce a deed in writing so binding the talookdar. Colonel Barrow, however, appears to have held that the admission of the Rajah at the time of the summary settlement and on other occasions, the former being in the nature of an admission on record, were equivalent to such a deed, and that, accordingly, the relation of trustee and *cestui que trust* having so to speak been established between them, she was entitled to one-third share of the profits of the villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

This case is, therefore, an authority for the proposition that a person who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talookdaree right in the whole property, may, nevertheless, have made himself a **[435]** trustee of a portion of the beneficial interest in lands comprised within the talook for another, and be liable to account accordingly.

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In that case the *cestui que trust* was a stranger. In this case the plaintiffs claimed as persons constituting with the defendant a joint Hindoo family.

It appears that the respondent in his application for a summary settlement in the case now under consideration stated that there was no partner of his other than Hurdeo Bux (p. 6), but he said nothing as to Purbut Singh.

On the 22nd March 1866 (Record pp. 78 and 79), the plaintiff deposed that he, Purbut Sing, and the respondent all lived together *and had everything in common up to January then last*, which was nearly eight years after the date of the summary settlement, and more than six from the date of the sunnud.

Their Lordships are of opinion that, up to the time of Lord Canning's proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the petitioner, and Purbut Singh, and the defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case on the 8th July 1859, that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Purbut Sing, who were his partners, should claim they could get their shares divided. He said, "They at present live with me, and receive food and clothing." It does not appear clearly from the latter words whether the estate was held as joint family property or whether the defendant merely made an allowance to the plaintiffs.

The defendant in his deposition deposed that his statement made at the time of the summary settlement referred to Mouzah Gungoa only (p. 83). But that seems to be at variance with the statement A, p. 6 of the Record, which refers to the eighty-two villages mentioned in column 3.

The Lower Courts appear to have decided the case merely upon the ground that the defendant was protected by the sunnud, without adverting to S. 15 of Act I of 1869, or enquiring whether, notwithstanding the summary settlement, the sunnud, and the statute, the plaintiffs or the appellant had, either before or after the passing of Act I of 1869, acquired or become entitled to a beneficial interest in any part of the property.

Their Lordships are of opinion that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question. They do not, on the materials before them, feel competent to decide it. The defendant's sunnud is not on the record. They have no evidence of all the circumstances under which the summary settlement was made, nor of those under which the sunnud was granted, nor of what was done with respect to it or the property comprised in it before the registration of the defendant under Act I of 1869.

Their Lordships will, therefore, humbly advise Her Majesty that the Commissioner may be directed to try or to refer to the Settlement Officer for trial the following issue, namely, whether the respondent has in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and sunnud, or any and what part thereof, or the rents and profits thereof, or any and what part thereof, in trust for the appellant and Pertab Singh, or either and which of them; that either party be at liberty to adduce such evidence upon the trial of that issue as he may be advised, and that the finding upon such issue, together with a translation of any additional evidence which may be adduced, be forwarded to the Registrar of the Privy Council, in order to enable the Judicial Committee to report to Her Majesty their opinion upon this appeal.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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MUHAMMAD EWAZ AND OTHERS (*Plaintiffs*) *v.* BIRJ LAL AND ANOTHER (*Defendants*). [13th June 1877.]

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1 A. 465 = 3 Suth. P.C.J. 433 = 4 I.A. 166 = 3 Saraswati's P.C.J. 738.

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1 A. 465 = 3 Suth.P.C.J. 438 = 4 I.A. 166 = 3 Saraswati's P.C.J. 738.

1. *Registration Act, VIII of 1871, S.* —*Construction.*

The words of the section, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed, which purports to be executed by several persons, if any one of these persons deny the execution or appears to be under any disability; such a construction, however, would cause great difficulty and injustice, which it cannot be supposed the Legislature contemplated; and would be inconsistent with the language and tenor of the rest of the Act. The words of the section, must, therefore, be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons, who deny the execution of the deed, and *quoad* any persons, who appear to be a minor, an idiot or a lunatic: There appear to be no reasons for extending the clause further than this, so as to destroy the operation of the deed as regards those, who admit the execution, and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso to the 23rd section of the Act shows that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it.

2. *Improper registration—Effect of.*

The fact that some of the provisions of the Registration Act have not been complied with, does not render the registration of a document invalid.

15 B.L.R. 2 228 = I.A. 210 = 24 W.R. 75—*R.* and *Appr.*

[1—Appl., 5 A. 599 = 3 A.W.N. 155; **R.**, 8 C. 597 (602) (**F.B.**), 26 A. 57 (59) = 23 A.W.N. 195; **2—Appl.**, 13 B. 449 (457), 18 C. 556 (563) (**F.B.**), 23 M. 580 (582); **R.**, 6 B. 96 (100), 4 A. 384, 1 C.P.L.R. 11 (12), 11 A. 319 (327), 18 M. 364 (366), 21 A. 281 (284) (**F.B.**) = 19 A.W.N. 59, 6 C.W.N. 329; **D.**, 7 A. 590, 23 A. 233 (**P.C.**), 5 C.L.J. 188.]

[This decision reverses the decision in *Baijnath* v. *Iradat*, 7 N.W.P H.C.R. 185.]

JUDGMENT.

[467] SIR MONTAGUE E. SMITH.—This is a suit brought by the appellants, the sons and heirs of Shere Muhammad, the vendee under a deed of sale which on the face of it purports to have been made by three persons, Mubarak Jan, and her two sons, Hyat Muhammad and Salamatulla. The sale was of certain shares in two mauzas, the shares which each held not being specified. It must be taken, however, on this appeal, that although the amount of the shares to which each of the parties was entitled is not yet ascertained, the shares were held in such a manner that each might separately dispose of his own shares. The respondents, who are purchasers under a subsequent deed of sale, and who impeach the deed of sale to Shere Muhammad, contend that the last mentioned deed cannot be read in evidence because it was not properly registered. The deed has been in point of fact registered, and it lies upon the respondents, who impeach that registration, to show the facts which invalidate it. They have not proved that the shares were held jointly, nor does it appear that that point was made in either of the appeals below.

The Subordinate Judge of Bareilly and the Judge of Bareilly to whom the case went from the Subordinate Judge on appeal, found that the mother had not executed the deed, but that the two sons had done so,

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and a decree was given by the Subordinate Judge, which was affirmed by the Judge, in these terms: "That a decree be given to the plaintiff for the completion of the sale [468] deed, dated 14th January, 1874, to the extent of the rights of Hyat Muhammad and Salamatulla, defendants, in the shares of mauzas Tah and Kashinpur Maupur against the said defendants and the vendees, and the claim for possession of the said shares, and for the rights of Musammat Mubarack Jan, be dismissed." That decree may be taken to be a declaration that the appellants, as the heirs of the vendee, are entitled to the rights, whatever they were, of Hyat Muhammad and Salamatulla in these mauzas. The decree goes no further, it refuses to decree possession; and, from the reasons given by the Judge for his decree, it would seem that the amount of the shares to which each was entitled had not been proved before him.

From these judgments there was a special appeal to the High Court, and the only question upon which the High Court decided, and which alone their Lordships think it material to consider, is that of registration. The High Court came to the conclusion that the registration of the deed of sale to Shere Muhammad was null, because the requisites of the Registration Act had not been complied with.

It appears that the deed was brought to the Registrar on the 15th January; the vendors did not attend, and it became necessary to summon them. The two sons appeared on the following day, and admitted their own execution, but denied that of their mother. The deed purports to have been executed by the two sons, each in his own handwriting, and by the mother, Musammat Mubarak Jan, by the hand of Hyat Muhammad. The sons admitted their own signatures and execution, but stated that their mother had not assented to the sale. The Sub-Registrar made the endorsements which are found upon the deed, and which consist of three separate paragraphs. The first endorsement was made on the 15th January, the day on which the deed was presented for registration, and is to the effect that the deed between the hours of 10 and 11 was presented for registration in the office of the Officiating Sub-Registrar by Chotay Lal, the agent of the vendee, who also applied for the compulsory attendance of the vendors.

The two sons having attended on the following day, and made the admissions and statement above referred to, the Sub-Registrar [469] made this endorsement: "Hyat Muhammad and Salamatulla, sons of Amirulla (sect Shaikh Panjabi, occupation zamindari), and residents of Pilibhit, in the District of Bareilly, two of the three vendors named in this sale-deed, were identified," and so on, stating the identity, "and their written depositions were taken down on separate papers, according to the application of the manager of the vendee for the compulsory attendance of the vendors. The said vendors admitted before me, in their written deposition, that they had executed the sale-deed now in the office, including therein the name of their mother, and completed it by having it duly signed and witnessed, but that they had this sale-deed drawn up without consulting their mother, and she was not a consenting party to it; that they had not received any money from this vendee, and they, having received a larger amount of consideration from Baijnath, &c., executed a sale-deed in their favour, and had it registered, and that they had no mind to have this sale-deed registered."[3] The last statement, that they had no mind to have the deed registered, appears to have been treated as a refusal on their part to endorse the document; but the Act gives power to the Registrar to register, notwithstanding such a refusal, and accordingly the Registrar did register the deed in the formal manner required by the Act, and made

this formal endorsement of registration upon the instrument: "This document is registered at No. 40, page 299, vol. 11, Register No. 1, on 16th January, 1874."

The deed of sale to the respondents, which also bears date on the 14th January, 1874, had been brought to the Registry on the 15th; and all the vendors having admitted, either by themselves or their agent, that that deed had been executed, it was registered on that day. Nothing, however, turns upon the priority of the registration of this deed, because by the provisions of the Act a deed operates not from the time of its registration, but from the time when it would have commenced to operate if no registration had been required. If, therefore, a deed is tendered for registration within the time prescribed by the Act, and registered, it is immaterial that another deed has obtained priority of registration.

These being the facts of the case, the High Court have decided that the execution of the deed not having been admitted by the [470] mother and her authority for its execution having been denied, it was improperly registered, and could not be received in evidence as against the sons. The decision is founded mainly on the 35th section of the last Registration Act, Act VIII of 1871. Before coming to that section it will be right to call attention to the scheme of the Act, with a view to see whether the general provisions do not furnish a context by which to construe the language used in the 35th section.

The 17th section describes the documents required to be registered. The 23rd prescribes the time within which deeds are to be presented for registration, *viz.*, a period of four months after their execution; and there is a proviso to that section to which it is material to call attention. It is this: "Provided that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution." It is plain that under that proviso a deed, say, by several vendors may be registered as to one or two of them when one or two have executed the deed, and may be again registered when others have at a later period executed it. Then come the 34th and 35th sections, which are the most important sections to be considered. The 34th enacts that, "Subject to the provisions contained in this part and in sections 41, 43, 45, 69, 76 and 86, no document shall be registered under this Act unless the persons executing such document or their representatives, assigns, or agents authorised as aforesaid appear before the registering officer within the time allowed for presentation." There the persons described are the persons executing the document;—not those who on the face of the deed are parties to it or by whom it purports to have been executed, but those who have actually executed it. Then there is power to enlarge the time, and a provision that the appearances may be simultaneous or at different times. Then "the registering officer shall thereupon inquire whether or not such document was executed by the persons by whom it purports to have been executed," and "satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and, in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear." The 35th section is: "If all the persons executing [471] the document"—again, not "purporting to execute it,"—but "if all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or, in the case of any

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person appearing by a representative, assign, or agent, if such representative, assign, or agent admits the execution, or if the person executing the document is dead and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in sections 58 to 61 inclusive." Then comes the enactment which occasions the difficulty: "If all or any of the persons by whom the document purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document." These words, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed which purports to be executed by several persons if any one of those persons deny the execution. Such a construction, however, would cause great difficulty and injustice, which it cannot be supposed the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act; their Lordships, therefore, think the words should be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* any person who appears to be a minor, an idiot, or a lunatic. There appears to be no reason for extending the clause further than this, so as to destroy the operation of the deed as regards those who admit the execution, and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso in the 23rd section to which allusion has already been made shows that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it. Now it would be extremely difficult to give effect to this enactment in the 35th clause in its literal meaning, and at the same time to give effect to the proviso in the 23rd clause. To do **[472]** so would certainly create an anomaly. Supposing three vendors live in different places, and are called upon at different times to execute the deed of sale, in that case there undoubtedly may be three several registrations. Supposing No. 1 and No. 2 attend the Registrar and admit the execution of the deed, and it is registered, but No. 3 afterwards comes and denies the execution of the deed, what is to be the consequence? Is the previous registration of the two to be rendered invalid? If so, effect could not be given to the proviso. And if that registration is not to be invalid, what difference in principle can there be between the case where three vendors appear at different times to admit or deny the execution, and where they appear at the same time to admit or deny the same fact? That which is required of them is precisely the same in both cases, and the admission and denial ought in reason to have the same effect in both.

Their Lordships cannot but think that considerable light is thrown upon the intention of the Legislature by the provision that there may be under the circumstances mentioned a registration and re-registration of the same document.

Again, the registering officer is to refuse to register, not only in the case of persons who deny the execution of the deed, but in the case of persons who appear—that is, who appear to him—to be minors, or idiots, or lunatics. Suppose a deed executed by three persons, two of whom were under no disability, and who admit their execution, but the third had become a lunatic, it would follow, if the construction contended for by the respondents were to prevail, that that deed could not be registered against the persons who admitted their execution, and who were under no

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disability. The consequences of such a construction would be so injurious that it cannot be supposed that the Legislature intended to produce them. The consequences of non-registration are pointed out in the 49th section, and are of the most stringent description:—"No document required by section 17 to be registered shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." The effect, therefore, in the case **[473]** which has just been supposed, would be that the deed could not be given in evidence against those who had executed it, and who were under no disability, because some other person interested in the property, and made a party to it, had become lunatic (it may be after the execution), or appeared to the Registrar to be lunatic. No injustice is done by admitting a deed to registration, because the effect is no more than to satisfy an onerous condition before the deed can be given in evidence; and when in evidence, it is subject to every objection that can be made to it precisely as if no registration had taken place; whereas when registration is refused, the effect may be to deprive the party altogether of perfectly good rights which he might have under the deed but for the Registration Act.

The Act gives little discretion to the Sub-Registrar. He is bound either to register or not to register when he is satisfied by the admission or denial of the parties that the deed has been executed, and no discretion is given to him to inquire further into the matter. He can only obtain from the parties or their agents the admission or the denial. But provision is made for an appeal from his refusal to register to the District Court, and that Court is empowered to go into evidence, and if the District Judge is satisfied that the deed was executed by the parties, he is then to order the registration. The power of that Court, however, does not and could not arise in this case, because in point of fact the Sub-Registrar did register the deed.

Their Lordships do not think it necessary to refer specifically to the other sections in the Act. They have referred to those which furnish, in their view, a context to explain and cut down the generality of the words used in the 35th section.

This point will of course dispose of the appeal. But there is another part of the judgment of the High Court which their Lordships think requires consideration. The High Court say: "It has been held by this Court more than once that unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may in fact have been improperly admitted to registration." Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there **[474]** was an improper registration,—that the terms of the Registration Act in some substantial respects have not been complied with. Undoubtedly it would be a most inconvenient rule if it were to be laid down generally that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration

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is then under the Act in a position which *prima facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed, the registration to be obtained by fraud, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding. The 60th section is: "After such of the provisions of sections 34, 35, 58, and 59 as apply to any documents presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word 'registered,' together with the number and page of the book in which the document has been copied. Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59 have occurred as therein mentioned." The certificate is that which gives the document the character of a registered instrument, and the Act expressly says that that certificate shall be sufficient to allow of its admissibility in evidence. Then by the 85th clause it is enacted that "Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." No doubt, in this case, **[475]** the fact of the non-admission of the mother's execution appears upon the endorsement made on the deed itself, and did not require to be proved *aliunde*; but the observations in the judgment go beyond the particular case.

This point does not come before their Lordships for the first time. It was a good deal considered in the case to which Mr. Cowie has referred, *Sah Makhun Lall Panday* v. *Sah Koondun Lall* (1); and although it was not there necessary to decide the point,—indeed the point did not arise, and the appeal was decided upon another ground,—yet the considerations to which their Lordships have just adverted were discussed in the judgment in this way:—"Now considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21 or 36, or other similar provisions." It may be observed that section 36 in the former Act is the equivalent of section 35 in the present Act. "It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in section 88 of the Act,"—which is the same as section 85 in the present Act—"so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under section 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

(1) 15 B. L. R., 228 = 2 I.A., 210; 24 W.R. 75.

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It is to be observed, with regard to the inconvenience which it is suggested may arise from a deed being registered when some [476] only of the parties to it have executed it, that provision is made for disclosing the parties who have really executed the deed. A copy of the deed is to be made in a book, and there are to be indexes, and it is directed that "Index No. 1 shall contain the names and additions of all persons executing, and of all persons claiming under, every document copied into or memorandum filed in book No. 1 or book No. 3." So that anyone consulting the register would find a copy of this deed, and that the two sons only had executed it, and that the mother had not.

On these grounds their Lordships think that the decree of the High Court cannot be sustained, and they will humbly advise Her Majesty to reverse it, and to order that the appeal from the decree of the Judge of Bareilly to the High Court be dismissed, with costs, and that the last-mentioned decree be affirmed. The appellants will have the costs of this appeal.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner and Mr. Justice Spankie.

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FULL BENCH.

NANKU AND ANOTHER (*Defendants*) *v.* THE BOARD OF REVENUE FOR THE N.-W.P., IN THE CAPACITY OF THE COURT OF WARDS, FOR THE MINOR RAJA OF KANTIT (*Plaintiff*). [14th June 1877.]

1 A. 444.

1 A. 444.

1. *Suits for Zamindari cesses, not Small Cause suits.*

Suits for *huq-i-chaharum*, or other Zamindari cesses, do not fall within any of the classes of suits cognizable by Small Cause Courts. The cesses are dues customarily payable. A claim for such a cess is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages.

2. *Joinder of causes of action between same parties.*

Several causes of action for money between the same parties may be joined together.

[1—R., 2 A. 358; F., 2 A. 905, 18 A. 430 = 16 A.W.N. 140.]

In a suit by the plaintiff against the defendants, claiming from them as joint decree-holders, a fourth share of the proceeds realised by auction-sale through the Court of the Munsif of certain houses, situate on land subject to a village-custom, whereby a proprietary due of the above amount was recognized and payable to the Zamindars of the said land, the defendant contended that as auction-purchasers under their joint money-decree of distinct houses sold at different times, the suit was bad for mis-joinder. Both the lower Courts decreed against the defendants.

REFERENCE TO THE FULL BENCH.

In special appeal to the High Court a question having been raised as to whether suits for "huq-i-chaharum" or other zamindari cesses were in the nature of suits cognizable by a Court of Small Causes, the Court (PEARSON AND TURNER, JJ.) made the following order:—

It appearing that there are conflicting rulings, we refer to the Full Bench the following question:—

Are suits for "huq-i-chaharum" or other zamindari cesses of the nature cognizable by a Court of Small Causes.

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1 A. 444.

OPINION OF THE FULL BENCH.

[446] STUART, C.J., PEARSON, TURNER, AND SPANKIE, JJ., concurring:—We have considered the language of the Small Cause Court Act, and hold that the claim brought in this suit does not fall within any of the classes of suits made cognizable by those Courts. The claim is for a zamindari due customarily payable: it is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages. The opinion at which we have arrived is in accordance with the more numerous rulings of this Court, and with the practice of the Court to allow special appeals in such cases although the sum in dispute is of less amount than Rs. 500. It must not be understood that we impugn the **[446]** ruling that, where "chaharum" is payable in virtue of a contract, the claim is of a nature triable by a Court of Small Causes.

JUDGMENT OF THE DIVISION BENCH.

The Division Bench, upon the return of the case with the above finding, dismissed the appeal on the grounds detailed in the judgment of the Court delivered by—

TURNER, J.—The Full Bench being of opinion that a claim for "huq-i-chaharum" is not cognizable by a Court of Small Causes we may entertain the appeal.

The first plea alone is urged that the claim is bad for mis-joinder. This plea has for sufficient reasons been over-ruled by the Courts below. The sale-monies, although the produce of the sale of more than one lot, have been taken out of Court by the decree-holders, the appellants, and they must give up to the respondent, the zamindar, his due in respect of each sale. The causes of action though several are between the same parties. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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APPELLATE CIVIL.

1 A. 446.

GANPAT RAI AND ANOTHER (*Defendants*) *v.* SARUPI (*Plaintiff*).

[21st June 1877.]

1 A. 446.

Money decree passed on simple mortgage bond—Right of purchaser of decree.

The purchaser of a simple money-decree passed on a simple mortgage-bond does not acquire a lien upon the property mortgaged.

[D., 78 P.R. 1905 = 135 P.L.R. 1905.]

The representative of the purchaser of a simple money-decree passed on a bond hypothecating property, brought a suit to enforce her claim, by sale of the said property. The defendants were the original mortgagees and certain auction-purchasers of the said property under sales effected in execution of money-decrees obtained by other persons against the said mortgagors. The lower Court gave the plaintiff a decree. The defendants appealed to the High Court.

JUDGMENT.

[447] TURNER, J.—The sale in this case extended not to the original debt but to the decree, and in the sale-deed no reference is made to any securities held by the original creditor. In our judgment then the sale-deed conveyed to the purchaser no title to the securities.

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1 A. 446.

We do not say that if the debt itself had been sold the purchaser might not have been entitled to call upon the seller to assign the securities. That question when it arises will be determined in reference to the terms of the contract, but in the case before us it is clear all that was sold was the money-decree.

Instances may be suggested in which the holder of such a decree would be unwilling to part with the lien though willing to sell the decree. He may, for instance, have a second mortgage of the same property, and it would in our judgment lead to injustice **[448]** to hold that the sale of the decree carried with it necessarily the right to an assignment of all securities held by the original creditor.

Whether this be so or not the lien in the present instance has not been assigned to the plaintiffs, and, therefore, they cannot claim the benefit of it. The decree of the Court below must be reversed and the suit dismissed with costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner and Mr. Justice Spankie.

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JUNE 29.

APPEL-LATE CIVIL.

1 A. 448 = 2 Ind. Jur. 320.

BAKHAT RAM AND ANOTHER (*Plaintiffs*) *v.* WAZIR ALI AND OTHERS (*Defendants*). [29th June 1877.]

1 A. 448 = 2 Ind. Jur. 320.

1. *Suit for ejectment and damages or mesne profits—Civil Court.*

A suit to eject a trespasser and to recover *mesne* profits is a suit cognizable by a Civil Court, and is not the less so, because the defendant claims to have entered as an ex-proprietary tenant under S. 7 of the N. W. P. Rent Act. The jurisdiction of the Court arises from the frame of the suit as brought.

2. *Person entitled to claim right of occupancy in* sir-*land attached to mahal, not a trespasser.*

A proprietor of a mahal, who has parted with, or lost, his proprietary rights in it, and who, being in possession, even though constructively, is entitled to claim the occupancy as an ex-proprietary tenant, cannot be treated as a trespasser, and a suit to eject him cannot be maintained.

Suit to eject the defendants as trespassers from certain *sir*-land and to recover mesne profits. The plaintiffs, who held possession of the share including the *sir*-land as conditional mortgagees, and who sub-let the *sir*-land to a tenant, became possessed of the share and the *sir*-land in full proprietary right by virtue of their purchase, at auction-sale, of the rights in the shares remaining in the mortgagors, the defendants in the suit. The plaintiffs alleged that the plaintiffs' tenant had been ousted of the *sir*-land by the defendant. The Court of first instance, holding that, as at the time of the auction-sale the plaintiffs were already in possession as mortgagees, they did not lose their right to possession by purchasing the rights remaining in the mortgagors, gave the plaintiffs the decree which they sought without determining what was the amount of mesne profits they were entitled to recover, although an issue had been fixed as to this point. On appeal by the defendants, the lower appellate Court held that the plaintiffs' rights as mortgagees merged in the higher title conferred by the auction-sale, and remanded the suit to the Court of first instance, to take evidence as to the produce of the land, and then to determine whether or not the suit was cognizable by the Civil Court. The plaintiffs appealed to the High Court, taking exception to the lower

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appellate Court's procedure and contending that the suit was cognizable by the Civil Court, that if the defendants had any right in the land they could enforce it according to law, but could not eject the plaintiffs' tenant, that the only questions in the suit were whether the plaintiffs' tenant had been dispossessed and what damages the plaintiffs were entitled to, and that, when the defendants adduced no evidence as to the damages, although an issue was framed on that point, they could not fairly complain of the decree of the Court of first instance in that respect.

The suit was remanded to the lower appellate Court, under S. 354 of Act VIII of 1859, the Court (after stating the facts of the case and the manner in which it was dealt with by the lower Courts) making the following

ORDER OF REMAND.

[450] It was the duty of the lower appellate Court to determine for itself whether or not the suit was cognizable by the Civil Court, and if it held the suit to be cognizable to proceed to determine it, remitting an issue under S. 354 touching damages, or if it found the suit was not cognizable to dismiss it forthwith. That the suit as brought was cognizable by a Civil Court we see no reason to doubt. The plaintiffs contend that the defendants ousted their tenant and took possession as trespassers. Such a suit may be instituted in the Civil Court.

The question then arises whether the defendants are to be regarded as trespassers or not.

In our judgment the Munsif was in error in holding that the plaintiffs, after the auction-sale, retained their position of conditional mortgagees. The lower appellate Court properly held that, having acquired the rights of the mortgagors, they thenceforward retained possession in full proprietary right; and inasmuch as up to the time of the auction-sale their possession of the *sir* as mortgagees must be treated as the possession of mortgagors, it appears to us the defendants are entitled to contend that the *sir* was held by them at the time of the sale, and that after the sale, in virtue of the provisions of S. 7 of the Rent Act, they became entitled to a right of occupancy in the *sir* as tenants at favourable rates; and if, in the assertion of this right at the proper season of the agricultural year, they took possession, offering to pay the proper rent due from them, the plaintiffs have no right to treat them as trespassers, but can only claim rent in the proper Court.

In order to enable us to determine the suit and to avoid the necessity for any further remand or remission of issues, we order the lower appellate Court to try the following issues—(1) Under what circumstances did the defendants take possession of the land in suit, and did they or did they not inform the plaintiffs of their intention to take possession of it as tenants, and of their readiness to pay **[451]** rent. (2) If at the time the land was in the possession of the tenant, had the tenancy for the year in which the tenant was ousted commenced prior or subsequently to the auction-sale. (3) At what rent did the tenant hold the land in suit, and what proportion, if any, of that rent had he paid for the year in which he was ousted.

On the first issue the lower appellate Court found that the defendants had ousted the plaintiffs' tenant, and that they did not inform the plaintiffs of their intention to take possession of the *sir* land as tenants, and of their readiness to pay rent. On the second issue it found that the tenancy for the year in which the tenant was ousted commenced subsequently to the auction-sale. On the third issue it found that the tenant paid an annual rent of Rs. 7-2-0 and that he had paid no portion of that

rent for the year in which he was ousted. The lower appellate Court having returned its findings, the High Court delivered the following

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[451] When the plaintiffs obtained the rights of the conditional vendors their rights as conditional vendees merged and they became possessed of the entire proprietary interest in the estate. Thereupon, by virtue of a provision of the rent law recently introduced, the defendants became entitled to hold their *sir* as tenants with rights of occupancy. Their proper course was to have given notice to the purchasers of their intention to avail themselves of their rights and to enter on the land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of the Rent Act, be properly payable by them. It would then have been incumbent on them, or on the purchasers, if they were unable to agree to the amount of rent payable, to apply to the Revenue Court to determine the rent. The defendants, without communicating with the plaintiffs or taking any steps to have a rent assessed on the land, entered and ousted the tenant. They cannot, nevertheless, be deemed trespassers, for they have a right to the occupancy of the land, but the plaintiffs are entitled to recover damages for the use and occupation of the land, and we assess those damages at twenty-five per cent. less than the sum payable by the tenant.

The decree of the lower appellate Court, so far as it reversed the claim for ejectment, is affirmed, so far as it dismissed the claim for **[452]** damages it is in part affirmed and in part reversed, and the plaintiffs will obtain a decree for the sum above-mentioned. Under the circumstances, we order each party to bear their own costs in all Courts.

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PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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PHULMAN RAI (*Defendant*) *v.* DANI KUARI (*Plaintiff*).

[12th July 1877.]

1 A. 452.

Hindu widow—Claim to pre-emption—Wajib-ul-arz.

A Hindu widow holding her deceased husband's shares in a village, so long as she enjoys the estate, fully represents the estate and can claim to exercise all rights which would attach to it in the hands of a male owner. So, she is entitled to prefer a claim to pre-emption as a share-holder in such village.

A suit by the widow of a deceased co-sharer for establishing her right of pre-emption to a share in a certain village, under a condition in the village administration-paper by which, on the sale of a share, share-holders were entitled to purchase in preference to strangers, was dismissed by the Court of first instance on the ground that the sale impugned by the plaintiff was only made on her refusal. But the lower appellate Court gave her a conditional decree, being of opinion that she did not refuse to purchase. On the appeal of the defendant, the High Court remanded the suit to the lower appellate Court, for determining whether the plaintiff was a sharer in the estate or only entitled to maintenance. The lower appellate Court, without determining this issue distinctly, found that the share in the plaintiff's possession was joint and undivided ancestral property. The plaintiff took exception on the evidence.

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JUDGMENT.

[453] TURNER, J.—We must admit the objection taken to the finding on the issue remitted, and it remains for us to determine whether a widow, holding her husband's share by inheritance, is entitled to pre-emption. In our judgment so long as she enjoys the estate she fully represents the estate and can claim to exercise all rights which would attach to it in the hands of a male owner. The circumstance that the widow lived with the vendors would not deprive her of her right, it being found that the claim is not collusive.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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1 A. 413.

THE EMPRESS OF INDIA *v.* KANCHAN SINGH. [13th July 1877.]

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Crim. Pro. Code, 1872, Ss. 4, 296—"Sessions case," meaning of—Ss. 457, 380, I.P.C.

Held by the Full Bench (Spankie and Oldfield, JJ., dissenting):—A "Sessions case" in S. 296, means a case exclusively triable by a Sessions Court.

Where a Magistrate discharged an accused person under S. 457, I.P.C., and the Sessions Judge ordered the commitment of the accused to the Sessions Court on a charge under Ss. 457 and 380, I.P.C., *held*, that the Judge's order to commit the case to the Sessions Court was illegal, as the case was a Magistrate's case, and not one triable by the Court of Sessions only.

[**F.**, 7 C.L.R. 168 (170), 2 A.W.N. 105; **R.**, 2 A. 570 (573).]

The appellant after his discharge by the Assistant Magistrate on a charge under S. 457, I.P.C., was committed to the Court of Sessions by order of the Sessions Judge under S. 296, Cr.P.C., 1872, on charges under Ss. 380 and 457, I.P.C. The appellant questioning the legality of the order of commitment contended that the offences under Ss. 380 and 457, I.P.C., not being exclusively triable by the Court of Session, did not come within the meaning of "Sessions cases" in S. 296, Cr.P.C., 1872.

ORDER OF REFERENCE.

PEARSON, J., referred the question to a Full Bench for decision in the following order of reference:

It appears that in the case of Huria and others (1), Mr. Justice Spankie has ruled contrary to the ruling of the 26th May 1873 (2), and that in the case of Charles John Sibold (3), the learned Chief Justice has expressed an opinion that it is erroneous. It is, however, supported by the ruling of the Calcutta Court, dated 17th February 1874, *Jaykaram Singh, and another, petitioners* v. *Man Pathack*, and by the ruling of the Madras Court, dated the 5th November 1873 (4). That the point in question may be definitively settled, and conflicting rulings be avoided in future, I refer it to a Full Bench.

(1) Unreported, decided on the 20th January 1877.
(2) H.C.R., N.W.P., 1873, p. 168.
(3) Unreported, decided on the 9th April 1875.
(4) Mad. H.C.R., 1871-74, p. 28 of Rulings.

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[414] STUART, C.J.—In this reference the question is whether the Sessions Judge of Mainpuri was justified in ordering a commitment to this Court on a charge under Ss. 457 and 380 of the Indian Penal Code, as being a "session case" within the meaning of S. 296 of the Criminal Procedure Code, read in connection with S. 4 of the same Code, where the expression "session case" is defined. The procedure which gave rise to the appeal to this Court, and the question submitted by this reference, appear to be as follows:—The appellant, Kanchan Singh, and another accused person, named Mathri, were brought up before and tried by the Assistant Magistrate on a charge under S. 457 of the Indian Penal Code, with the result of Mathri's conviction and the appellant's discharge. The discharge of the appellant, Kanchan Singh, being unsatisfactory to the Sessions Judge, he ordered a commitment to the Sessions Court and the appellant was committed, tried, and convicted there accordingly. The validity of such order of commitment is one of the pleas in appeal.

In S. 4 of the Criminal Procedure Code the following is the definition of a "session case." "Session case means and includes all cases specified in column seven of the fourth schedule to this Act as cases triable by a Court of Session, and all cases which Magistrates commit to a Court of Session, although they might have tried them themselves." Now if we had nothing else to consider than the true construction of this section itself, our task would be an easy one, and here I must say that we are not much assisted by some of the remarks made by Mr. Justice Jardine in the case mentioned in the present reference (1). In the report of his judgment he is made to say that the words "triable by a Court of Session in S. 4 must be read as if they had been printed in inverted **[415]** commas," but, in my opinion, it is not legitimate to interpret laws in this manner, whether by the importing of words of limitation, or extension, or fanciful punctuation. If the inverted commas had been used as suggested, the meaning and application of S. 4 would have been altogether changed from what it is in its present shape. I could understand the suggestion that these words "triable by a Court of Session" might, with advantage, have been imported into S. 296 immediately after the words "session case," but it is altogether beside the rules of legal construction to attempt to interpret such a section as S. 4 by such a device. Then, again, I must express my dissent where Mr. Justice Jardine says it is "on principle wrong that a Session Judge should have power to order a committal in spite of a discharge by a Magistrate, who had himself full power to try and acquit. Where the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Session Court should have power to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Session Court power to disturb this order, because it takes the form of a discharge." On the contrary, I do not only see nothing wrong on principle, but, judging from my own experience in criminal cases in this Court, it would, I consider, be very convenient and advantageous if Session Judges had such a power of correction and control over their Magistrates. But all these speculations and fanciful views of legal interpretation are really beside the question of the true construction of S. 4, nor are they necessary to the elucidation of S. 296, the correct application of which, in my view, depends, at least so far as the present case is concerned, on a much simpler test, which I do not find noticed either in the judgment of

(1) H.C.R., N.W.P., 1873, p. 168.

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Mr. Justice Jardine, or in any of the other authorities which have been referred to. As to S. 4 itself, anything more simple or more obvious in meaning than the language of that section I cannot imagine. It very plainly provides that "session case" means and includes all cases triable by a Court of Session itself, that is, if you prefer it, by a Court of Session only, or exclusively, and also all cases which Magistrates commit to a Court of Session for trial. These are the two classes of cases which by S. 4 are to be understood as session case, the one neither more nor less so, than the other. Nor is the definition, given in **[416]** this S. 4 of a Magistrate's case in the slightest degree inconsistent with such a definition of a session case. A Magistrate's case, the section says, means and includes all cases triable by Magistrates, and all cases which Magistrates try themselves, although they might have committed them for trial to a Court of Session, being the very cases which, when committed to a Court of Session, become *ipso facto* session cases. In fact it comes to this, that by S. 4 the term "session case" applies to cases triable by a Court of Session alone, and also all other cases (doubtful cases as Mr. Justice Jardine calls them, although why they should be so described I cannot see), in which the Court of Session has, by force of the commitment to it, concurrent jurisdiction with the Magistrate.

Such are the observations suggested to me by the consideration of S. 4 taken by itself, and without reference to any other part of the Criminal Procedure Code. But when we come to S. 296, we find it necessary to understand a session case in a more limited sense. The second part of that section provides that "in session cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial upon the matter of such complaint, or of which the accused person has been, in the opinion of the Court or Magistrate, improperly discharged." Now there can be no doubt that this section strictly and literally applies to cases triable by the Court of Session itself, but does it apply to these cases exclusively and not to the second class of session cases which S. 4 defines? The answer to this question is supplied by the definition given in S. 4 of the other class of session cases, namely, those which Magistrates commit for trial to the Court of Session. The word "commit" is I consider a governing word in this sentence, and everything depends upon its right construction. If it could be taken to mean "may commit," then unquestionably S. 296 would let in these Magistrates' cases were a commitment had not been made. But as I view this part of S. 4, the fact of the committal to the Court of Session is the essential quality of such session cases. On the other hand, the remedy provided by S. 296 assumes that there had been no previous **[417]** commitment to the Court of Session at all, and the Judge is simply empowered, in that state of things, to order a commitment. It follows, therefore, that such remedy cannot contemplate the second class of session cases defined by S. 4, for there, as I have pointed out, commitment to the Court of Session, as a fact and proceeding already completed, is assumed or taken for granted, and no other or further order of commitment is necessary, or, from the nature of the case, possible. Any other view would involve the absurdity of the Sessions Judge ordering a commitment which has already been made to the Sessions Court by the Magistrate himself. In fact in no view of it can S. 296 be read as applicable to a Magistrate's case, and the question of commitment or no commitment is immaterial, for if the Magistrate did not commit the present case to the Court of

Sessions, and he in fact did not, then the case is not a session case within the meaning of S. 4, while if he did commit, there was no necessity, and no reason for any other commitment, whether by the Judge's order or otherwise. The result, therefore, is that the session cases referred to in S. 296, are session cases triable by the Court of Session only, and the present case being a Magistrate's case, and not one triable by the Court of Session only, the Judge's order to commit it, was illegal.

I think it unnecessary to make any further remarks on the rulings referred to in the order of reference. In my own judgment in the case of *Sibold* (1) I do not appear to have entered into the question very fully, and I remark that the case in which Mr. Justice Jardine's ruling was made, was different from the one then before me, and in the glance I then gave to the matter, I may not have sufficiently considered the phraseology of S. 4. As to the Calcutta (2) and Madras (3) cases, they appear to have been properly disposed of; although I observe that the Calcutta judgment (4) simply repeats Mr. Justice Jardine's argument, and the Madras ruling appears to have been made by the Court itself, on a reference to it, without any argument from the bar.

[418] PEARSON, J.—I concurred at the time in the ruling (on the 26th May 1873) by the late Mr. Justice Jardine in the case of *the Queen* v. *Sital Prasad* (5), and on further consideration I see no good ground for questioning its correctness. The reasons assigned by him in support of it are, in my opinion, as conclusive as they are well nigh exhaustive. Little has been left by him to be said on the subject. The terms used in the designation of a session case in S. 4 of Act X of 1872 "all cases specified in column seven of the fourth schedule to this Act as triable by a Court of Session," are not synonymous with all cases triable by a Court of Session. We find various specifications in the seventh column of the schedule; some cases are specified as triable by a Court of Session; others as triable by a Court of Session or by a Magistrate of the first class; others again as triable by a Magistrate of the first or second class; others as triable by any Magistrate, and so on. Evidently, as it seems to me, those simply specified as triable by a Court of Session, which are triable by that Court exclusively, are those indicated in the first part of the definition as session cases.

The definition of a session case is followed by the definition of a Magistrate's case for the purpose of distinguishing the one from the other. The two definitions comprehend all triable cases, and read together, explain one another.

There are many cases which a Magistrate may either try himself or commit for trial to a Court of Session; and the definitions declare such cases, if tried by the Magistrate, to be Magistrate's cases, and if committed to the Court of Session, to be session cases.

Session cases, therefore, include along with cases exclusively triable by a Court of Session, and Magistrate's cases include along with cases exclusively triable by Magistrates, cases triable by them or by a Court of Session, which they, in the exercise of their discretion, elect to try themselves.

The ruling gives full effect and meaning to every part of the definitions, and is perfectly consistent with, and agreeable to, them. There is,

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(1) Unreported, decided on 9th April 1874.
(2) Jay Karan Singh *v.* Man Pathack, 17th February 1874.
(3) 7 Mad. H.C.R., 1871-74, p. 28 of Rulings.
(4) Jay Karan Singh *v.* Man Pathack, 17th February 1874.
(5) H.C.R., N.W.P., 1873.

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too, much force and pertinence in the remark that "it seems, on principle, to be wrong that a Sessions Judge should have power to order a committal in spite of a discharge by a Magistrate [419] who had himself powers to try and acquit. Where the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Session Court should have power to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Session Court power to disturb that order because it takes form of a discharge."

The case out of which the present reference has arisen is, according to the ruling in question, a Magistrate's case. It is not a case exclusively triable by a Court of Session, nor was it committed to that Court. It was triable by a Court of Session or by a Magistrate of the first or second class; and was tried and disposed of by a Magistrate. To rule that this is a sessions case on the ground that the terms before quoted in the definition of a session case do not mean cases exclusively triable by a Court of Session, but include cases triable by a Court of Session and a Magistrate, would lead to this result, that all cases triable by a Court of Session, or a Magistrate, are both sessions cases and Magistrate's case: and would thus confound what the definitions were carefully designed to distinguish.

TURNER, J.—It appears to me that the definitions of "Sessions case" and "Magistrate's case," respectively, must be read together, and that so read, all difficulty in their construction disappears.

There are some cases specified in the schedule as triable by a Court of Session, there are others specified in the schedule as triable by Magistrates, again, there are cases specified as triable either by a Magistrate or a Court of Session, and, lastly, there are cases in which, though ordinarily triable by a Magistrate, an accused person, if he be an habitual offender, may be committed to the Court of Session.

Now in order to bring all these classes under two heads, the definitions, as I understand them, declare that sessions cases mean and include all cases triable by a Court of Session exclusively, and all cases of the classes in which jurisdiction is given to the Sessions Court, or to the Magistrate if the Magistrate elects to commit them, and that Magistrate's case means and includes all cases specified as triable by Magistrate exclusively, and also all cases of those classes [420] in which jurisdiction is given to the Court of Session or the Magistrate, if the Magistrate elects to try himself. If the other construction be adopted, and the term triable by a Court of Session in the first definition be held to include cases triable by the Court of Session or the Magistrate, a case of that class tried by a Magistrate will fall under both definitions and the anomaly will arise which was pointed out by Mr. Justice Jardine in *Regina* v. *Sital Prasad* (1) that a Sessions Judge may order a committal if the Magistrate discharges an accused person whom he had power to try and acquit, when the Sessions Judge cannot interfere to set aside an acquittal, except on the appeal of the Government. Seeing that the construction adopted by Mr. Justice Jardine has approved itself to the High Courts of Calcutta and Madras, I am the more confident in accepting it.

SPANKIE, J.—It is contended that a sessions case means a case triable by the Court of Session only.

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(1) H.C.R., N.W.P., 1873, p. 168.

The late Mr. Justice Jardine in this Court (1) held that the words "triable by a Court of Session in S. 4 must be read as if they had been printed in inverted commas." This he considered would limit the meaning "of cases specified" as triable by a Court of Session alone. This view was supported by a consideration of the two definitions together. We might expect, the learned Judge remarked, that "the two would just cover all possible cases, and this upon the view above expressed is found to be the fact. Sessions cases include all those which the Court of Session alone can try, and such as are committed to the Court of Session. Magistrates' cases include all those which only Magistrates are to try, and so many of the doubtful cases as the Magistrates do, in fact, try themselves. It seems, moreover, on principle to be wrong that a Sessions Judge should have power to order a committal in spite of a discharge by a Magistrate who had himself full power to try and acquit; when the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Sessions Court should have power [421] to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Sessions Court power to disturb his order, because it takes the form of discharge." It appears that Mr. Juctice Pearson holds the same views, and that the Calcutta (1) and Madras (2) Courts have ruled to the same effect that the Sessions Court can only order committal in cases exclusively triable by itself.

Referring to S. 4 I find nothing to support the views that sessions case means cases exclusively triable by a Court of Session. But I do find in the plainest language possible that a session case means and includes all cases specified in column seven of the fourth schedule as cases triable by a Court of Session, and all those cases which Magistrates commit to a Court of Session, although they might have tried them themselves.

It is true that on reading the definition of a Magistrate's case, it would at the first glance seem that until a Magistrate had actually committed a case which he could have tried himself, it would not become a sessions case. But this construction would only hold good for the purpose of defining what is a Magistrate's case and what a sessions case, and of so far regulating the exercise of their concurrent jurisdiction. This construction, however, does not necessarily limit the power of revision given by S. 296 to the Sessions Judge and District Magistrate. These words "sessions case" and "Magistrate's case" are only to be met with twice, respectively, in the Code, in Ss. 4, 296 and 74. In S. 74, which deals with offences committed by European British subjects, the words "a Magistrate's case" clearly refer to a case which is specified in column 7, Sch. 4, as triable by a Magistrate, which might be sent to the Sessions, but which the Magistrate is *not* to send to the Sessions, if he thinks that he can adequately punish it by any sentence warranted by law, not exceeding three months' imprisonment, or a fine up to one thousand rupees, or both. If he thinks that he cannot adequately punish it under S. 74, then he must commit to the Sessions Court, or High Court, as the case may be, under S. 73. This, it is true, is a special part of the Code applying [422] to European British subjects alone. But when we examine chapter XV and Ss. 89, 195, and 196, we find in the first section that the procedure to be adopted refers to cases triable (not exclusively triable) by a Sessions Court or High Court. By S. 195, a Magistrate can discharge an accused person if he

(1) Jay Karan Singh *v.* Man Pathak, 7th February 1874.
(2) Mad. H.C.R., 1871-74, p. 28 of Rulings.

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thinks there is no ground for committing him, and dispose of the case himself under chapters XV, XVII or XVIII, as the case may be. By S. 196, if the Magistrate considers that the evidence justifies commitment for an offence exclusively triable by the Court of Session or High Court, he is to make the commitment to such Court, and he is to do the same if he thinks that the case is one which ought to be tried by the Sessions Court, though it be not an offence exclusively triable by the Sessions Court. The section is mandatory where the case is exclusively triable by the Sessions Court, and permissory in other cases. But here we have *exclusively* used for a purpose; we shall find in S. 296, which deals with discharge under S. 196, no such use for the word at all. S. 296 refers to the superintendence of the subordinate Courts by the Sessions Judge and Magistrate of the district, and to the revision which they may exercise. The first para. provides for the report of cases of this Court in which the judgment or order is contrary to law, or the punishment too severe or inadequate. The second para. provides that in sessions cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial. Now here we go back to the definition of a sessions case, and find that there is no such limit in S. 4 as that contended for, *viz.*, that those cases only are sessions cases which can be tried by the Sessions Court alone. All those cases in fact are sessions cases which are specified in column 7 of the fourth schedule as triable by the Court of Session, including all the cases which Magistrates commit to a Court of Session, though they might have tried them themselves. They are all cases specified in column 7, schedule 4, and are triable by the Court of Session, though, if the Magistrate tries those himself which are within his jurisdiction to punish, they are not sent up to the Sessions. But they are not the less **[423]** sessions cases, though they are within certain limits jointly triable by the Sessions Court and Magistrate of the first class, and because they are so, both the Sessions Court and the Magistrate of the district have the power to revise improper dismissal of complaints and discharges ordered by the subordinate Magistrates.

This superintendence is part of their office. They are in a certain degree responsible for the proper discharge by their subordinates of their judicial duties. All the Magistrates are subordinate to the Magistrate of the district, but neither the Magistrate of the district nor the subordinate Magistrates are subordinate to the Sessions Judge, except to the extent and in the manner provided by the Act (S. 37). Under the old Act the subordination of the Magistrate to the Magistrate of the district was not clearly recognised, and 23-g. was added by S. 4 of Act VIII of 1869. So by S. 435 of the old Act, the Sessions Judge only could order commitment of an accused person, if he was charged with an offence triable by the Sessions Court exclusively. But the section was altered by S. 4, Act VIII of 1869, and he has now the power of doing so in cases in column 7, schedule 4, not only triable by himself, but also by the Magistrate of the district. The Magistrate of the district also had the power of directing commitment or inquiry when the Magistrate who had discharged the accused person or dismissed his complaint without any investigation, was a subordinate Magistrate. But under the old Act, subordinate Magistrates were of two classes only, one with powers up to six months, and the other up to one month, as provided by S. 22 of Act XXV of 1861. Under the present Act there are three classes of Magistrates, and all are subordinate

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to the Magistrate of the district. Thus, it became necessary, all Magistrates being subordinate to the Magistrate of the district, to enlarge the powers of that officer as a Court of superintendence and revision, and so both the Court of Session and the Magistrates of district were empowered by the second para., S. 296, to direct a committal where a complaint had been improperly dismissed or an accused person improperly discharged in sessions cases. If we are to accept the view contended for by the appellant, then the alterations as regards this power of revision, made since Act XXV of 1861 was passed, would have no meaning, and there would be no **[424]** reason for the omission of such words as exclusively triable by the Court of Session, which have no place in S. 4 and S. 296 of the present Code.

There is nothing opposed to principle in allowing this power of revision to the Court of Session and District Magistrate. A Magistrate of the first class may improperly discharge an accused person under S. 195, that is to say, in cases triable by a Court of Session, even though he may have, under the provisions of that section, proceeded under Chapters XV and XVII, or XVIII. If the Magistrate of the district or Court of Session considered that there were sufficient grounds for commitment, then the accused would have been improperly discharged. Where a Magistrate improperly discharges an accused person under S. 215, the High Court can order him to be tried, or committed for trial; a discharge is not equivalent to an acquittal under either section. The Sessions Court is empowered to guard against a miscarriage of justice in cases triable by itself. The High Court has plenary power in all cases of improper discharge. No question of acquittal is applicable to the point before us. An acquittal may be appealed against by the Government. This is an exclusive privilege of Government. But private prosecutors, so to speak, have no other remedy but that afforded by Ss. 296 and 297 of the Code.

Being of opinion that it is not for us who administer the law to import into S. 4 and S. 296 of the Act the words "exclusively" triable, or by the Court of Session "alone," I would answer the reference by saying that the Sessions Judge had the power to order the committal.

OLDFIELD, J.—I agree in the view taken by Mr. Justice Spankie of the question referred.

ORDER.—In accordance with the ruling of the majority of the Full Bench, PEARSON, J., passed the following final order in the above case.

The second ground is sustained by the opinion of the majority of the Full Bench. The proceedings of the Sessions Court must, therefore, be set aside as illegal, and the sentence passed on the appellant is accordingly annulled and his release is ordered.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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1 A. 453.

DULAR CHAND (*Plaintiff*) *v.* BALRAM DAS AND OTHERS (*Defendants*).

[16th July 1877.]

1 A. 453.

1. ***Non-joinder of parties—Effect of.***

When the cause of action is jointly in favour of a number of persons, and not solely in favour of one, they must all be made parties. Failure to do so would involve the dismissal of the suit.

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APPELLATE CIVIL.

2. *Adding parties in appeal.*

Though, in some instances, parties are allowed to be added in appeal, yet in a case, where the party seeking the addition has elected to go to trial without the amendment, the appellate Court may refuse to allow the addition of parties.

[1—**Ap.**, 14 A. 524 = 12 A.W.N. 104 ; **D.**, 9 B. 311 (315) ; **R.**, 7 B. 217 (219), 17 B. 6 (8) ; 2—**R.**, 156 P.R. 1889 (**F.B.**), 159 P.R. 1889 (**F.B.**), 18 M. 33 (37).]

JUDGMENT.

[454] The appellant was badly advised by his pleaders in the Court below to file his plaint in his sole name and not also in the name of the other partners in the firm, for he had no sole cause of action against the respondents. When the objection was taken by the respondents in the Court below, the Court should either have made the other partners parties, or, on this ground, have dismissed the suit. Even when the defect was pointed out, the appellant, instead of praying the Court to amend the plaint, put in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of the appellant. The Judge was in error in holding that a defect of which the respondents complained and which, if it affected any party to the suit, affected them could be thus cured.

[455] The appellant's pleaders in this Court at once recognised the position in which their client was placed, and have preferred a petition praying that the other partners may now be made parties. Although in some instances parties have been added by this Court in the stage of appeal, yet, seeing that the appellant elected to go to trial and the case was decided in the Court below without amendment of the proceedings, we are of opinion that in this instance we ought to refuse the application and allow the objection.

We shall therefore dismiss the appeal, affirming the decree of the Court below, not on the grounds on which that decree was passed, but on the preliminary ground that all the necessary parties were not joined as plaintiffs, and that the appellant has shown no sole cause of action. The appellant and his partners may of course bring a fresh suit.

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PRIVY COUNCIL.

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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JULY 19.

On Appeal from the Court of the Commissioner of Fyzabad.

MAHARAJAH PERTAB NARAIN SINGH *v.* MAHARANEE SUBHAO KOOER AND OTHERS. [19th July 1877.]

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3 Suth. P.C.J. 458 = 4 I.A. 228 = 3 Cal. 626 = 1 C.L.R. 113 = 3 Saraswati's P.C.J. 740.

1. *Revocation of will by Hindu.*

The will of a Hindu may be revoked by parol.

If definite authority to destroy a will is given by the maker, with intent to revoke the will, this would be sufficient in law to constitute a revocation, though, in fact, the instrument may not be destroyed.

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2. *Act I of 1869, S. 22, Cl. 4—Oudh Talukdars—Intestate succession—Treatment of daughter's son as son.*

Where an Oudh talukdar without male issue, has, by his exceptional treatment of his daughter's son "in all respects as his own son," indicated an

unmistakable intention that he shall succeed him, the grandson will be brought within the enactment of the fourth clause of S. 22, Act I of 1869. The circumstances affording evidence of such an intention considered.

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[1—**R.**, 25 M. 678 (685) (**P.C.**) ; **3—Cons.**, 21 C. 997=21 I.A. 163 (**P.C.**) ; **R.**, 11 C. 186=11 I.A. 197 (**P.C.**).]

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JUDGMENT.

[459] SIR JAMES COLVILE.—The question raised by this appeal is the right of succession to the talook of the late Maharajah Sir Man Singh, one of the most considerable, if not the most considerable, of the great land-holders of Oudh, whose status and rights are the subject of Act I of 1869.

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The Maharajah died on the 11th October 1870. He had no male issue. His nearest surviving relatives were his widow, the Maharanee Subhao Kooer, a daughter by a deceased wife, and the appellant, the son of that daughter. The Maharajah had also brothers, and brothers' sons, of whom some survived him. His grandson, the appellant, was known in the family as "Dadwa Sahib," by which name he will be generally designated in this judgment.

The property which is the subject of this litigation belonged to Man Singh before the annexation of Oudh. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as talookdar was duly confirmed by sunnud. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir, not necessarily determined by the strict rule of primogeniture. It had certainly passed from Buktowar Singh, the preceding proprietor, to his nephew, Man Singh, though the youngest of three brothers. Accordingly, when the lists prescribed by S. 1 of Act I of 1869 were made up, the name of Man Singh, as talookdar, was inserted in the first and second of those lists.

Some years before the passing of this Act, and on the 22nd April 1864, Man Singh, under the circumstances which will be afterwards considered, executed and delivered to the Commissioner of the district the document at p. 8 of the Record, which is in these words :—

"I, Maharajah Man Singh, etc., Talookdar of Shahgunge, Gonda, etc., do hereby declare that, as I have not yet come to any determination as to what boy is to become my successor, I, for the present, declare my wife to become my successor, and inherit the whole of my property, whether moveable or immoveable. She will, until she nominates a successor, have the same power over the property as myself, except that she will not be authorised to make a transfer. There is no partner of mine in my moveable or immoveable property. I have, therefore, executed this will, and deposited it in a public office, that it may serve as a document, and prove of use when required."

Mr. Simson, the then Commissioner, made the following endorsement on the will :—"April 22nd, 1864. Maharajah Man Singh this day in person signed this document in my presence, and then delivered it to me as his last will and testament ; " and wrote on the envelope within which it was inclosed, " Within this sealed envelope is Maharajah Man Singh's will. I forward the envelope to the Deputy Commissioner of Fyzabad, with instructions to lodge it, sealed as it is, in the Treasury ; and each Treasury Officer will note it in his receipt on giving or receiving charge. Of course the Maharajah may reclaim this on a written application properly authenticated at any time."

After the death of the Maharajah, and in November 1870, this will was opened, and under it the Maharanee was put into possession of the

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talook. She afterwards, by a document dated August 16th, 1872, exercised the power which the will gave her of "nominating a successor" in favour of the respondent Triloki Nath, who was a son, then under age, of one of the late Maharajah's brothers, and had married her own niece.

Shortly after this transaction the appellant, Dadwa Sahib, instituted this suit, praying for a declaration of his title to the succession to the Maharajah's estate, and for the cancellation of the document of April 22nd, 1864 (the will); that of August 16th, 1872 (the appointment); and the order of the revenue authorities of November 11th, whereby the Maharanee was put in possession.

It is now admitted on all sides, if it were ever seriously disputed, that the [460] appellant can only succeed in his suit by establishing both the following propositions:—

1. That the testamentary disposition which the Maharajah unquestionably had power to make, and did make in April 1864, was revoked or became inoperative in his lifetime.

2. That the appellant is entitled to succeed to the talook as the son of a daughter of the Maharajah, who had "been treated by him in all respects as his own son" within the meaning of Cl. 4 of S. 22 of Act I of 1869; it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the talook under the special canon of succession to intestate talookdars established by that section of the Statute.

The Court of First Instance and the Appellate Court in Oudh have concurred in determining the first of these issues against the appellant. The second of them was found in his favor by the Court of First Instance; but that decision was reversed by the Appellate Court.

In dealing with this appeal, their Lordships propose to consider, in the first instance, whether the appellant has established that he was treated by the late Maharajah "in all respects as his own son," within the meaning of the enactment in question, and is consequently the person entitled to inherit the talook, if the Maharajah died intestate.

The clause is perhaps not very clearly or happily expressed, and considerable doubt appears to prevail in Oudh as to the construction to be put upon it. One passage in the Commissioner's (Mr. Capper's) judgment almost implies that, inasmuch as the actual treatment of a son by his father varies in all countries according to the characters of the parent and the child, it is impossible to say what the Legislature meant by the treatment of a grandson "in all respects as a son." Other passages of the same judgment seem to assume that the treatment must in some way be tantamount to an adoption under the Hindoo Law, involving the legal consequences of such an adoption as, *e.g.*, the subjection of the grandson to prohibitions as to marriage which would not otherwise attach to him. And the appellant's own plaint affords some colour to such a construction, by describing his mother and guardian as his "sister."

Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindoo Law. They apprehend that a Hindoo grandfather could not in the ordinary and proper sense of the term adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly, obsolete) of constituting, in the person of a daughter's son, a "patrica-puttra," or son of an *appointed* daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the 4th clause, but it is not, therefore, essential in order to do so. Moreover, it is to be observed that the 4th, like every other clause in the

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22nd section, applies to all the talookdars whose names are included in the second or third of the lists prepared under the Act, whether they are Hindoos, Mahomedans, or of any other religion; and it is not until all the heirs defined by the ten first clauses are exhausted that, under the 11th clause, the person entitled to succeed becomes determinable by the law of his religion and tribe.

It is necessary then to put a general as well as a rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their Lordships are of opinion that wherever it is shown by sufficient evidence that a talookdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.

[461] Their Lordships will now proceed to consider the effect of the evidence as to the treatment of the appellant by the Maharajah.

It is unquestionable that the appellant was from the first brought up in the house of his grandfather, and not in that of his father. This circumstance, of itself, does not go far to prove his case. It may be accounted for by the fact that the social position of the father, though respectable, was very inferior to that of the Maharajah. But, whatever may be its value as evidence, this is a circumstance in the treatment of the boy which involved a departure from the ordinary usages of Hindoos.

On the other hand, it must be admitted on the evidence that the Maharajah had not, in 1864, formed a clear intention that Dadwa Sahib, who was then between seven and eight years old, should be his successor.

It has been said that the making of his will was the result of pressure on the part of the authorities. However that may be, the act was a natural one. At that time nothing was definitely fixed as to the course of succession to the newly constituted talooks, except that the talookdars had an absolute power of disposition over them. The family custom which had previously regulated the succession to the Maharajah's talook was one which implied selection. It was, therefore, in every way desirable that the Maharajah should make some provision as to his successor. The will, which was clearly his own act, indicates that he intended his successor to be a male, though he had not yet made up his mind as to the person. His words are: "As I have not yet come to a determination as to what *boy* is to become my successor." He, therefore, made his wife provisionally his heir, delegating to her the power of selection, which, in his then state of mind, he did not feel able to exercise himself.

That state of mind is the more conceivable if we suppose that he had then begun to entertain the notion that Dadwa Sahib should ultimately succeed him. Had he then resolved that the successor should be taken from his male relations *ex parte paterna*, it would have been comparatively easy to nominate a brother or brother's son. In that case his only reason for delaying his choice would have been the desire to be more fully assured of the fitness of the person selected. But a predilection for his grandson would introduce fresh and more serious grounds for hesitation and delay. Independently of his affection for the boy, he might feel that the estate, being separate property, would, according to the *Shasters*, devolve upon him in preference to collaterals, though in the male line. On the other hand, he may have felt reluctant to depart from the family custom and offend

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his relations by allowing the estate to pass out of his own "gotra." And if, as is stated on the record, he were a man apt to prefer an indirect to a direct course, he might well determine to shift the responsibility of selection to his widow, to whom he might confide his real and final intentions, trusting to her for the performance of them. That the above was really the state of mind and feeling of the Maharajah when he made his will appears in some measure from the evidence of Anunt Ram, his Dewan, whom the Deputy Commissioner considered to be a trustworthy witness.

In 1867, the ceremony of the Janeo, or investiture of the appellant with the Brahminical thread, took place. That this was done with considerable pomp in the Maharajah's house, that the Maharajah took that part in the ceremony which, in the ordinary course of things, would be assumed by the boy's natural father, seems to be established. That what was done operated either in law or in fact as a tranfer of the boy from his own into the Maharajah's *gotra*, their Lordships, upon the conflicting evidence in the cause, and against the opinion of Mr. Capper, are unable to affirm.

The next important event in Dadwa Sahib's history was his marriage in 1868 to the daughter of Darogha Ramdan. It seems to be clearly established that on that occasion the Maharajah wrote the two following letters to the father of the bride. The first is in these words:—

[462] "Lallah Tulsiram came to me and verbally mentioned to me all the facts. I have, in my former letter, already stated what I wished to communicate to you, and you should attach great weight to that statement. I had fully weighed all the ups and downs before I embarked in this affair. In short, when I have candidly declared Dadwa to be my heir, and am about to celebrate his marriage, with a view that he may stop here, you can have no cause to entertain any apprehension.

"The will contains no such derogatory clause as you have heard. Every sentence in it has a peculiar meaning. Moreover, I have made my intentions known to Colonel Barrow, which you should consider quite correct; you should be quite satisfied."

The other letter is as follows:—

"I have received your letter and become acquainted with its contents. You have some doubt regarding the marriage of Dadwa, but you know very well that I have declared no one to be my heir except Dadwa, and this is known to the authorities. This is the reason that my brothers are displeased with me. You are entirely in fault. As I have made him my heir, and am about to celebrate his marriage here, how is it possible that any other person can become my successor? Dadwa has no reason to go to his native place. You should rest satisfied, and consider what I write to you to be of great weight. I have fully made my views known to my wife, so you should be satisfied, and make preparations for the marriage."

These letters no doubt are no legal revocation of the will. They seem rather to recognise the continued existence of a will. But they are pregnant evidence to show that the Maharajah's inclinations in favor of his grandson had then ripened into a confirmed intention to make him his successor. They are consistent with the hypothesis that the Maharajah at that time either thought that he had named Dadwa Sahib in the will as his successor, or had instructed his wife to exercise her power of appointment in Dadwa's favor. They are inconsistent with the hypothesis that at that time he was in doubt as to the person who should succeed him; or intended to leave to the Maharanee a discretionary power to name any other successor.

There remains, no doubt, the possibility that these letters, written to remove the apprehensions of his correspondent, and in order to bring about the proposed marriage, were written with a dishonest intention to deceive. But nobody has sought to cast upon the Maharajah's character the imputation which such a supposition implies.

These letters hardly require the confirmation supposed to be afforded by what has been called the "red letter," being the invitation to attend the marriage, which was addressed by the Maharajah to the late Nowring Singh, and contains the words:—"Do not regard this as a customary invitation. Dadwa Sahib is the light of my eyes, and heir to my property." Their Lordships, however, think it right to state that they see no reasons to doubt the genuineness of that document. The original is produced by the widow of the person to whom it was addressed, and it corresponds with a copy of it in the Maharajah's letter-book.

The documentary evidence which has just been considered is far more important, as direct evidence of this intention of the Maharajah, than any parol testimony touching the manner in which the marriage ceremony was conducted. It also goes far to corroborate the testimony of the plaintiff's witnesses on this point, when that is in conflict with the testimony adduced by the defendants.

There is, again, some conflict of evidence as to the fact whether the appellant bore the title of Kowar. There is, however, some evidence that the title was often conceded to him, though he is not uniformly so designated in the Maharajah's own letters. He is so designated in the "red letter." There is also evidence, which their Lordships see no reason to doubt, as to his having on important **[463]** occasions sat on the Guddee with the Maharajah; of his having been introduced by the Maharajah's desire to European officers high in authority; of his having been taken to the durbar of the Governor-General and put prominently forward there; and it cannot be doubted that the effect of the Maharajah's treatment of him was to produce a strong impression on the minds of the officials that he was the intended successor.

So matters stood when the Maharajah, as one of the leading members of the British Indian Association of talookdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act I of 1869. This must have been in the latter half of 1868.

Imtiaz Ali, the vakeel concerned in the drafting and preparation of this Act on the part of the talookdars, has sworn that Cl. 4 of S. 22 originated with the Maharajah; that it was opposed by some of the talookdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the Bill, and passed into law. He also says that he was told by the Maharajah that his object in pressing this clause was to provide for the Dadwa Sahib.

There is some contradictory evidence on this point on the part of the defendants. One of their witnesses, however, Chowdree Niamut Khan, at page 63 of the Record, seems to admit that the Maharajah was the author of the clause in question, though he represents that it was inserted for the benefit of Mahomedan rather than for that of the Hindoo talookdars. He says, "I asked Maharajah Man Singh what the object was of the clause in question, and he informed me that in the absence of a near relation, grandsons on the daughter's side can have no claim under the Hindoo law, but under the Mahomedan law they have; and that the clause in question was inserted with the view that the followers of neither religion might suffer, and that the provisions of the Hindoo law might

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not be contravened." It is not easy to see why the Maharajah should have been thus anxious to originate a clause that was to enure only for the benefit of Mussulman talookdars.

The scale, however, is conclusively turned in favour of the testimony of Imtiaz Ali on this point by the evidence of Mr. Carnegy.

Mr. Carnegy, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered, cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the Maharajah in January 1870, and that in the course of that conversation the Maharajah did make a statement to the effect that he had had a clause inserted in Act I of 1869 to suit the identical case of the Dadwa. That statement is very material, inasmuch as it shows that the Maharajah considered that he had treated his grandson in all respects as a son.

The Deputy Commissioner (Mr. King), speaking possibly in some measure from personal knowledge says: "It is not saying too much, the Court believes, to say that if the plaintiff had not existed, the clause as it stands would never have been enacted." Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion.

It appears, then, to their Lordships that, however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharajah had that intention as early as the date of the Dadwa Sahib's marriage: that, with that intention, he continually treated his grandson, in fact, as the son of the house would be treated, and not as a mere grandson by a daughter; and that, in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the Statute.

They are further satisfied that the treatment, in point of fact, was such as the words of the clause, upon the true construction of it, must be held to contemplate; and that, in the events that have happened, the appellant was the **[464]** statutory heir to the talook, if the Maharajah is to be held to have died intestate.

They now approach the more difficult question, whether there was a revocation of the will.

If the finding of their Lordships upon the question of "treatment" is correct, it follows that the Maharajah, from the time of his return from Calcutta, would presumably have, with regard to his will, the *animus revocandi*. It is unreasonable to suppose that having been at so much pains to make Dadwa Sahib his heir *ab intestato*, he would wish to leave that arrangement liable to be defeated at the will, and by the act, of the Maharanee. Moreover, his conduct, and what we are told of his character, make it probable that, even if he thought the succession of Dadwa was secured either by the terms of the will or by further instructions given to the Maharanee, he would now desire it to be effected by operation of law rather than by a voluntary disposition, certain to offend his relatives in the male line, likely to provoke criticism and censure, and not unlikely to cause dissension and litigation in the family.

Nor have we, in this instance, as in ordinary cases of revocation, to account for a change in the testator's intentions, whereby his bounty is diverted from one object to another. The disposition by this will was, on the face of the instrument, only provisional. It argued no fixed intention to benefit the Maharanee, for it provided for the substitution of a male successor in her place. The Maharajah had since made up his mind who

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that successor should be, and believed that he had provided for effecting his intention by operation of law. In these circumstances, the provisional disposition by this will, if not an obstacle to the carrying out of his wishes, had at least become useless and superfluous. These considerations render it highly probable that the conversation to which Mr. Carnegy has deposed did pass between him and the Maharajah. Their Lordships will now consider that gentleman's testimony and the objections that have been taken to it.

The passages material to the question of revocation in Mr. Carnegy's deposition are the following :—

" He spoke to me about having it (the will) withdrawn from the treasury on the eve of my departure on tour across the Gogra (Mr. Sparks's evidence fixes the date of this as some time in January 1870), and expressed a wish that I should examine the deed and see what provisions he had made for the adoption of an heir. He said he had authorized the Maharanee to name an heir, and it was his wish that the power to adopt or name an heir should be limited to the Dadwa Sahib ; that he was apprehensive that he had given her a personal power to adopt any one of the lads of the family ; and that if, on examination of the document, I found that his apprehensions were just, he wished me to destroy it, because his intention was, and always had been, that the Dadwa should succeed him ; and he had had a special clause inserted in Act I of 1869 to suit the identical case of the Dadwa ; so his wishes would be fully met by the document being destroyed and the law being allowed to take its course. Next morning I crossed the Gogra on tour and was absent several weeks. I wrote demi-officially to Mr. Sparks, the Deputy Commissioner, to get out the will and send it to me, and I also discussed the subject with the Chief Commissioner, Mr. Davies, who, I remember, said that if the will was sealed up and deposited by the Commissioner, I, as officiating Commissioner, might open it ; but, if sealed and deposited under orders of the Chief Commissioner, I had better not open it myself. Mr. Sparks unfortunately overlooked the matter, and it escaped my memory during the rest of my tour, and when I returned to Fyzabad I found the Maharajah's health, physical and mental, to be such that I deemed it expedient to take no further steps in the matter, and there it remained. This was in the cold weather of 1869-70."

And in cross-examination he said : " The Maharajah wished his will to be **[465]** destroyed that the Dadwa Sahib might get the benefit of S. 22 of Act I of 1869. He said there was no need of the document, as the clause secured his wishes.

The first objection to Mr. Carnegy's evidence is that it is not corroborated by that of Mr. Sparks, which is also given in the cause. He says, touching this point, " To the best of my recollection, Mr. Carnegy never wrote to me to send him the will. Mr. Carnegy, either verbally or by note, asked me to get out the will and see by whom it was deposited. I requested the Treasury Office to get out the will and see by whom it was deposited, which copy I despatched to Mr. Carnegy. I did not receive any letter, official or demi-official, to return the will to the Maharajah. I did not receive any letter from Mr. Carnegy asking me to return the will, nor did I receive any khutt from the Maharajah. I don't remember receiving any."

Upon this testimony, it is to be remarked, that it confirms that of Mr. Carnegy as to the fact that at the time in question he made some communication to Mr. Sparks touching the Maharajah's will, though there is a material discrepancy between the two depositions as to the precise

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terms and nature of that communication. To that extent then it corroborates Mr. Carnegy's general statement that he had had a conversation with, and some instructions from, the Maharajah about the will, for otherwise there would be no apparent reason for any correspondence between the two officers on the subject. Mr. Carnegy was examined on the 19th April 1873, when on the eve of his departure for Europe. Mr. Sparks was examined on the 2nd of the following July, and there was no opportunity of recalling Mr. Carnegy, and getting him to explain, if he could, the before-mentioned discrepancy. It is conceivable that the deposition of each officer may be partially accurate and partially defective; that Mr. Carnegy, after the discussion with Mr. Davies to which he deposes, may have written to Mr. Sparks to the effect deposed to by the latter, and may on another and possibly subsequent occasion have written to the effect to which he himself deposes. The letter or letters (if any) that did pass are not in evidence, and the question of what really passed rests on the accuracy of the recollection of the two witnesses. It may further be observed, as bearing on the general credibility of Mr. Carnegy, that he has expressly sworn to a discussion on this subject with the Chief Commissioner, Mr. Davies. He has, therefore, vouched that gentleman, who might have been called to contradict him, and the discussion, if it took place, presupposes that Mr. Carnegy had some instructions from the Maharajah concerning the will.

Other objections to the testimony of Mr. Carnegy are founded on his conduct. It has been asked why, if he had this alleged authority to destroy the will, he did not exercise it; why, after his return from his official tour, he did not even inform the Maharajah (who lived until the following October, and, notwithstanding frequent attacks of epilepsy, was occasionally equal to the transaction of business) that the will was still in existence; and, above all, why, after the death of the Maharajah, he allowed the widow to be put into possession of the talook, under the will, upon the assumption that the disposition made by it was still in force.

It is impossible to deny that these objections have more or less weight. The following is the explanation which may be set against them. It is clear that the will, from one cause or another, did not reach Mr. Carnegy whilst on his tour; that, according to his own account, he allowed the matter, though of such great importance, to escape his memory, and omitted to press for the dispatch of the document; that after his return he found the Maharajah on the occasion of his visit to him in a deplorable state of health, and wholly unfit for business. So far Mr. Carnegy is confirmed by Mr. Sparks. Mr. Cornegy seems then to have jumped to the conclusion that the Maharajah's health, physical and mental, was such as to make it inexpedient to take further action in the matter. If this were Mr. Carnegy's sincere conviction, it may well account for his not acting after his [466] return on the antecedent authority by destroying the will. To destroy a will on the parol authority of the testator would in any case be an extremely delicate matter. A man who would have done the act, if assured that it would be confirmed, if necessary, by a person in the full possession of his faculties, would naturally abstain from doing it, if he felt that the confirmation (if obtained) might be questioned as proceeding from one of enfeebled capacity, if not of absolute incapacity for business. His conviction of the Maharajah's continuous incapacity for business, though erroneous in point of fact, might also account for his omission to renew the subject, or to inform the Maharajah that the will was still in existence. His conduct after the Maharajah's death seems to be explicable only on the assumption that he may have thought the actual destruction

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of the instrument was essential to its legal revocation; and that, if he objected to the Maharanee's title on the ground of what had passed between himself and her late husband, he would expose himself to criticism and censure without benefiting the Dadwa Sahib, whose interests he may have supposed, in common with other officials, and many of the dependants of the family, would be secured by the Maharanee's exercise of her power in accordance with her husband's intentions.

Their Lordships do not say that this explanation is wholly satisfactory. But the question which they have to determine is not whether Mr. Carnegy's conduct can be completely explained, but whether it be such as renders his evidence untrustworthy. Their Lordships, considering the position and general character of the witness, are of opinion that this is not the case. Upon his general truthfulness neither the Commissioner nor the Deputy Commissioner has cast any suspicion. The former was of opinion that, considering all the circumstances, he could not depend on the accuracy of Mr. Carnegy's recollections of the conversation with the Maharajah. The other Judge says expressly "that the conversation, such as related by Carnegy, passed between him and the Maharajah I have no doubt." Reviewing, however, Mr. Carnegy's subsequent conduct, he came to the conclusion that "Man Singh only expressed an intention that the Dadwa Sahib should succeed him, and of inspecting his will for the purpose of seeing what he had actually written in it regarding his wife's power to adopt, but did nothing more." He also expresses a doubt "whether, supposing revocation had been clearly proved, it would be proper to let this outweigh the existence of the will," implying that something in the nature of cancellation was necessary. Upon these judgments their Lordships observe that, if Mr. Carnegy be accepted as a truthful witness, the more important portion of his testimony can hardly thus be explained away. His recollection may possibly deceive him as to the terms and nature of his communication with Mr. Sparks; but mere imperfection of memory can hardly account for his imagining that the Maharajah gave him authority to destroy the will if no such authority was given. The authority was in itself a thing so unusual and so important, that the words which conveyed it were likely to stamp themselves on the memory. Nor is it easy to see how such an authority, if not clearly expressed, could be honestly inferred from other words imperfectly remembered. Their Lordships have, therefore, come to the conclusion that Mr. Carnegy's statement of what passed between him and the Maharajah may be accepted as substantially accurate.

If this be so, their Lordships are of opinion that what so passed amounted to a revocation of the will. It cannot, they think, be doubted that the will of a Hindoo may be revoked by parol. The cases cited at the Bar show that this was the law of England before the Statute of Frauds was passed. Their lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the Courts in India in order to establish such a revocation, and they desire to say nothing which may induce those Courts to apply the law in such cases otherwise than with extreme caution. Even in the present case their Lordships have come to the conclusion upon which they are about to act with some **[467]** hesitation, not because they are not perfectly satisfied that the Maharajah had the *animus revocandi*, but because the testimony of Mr. Carnegy is open to the objections which have been considered. It was hardly disputed at the Bar that, if definitive authority to destroy the will was given to him by the Maharajah, that would be sufficient in law to constitute a revocation, although the instrument was not in fact destroyed.

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In truth, the case would then be almost on all fours with that of *Walcott* v. *Ochterlony*, 1 Curteis, 580, the only difference being that the authority was given here by words, and there by a writing sufficient to satisfy the Statute of Frauds. In that case, as in this, the authority was not exercised by the actual destruction of the will.

Their Lordships see no grounds for not accepting that part of Mr. Carnegy's testimony which says that the Maharajah gave him authority to destroy the will, if on examination he should find that it contained a certain disposition. Nor do they think that this qualification of an absolute order to destroy is material, because the will, being what it was, the authority would have clearly justified its destruction. And they are disposed to think that even if the direction to destroy were not, as, upon the whole, they think it is, satisfactorily established, the declaration made by the Maharajah to the principal officer of the district in whose custody the will was, of his desire and intention that the Dadwa Sahib should succeed him by virtue of the newly-passed Statute, and in supersession of the will, would have been in law a sufficient parol revocation.

Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the appellant is the person who, under Cl. 4 of S. 22 of Act I of 1869, was entitled to succeed to the talook; and that he has made out his claim for a declaratory decree to that effect.

The declaration, however, must, their Lordships think, be limited to the talook and what passes with it. If the Maharajah had personal or other property not properly parcel of the talookdari estate, that would seem to be descendible according to the ordinary law of succession.

They will, therefore, humbly advise Her Majesty to reverse the decree of the Commissioner of Fyzabad dated December 24th 1873, and that of the Deputy Commissioner of Fyzabad dated July 28th 1873; and to declare that the will of the late Maharajah Man Singh of April 22nd 1864 was duly revoked by him in his lifetime; and that the plaintiff, Maharajah Pertab Narain Singh, *alias* Dadwa Sahib, was and is entitled, under Cl. 4, S. 22 of Act I of 1869, to succeed, as *ab intestato*, to the talookdari estate of the late Maharajah, including whatever is descendible according to the provisions of the said Statute. Their Lordships are of opinion that, under the peculiar circumstances of this case, the Commissioner exercised a sound discretion in making the costs of the litigation payable out of the talookdari estate; and that the costs of both parties of this appeal ought to be taxed as between solicitor and client, and similarly dealt with. And they will advise Her Majesty accordingly.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

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HIRA CHAND (*Defendant*) *v.* ABDAL (*Plaintiff*). [20th July 1877].

APPELLATE CIVIL.

1 A. 455.

1 A. 455.

1. *Suit for contribution—Joint decree—Maintainability.*

When the purchaser of a share of a mortgaged estate, who had paid off the whole mortgage amount in order to save the property from foreclosure, sued all the other sharers jointly for their share of the amount paid by him; *held* that the suit should be dismissed; but that he can claim from each of them a contribution proportionate to his interest in the property.

But see, *contra*, H.C.R., N.W.P., 1873, p. 215, where the High Court, in a similar case, instead of dismissing the suit, remanded the case that the Court below might determine and separately decree the respective shares of the other persons.

1877 JULY 20. APPELLATE CIVIL.

2. *Appeal against joint decree by some of the defendants on grounds common to all.*

In an appeal against a joint decree by some only of tbe defendants on grounds common to all of them, the whole decree may be reversed.

[1—D., 12 A. 110=10 A.W.N. 31.]

JUDGMENT.

[456] TURNER, J.—The suit cannot be maintained as brought. The plaintiff, respondent, the purchaser of a mortgagor's share, paid off the mortgage to save the property from foreclosure. He thereby became entitled to call upon each of the other mortgagors to contribute, that is to say, he could claim from each a contribution proportionate to his interest in the property. He has now claimed in the lump sum the whole amount paid by him from the other co-sharers collectively, not even excluding his own quota.

1 A. 455.

The appeal is decreed, and as the ground is common to all the defendants, and it would be inequitable to allow the decree to stand against any of them, we reverse the decrees (1) of the Courts below as against the defendants who did not appeal as well as against the defendant who has appealed. Hira Chand (2) will recover his costs in all Courts. The other defendants must pay their own costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

1877 JULY 23. FULL BENCH.

UDAI SINGH (*Judgment-debtor*) *v.* BHARAT SINGH AND OTHERS (*Decree-holders*). [23rd July 1877.]

1 A. 456=2 Ind. Jur. 260.

Rival final decrees—High Court's decree—Privy Council's decree—Execution.

1 A. 456= 2 Ind. Jur. 260.

Where there were two cross-suits for possession of the whole of an estate and one-third of the estate respectively, and the suit for the whole estate was finally decreed by the High Court, and the plaintiff put in possession, and the suit for the one-third share finally decreed for the opposite party by the Privy Council; *held*, in an application for execution by the holder of the one-third share, that the decree of the Privy Council can be executed, notwithstanding that it involved the disturbance of possession obtained by the claimant of the whole estate under the High Court's decree, which had become final. The decree of the Privy Council in this case was later in date, and the claimant of the whole estate, should, if he desired to be secured in possession, have pleaded the decree of the High Court in the cross suit, when the appeal in connection with the one-third share was before the Privy Council.

The sons of Kundun Singh had obtained in the first Court a decree against Udai Singh and certain other persons in a suit by them for possession of one-third of certain real property. This decree was set aside by the High Court on appeal by Udai Singh. At the same time an appeal by two of the other persons mentioned above, the High Court affirmed a decree obtained by Udai Singh against these persons and the sons of

(1) Both the Courts below gave the plaintiff a decree against all the defendants for the sum claimed.
(2) The appellant and one of the mortgagors.

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Kundun Singh for possession of two-thirds of the same property in a suit wherein Udai Singh had claimed possession of the whole. The High Court subsequently on appeal by Udai Singh against that portion of the decree made in the suit brought by him which dismissed his claim in respect to a third of his property reversed that portion and gave him a decree for the whole. On the sons of Kundun Singh appealing to the Privy Council only from the decree of the High Court setting aside the decree obtained by them from the first Court for one-third of the property, the decree of the High Court was reversed and that of the Court of first instance restored. In the meantime Udai Singh in execution of the decree of the High Court which he had obtained in the suit brought by him, obtained possession of the whole property. The sons of Kundun Singh applied to the Court of first instance to obtain possession of one-third of the property in execution of the decree obtained by them from the Privy Council. Udai Singh objected that the decree could not be enforced against him on the ground that he was in possession under a decree of the High Court which had become final. On the first Court disallowing this objection he appealed to the High Court.

REFERENCE TO THE FULL BENCH.

The case came on for hearing before STUART, C. J., and OLDFIELD, J., by whom the question whether the application for the execution of the decree of Her Majesty in Council might be granted was referred to a Full Bench.

JUDGMENT.

[459] PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., concurring: The decree of the Privy Council must be executed, notwithstanding its execution involves the disturbance of the possession obtained by Udai Singh under the decree of this Court which has become final. The decree of the Privy Council is the later in date, and had Udai Singh desired to secure his possession, he should have pleaded the decree of this Court in the cross suit when the suit in which the decree of the Privy Council has been passed was before that tribunal in appeal.

STUART, C. J.—Under the peculiar circumstances of this case I do not think that I ought to withhold my assent to the order agreed to by my colleagues, although I desire to guard myself against the opinion, as matter of law, that the decree of the Privy Council is as such a better decree than the decree of any other Court of a prior date and which has become final.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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APPELLATE CIVIL.
1 A. 459 = 2 Ind. Jur. 283.

BHAGWAN SINGH AND ANOTHER (*Plaintiffs*) *v.* MURLI SINGH AND ANOTHER (*Defendants*). [27th July 1877.]

1 A. 459 = 2 Ind. Jur. 283.

Meaning of S. 7, Act XVIII of 1873 (N.W.P. Rent Act).

To enable an owner of proprietary rights in a mahal to claim the right of occupancy as an ex-proprietary tenant, under S. 7 of the N. W. P. Rent Act, there must be something more than a mere temporary transfer of his proprietary rights. These rights must have been completely lost or parted with.

When, therefore, such rights are mortgaged with possession, and a suit for possession is brought by the mortgagee against the proprietor, the latter cannot plead the right of occupancy and refuse to give up possession.

But when the mortgagees in possession of the proprietary rights in a mahal purchased the same at an auction-sale, their possession, on the one hand, became possession in full proprietary right; and on the other hand, the mortgagors, having completely lost their proprietary rights, and having been, till the auction-sale, in possession of the lands constructively, (for the possession of the mortgagee is the possession of the mortgagor), became entitled, under S. 7 of the N. W. P Rent Act, to the right of occupancy of the sir-lands attached to the mahal, as tenants at favourable rates. And if in the assertion of this right, they enter the sir-land, offering to pay the proper rent due from them, they cannot be regarded as trespassers.

[Diss., 7 A. 553 (F.B.); R., 16 A. 337.]

1877 JULY 27. — APPELLATE CIVIL. — **1 A. 459 = 2 Ind. Jur. 283.**

Suit in which the plaintiffs claimed from the defendants possession of 32 bighas and 9 biswas of land, comprising the proprietary rights of the defendants in a certain mahal. The defendants had mortgaged the same to the plaintiffs covenanting to give the mortgagee possession for the purpose of cultivation and the payment of Government revenue and reserving the liberty to redeem the same at any time at the end of the month Jaith. The first Court gave a decree and the lower appellate Court held that the defendants had a right of occupancy in the lands, under the provisions of S. 7 of Act XVIII of 1873, and modified the decree of the Court of first instance, giving the plaintiffs a decree "for declaration of right and possession as mortgagees by preservation of the defendants' tenancy rights." The plaintiffs preferred a special appeal to the High Court contending that S. 7 of Act XVIII of 1873 was not applicable, and that they were entitled to the possession of the lands.

JUDGMENT.

[460] SPANKIE, J.—We understand that the share of the defendants is expressed in bighas of which they are in possession and which they cultivate. These they have mortgaged to the plaintiffs, covenanting to give possession of the same for the purpose of cultivation and the payment of Government revenue. They can redeem the land in any year in Jaith. S. 7 of the Rent Act does not appear **[461]** to apply to this case. The defendants have not lost or parted with their proprietary rights, attached to which is a certain proportion of sir-land, of which they might claim, under S. 7 of Act XVIII of 1873, a right of occupancy as ex-proprietary tenants. The section not only contemplates something more than a mere temporary transfer of proprietary rights, but in the particular case before us the lands in the occupation of the share-holders are the measure of each man's share, and the lands of the defendants are the subject of the mortgage. The plaintiffs are entitled to a decree as claimed.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

1877 AUG. 3. — FULL BENCH. —

THE EMPRESS OF INDIA v. DARBA AND OTHERS. [3rd August 1877.]

1 A. 461 = 2 Ind. Jur. 322.

Crim. Pro. Code, 1872, S. 309—Effect of the section on S. 65, I.P.C.—Act VIII of 1873, Canal Act.

The provisos to S. 309, Crim. Pro. Code, do not extend the period of imprisonment that may be awarded under the provisions of S. 65, I.P.C. They only regulate the proceedings of Magistrates whose powers are limited.

1 A. 461 = 2 Ind. Jur. 322.

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S. 309, Crim. Pro. Code, makes Ss. 64 and 65 of the Indian Penal Code applicable, not only to offences punishable under that Code, but to offences punishable under any law in force for the time being, and therefore applicable to offences punishable under the Canal Act, VIII of 1873.

[F., 10 M. 166 (note) = 2 Weir 26, 10 M. 165 (167) = 2 Weir 30; R., L.B.R. (1893—1900), 494 (496).]

Reference to the High Court under S. 296, Cr. P.C., 1875, of the cases of 9 persons convicted under S. 70, Act VIII of 1873. and only fined (the sentences of imprisonment awarded in default of payment of the fine being all in excess of one-fourth of the maximum period of imprisonment allowed by S. 70).

REFERENCE TO THE FULL BENCH.

TURNER, J., having held on a former occasion that such sentences were illegal in view of that section, SPANKIE, J., before whom the reference was laid, referred to a Full Bench the question whether the sentences in the cases referred were legal or illegal, thinking that S. 309 of Act X of 1872 left the matter in some doubt.

JUDGMENT.

[462] STUART, C. J.—The question referred to us relates to the legality or illegality of sentences passed by two canal deputy magistrates on conviction before them in nine cases for offences under S. 70 of the Northern Indian Canal and Drainage Act VIII of 1873, in respect of the sentences of imprisonment awarded in default of the fines imposed, for there is no question as to the legality of the fines themselves. (the learned Chief Justice then stated the convictions and sentences and continued :) S. 70 of Act VIII of 1873 provides that for such offences as these convicted persons "shall be liable on conviction before a Magistrate of such class as the Local Government directs in this behalf to a fine not exceeding Rs. 50, or to imprisonment not exceeding one month, or to both." There can therefore be no doubt of the legality of the fines imposed in the cases mentioned, but the sentences of imprisonment awarded respectively in default of payment of the fines are clearly illegal, as will presently appear. The Canal Act VIII of 1873 does not appear to contain any other provision for convictions under S. 70 than that I have just quoted, and it must be interpreted by reference to the general law relating to sentences in criminal cases.

That law will be found in the first place in S. 309 of the Criminal Procedure Code, the last clause of which provides that "when a person is sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine *as is allowed by law*, provided the amount does not exceed the Magistrate's powers under this Act." Then by the General Clauses Act I of 1868, S. 5, it is enacted that "the provisions of Ss. 63 to 70, both inclusive, of the Indian Penal Code, shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such shall contain an express provision to the contrary." Act VIII of 1873 contains no express provision to the contrary of the section of the Act last quoted, and we are therefore to find the law relating to sentences of imprisonment in default of fines within the provisions of Ss. 63 to 70, both inclusive, of the Indian Penal Code, and of these 64 and 65 appear to be the sections applicable to the sentences under consideration. I do not see that S. 67 has anything to do with the question, for that section deals **[463]** solely with offences "punishable with fine only," whereas the offences contemplated by S. 70 of Act VIII of 1873 involve liability "to a fine not exceeding

Rs. 50, or to imprisonment not exceeding one month, *or to both*," or, as it is otherwise put in S. 65 of the Indian Penal Code, offences "punishable with imprisonment *as well as* fine." S. 64 provides: "In every case in which an offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence:" and by S. 65 "the term for which the Court directs the offender to be imprisoned in default of payment of a fine *shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence*, if the offence be punishable with imprisonment *as well as* fine."

Thus, at last, we arrive at the rule to be applied to sentences such as are now before us, and under which the imprisonment to be awarded in default of a fine, when the offence is punishable by both penalties, is one-fourth of the term of imprisonment which is the maximum fixed for the offence. In all these canal convictions the maximum imprisonment is one month, and, therefore. the Deputy Magistrates here were not competent to award more than one-fourth of the month, or say one week, and this, of course, under the General Clauses Act I of 1868, S. 2, Cl. 18, applies to either description of imprisonment, simple or rigorous.

From all this it is very clear that the sentences of imprisonment in default of the fines passed by these canal deputy magistrates were illegal, and to that extent they ought to be quashed. It is otherwise, as I have already remarked, as to the fines, which, however, we are informed have all been paid.

PEARSON, TURNER, and SPANKIE, JJ., concurring: Offences under the Canal Act may be punished by fine not exceeding Rs. 50, or imprisonment not exceeding one month, or both. The 64th section of the Indian Penal Code enables the Court, in every case in which an offender is sentenced to fine, to direct that in default of payment of the fine the offender shall suffer imprisonment. The 65th and **[464]** 67th sections of the Indian Penal Code declare what shall be the limit of this imprisonment. When an offence is punishable with imprisonment as well as fine the imprisonment which can be awarded in default of payment of fine is limited by S. 65, Indian Penal Code, to one-fourth the maximum fixed for the offence, but if the offence be punishable with fine only, it was necessary to set up another standard, and accordingly by S. 67, Indian Penal Code, a scale was fixed varying with the amount of fine which could be imposed.

It may be admitted that in some few instances these sections work an anomaly in that when fine alone is imposed as the punishment for an offence punishable with fine, or imprisonment, or both, the term of imprisonment to which an offender may be sentenced in default of payment of the fine is less than could be awarded in default of payment of a fine of equal amount imposed for an offence punishable with fine only. Thus, if for affray, an offence punishable with imprisonment, or fine, or both, an offender be sentenced under S. 160 of the Indian Penal Code to a fine of Rs. 50, the imprisonment which can be awarded in default is limited to one-fourth of a month, while if an owner of land be convicted under S. 154 of the Indian Penal Code for omitting to give information of a riot, an offence punishable with fine only, and be sentenced to pay a fine of Rs. 50, he can be sentenced in default of payment of the fine to imprisonment for two months. This anomaly can occur but in few instances, and it is not very important, because the Court is not confined, in sentencing an offender

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for an offence punishable by fine, or imprisonment, or both, to inflict a fine only, but may also impose a substantive sentence of imprisonment. Moreover, the imprisonment imposed in default of payment of fine does not if suffered satisfy the fine, but the fine may, nevertheless, be levied on the property of the offender if any can be found.

The 309th section of the Code of Criminal Procedure makes Ss. 64 and 65 of the Indian Penal Code applicable not only to offences punishable under the Penal Code, but to offences punishable under any law in force for the time being, and therefore applicable to offences punishable under the Canal Act. The provisos to that section do not extend the period of imprisonment which may be awarded under the provisions of S. 65 of the Indian Penal Code [465] otherwise they would not be confined to Magistrates but would be extended to all Criminal Courts. They were enacted then to regulate the proceedings of Magistrates whose powers are limited. Thus, although a Court of Session, in sentencing an offender for criminal breach of trust, may, in addition to imprisonment and fine, sentence the offender, in default of payment of the fine, to undergo imprisonment for nine months, or one-fourth the maximum of imprisonment which may be awarded for the offence, a Magistrate of the second class, whose powers are limited to six months, convicting an offender of the same offence, and punishing him with fine and imprisonment, can only sentence him, in default of payment of fine, to undergo imprisonment for one-fourth of six months, although if he punishes the offender with fine only, he may, under the second proviso to S. 309 of the Code of Criminal Procedure, award six months as the period of imprisonment to be undergone in default of payment of fine, the term allowed by law being nine months. These observations may serve to explain the object of the provisos, which it has been suggested may extend the powers of Magistrates so as to authorise the imposition of a longer term of imprisonment than could be awarded under S. 65 of the Indian Penal Code.

In the case of a canal offence, which is punishable with fine and imprisonment, the maximum period of imprisonment in default of payment of fine allowed by law is one-fourth of one month, and if the Magistrate punishes an offender for such an offence with fine only, he can award, in default of payment of the fine, no longer term.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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MAN SINGH (*Defendant*) *v.* NARAYAN DAS AND OTHERS (*Plaintiffs*).*

[3rd August 1877.]

APPELLATE CIVIL.

1 A. 480 = 2 Ind. Jur. 387.

1 A. 480 = 2 Ind. Jur. 387.

Res judicata—C. P. C. (1859), Ss. 2, 139.

If, in a suit in which a number of issues are framed on the pleadings, the findings on some of the issues are enough to dispose of the suit, the Court is not bound to refrain from determining the other issues, nor can its adjudication on them be treated as a nullity. And its findings on such issues will be *res judicata* and cannot be re-opened in a subsequent suit between the same parties or their representatives.

[R., 7 A. 606 (614) (F.B.) = 5 A.W.N. 89; 17 A. 174 (184).]

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1 A. 480=2 Ind.Jur. 387.

JUDGMENT.

[482] PEARSON, J.—The question whether the bond on which the claim in the present suit is founded was collusive or not was distinctly raised by the pleadings in the suit formerly brought (1) by Man Singh against Tula Ram (now represented by the present plaintiffs), was made an issue for trial, and was determined in that suit adversely to Tula Ram. The lower appellate Court is of opinion that the finding on that issue in that suit does not preclude a re-adjudication of it in the present suit for two reasons; first, because the determination of the issue in that suit was not required for its disposal; and secondly, because the finding by which it was determined was imperfect. We are unable to concur in the opinion. It is true that the Munsif might have disposed of the former suit without adjudicating on that issue on the basis of his findings on the other issues tried by him; but it is also true that he was perfectly justified in laying down that particular issue for trial, as it arose out of the pleadings and an adjudication on it might have been necessary, and as his finding thereon rendered his decision in the case more firm and complete. We are not prepared to hold that he was bound to refrain from adjudicating upon it under the circumstances, or that his adjudication thereon can be treated as a nullity. His finding is regarded as imperfect by the lower appellate Court because it proceeded on the ground that Tula Ram had failed to prove the authenticity of the bond rather than on any absolute proof of fraud. But, if the finding were open to objection either on the score of irrelevancy or error, the objection might have been taken in the appeal preferred by Tula Ram against the decree passed by the Munsif on the 12th December, 1873, in Man Singh's favour. Tula Ram appealed to the Zilla Judge and to this Court, but never took any such objection, and the finding remained undisturbed. This being so, the question determined by it must in our judgment be deemed to be a *res judicata* not open to re-adjudication. Allowing then the validity of the plea in appeal, we decree the appeal, reverse the decrees of the lower Courts, and dismiss the suit with costs in all Courts.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

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APPELLATE CIVIL.

MANOHAR LAL (*Defendant*) *v.* GAURI SHANKAR (*Plaintiff*).

[10th August 1877.]

1 A. 476=2 Ind. Jur. 354.

Act XXXV of 1858, S. 9—Act XIX of 1873 (N. W. P. Land Revenue Act), S. 195—Lunatic—Court of Wards.

Act XXXV of 1858 declares that, when a person possessing a certain kind of property is adjudged to be of unsound mind and incapable of managing his affairs, the Court of Wards "shall be authorized to take charge of the estate," and that, in all other cases, the Civil Court shall appoint a manager of the estate. The Act, therefore, does not render it imperative on the Court of Wards to take charge of the estate, but merely confers on the Court of Wards authority to do so.

Similarly, S. 195 of the N.W.P. Land Revenue Act declare the Court of Wards competent in its discretion to assume or refrain from assuming the superintendence of the person or property of any disqualified person pronounced by a

1 A. 476=2 Ind. Jur. 354.

(1) The decree in this suit was passed in favour of Man Singh on 12—12—1873.

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APPELLATE CIVIL.

1 A. 476 = 2 Ind. Jur. 354.

District Judge to be of unsound mind. Till the Court of Wards exercises its power, it is competent for the Civil Court to appoint a manager of the lunatic's property.

In a suit for possession of a six anna share in a certain *mauza*—the joint and undivided property in equal shares of G. S. & H. S.—brought by the manager (appointed by Court) of G. S's estate on behalf of G. S. (alleged to have become lunatic), by setting aside the sale by H. S. (of a twelve-anna share) so far as G. S. was concerned, the Court of first instance gave the plaintiff a decree. The defendant appealed to the High Court contending that, inasmuch as the estate of the lunatic included property which subjected the proprietor, if disqualified, to the superintendence of the Court of Wards, charge of the estate devolved on the Court of Wards, and the District Judge had no power to appoint a manager, and as such the manager was not competent to bring the suit.

JUDGMENT.

[477] The Act (XXXV of 1858) declares that when a person possessing such property is adjudged to be of unsound mind and incapable of managing his affairs, the Court of Wards "shall be authorised to take charge of the estate," and that "in all other cases" except as otherwise thereinafter provided, the Civil Court shall appoint a manager of the estate. The Act it will be observed does not render it imperative on the Court of Wards to take charge of the estate, but merely confers on the Court of Wards authority to do so. Similarly, the 194th section of Act XIX of 1873 includes lunatic **[478]** landholders among disqualified persons and the 195th section of the same Act declares the Court of Wards competent in its discretion to assume or refrain from assuming the superintendence of the person or property of any disqualified person. If, as has been contended, we are to construe the 9th section of Act XXXV of 1858 as conferring on the District Court no authority to appoint a manager of the estate of a lunatic landholder, it follows that, where the Court of Wards abstains from exercising the authority conferred on it and taking charge of the estate, the property of the lunatic will be left unprotected. In our judgment this could not have been the intention of the Legislature, and the language of the Act admits of a reasonable construction which would avoid the anomaly. We consider that the term "in all other cases" applies not only to cases in which no part of the estate would subject the lunatic to the superintendence of the Court of Wards, but also to cases in which the Court of Wards, having authority to assume the superintendence of the property, has not exercised that power. Ordinarily, before appointing a manager in such cases, the District Judge should allow the Court of Wards an opportunity to declare its election, but we can conceive cases in which it may be essential for the protection of the estate that a manager should be at once appointed, and if subsequently the Court of Wards assumed superintendence, the appointment made by the Judge would thereupon be annulled.

In the case before us it is not suggested that the Court of Wards has assumed charge of the estate, and we hold that the appointment by the Judge remains valid and entitles the manager to maintain this suit and to verify the plaint.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

MANKUAR (*Plaintiff*) *v.* JASODHA KUAR (*Defendant*).

[13th August 1877.]

1 A. 478 = 2 Ind. Jur. 356.

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APPELLATE CIVIL.
1 A. 478 = 2 Ind. Jur. 356.

1. *Immoral consideration—Void agreement—Indian Contract Act, Ss. 23 and 25.*

A registered agreement given by a man to his concubine, settling on her an annuity charged on real estate (before the Indian Contract Act was passed) as a provision which he was bound in honour to make, was held to be neither void for want of consideration, nor for an immoral consideration (future co-habitation being negatived).

2. *Profits from estate necessary.*

In such a case, it is necessary to prove that profits have accrued from the estate charged or other property of the deceased paramour before the concubine could recover from his heir.

[R., 13 M.L.J. 7 (13), A.W.N. (1904) 238, 27 A. 266 (268) = 1 A.L.J. 632.]

JUDGMENT.

[479] The appellant sued to enforce the provisions of a contract whereby one Gajadhar Singh, now deceased, had settled on her an annuity of Rs. 800 secured by a charge on his estate mauza Lakhnaura. The appellant had lived for many years with the settlor as his concubine, and there seems no reason to doubt he was attached to her and desired to make a suitable provision for her. The respondent, the married wife of the deceased, pleaded that the deed was void under the provisions of the Indian Contract Act, S. 23, having been executed for an immoral consideration, and if not, that it was void under the provisions of S. 25 of the same Act, it having been executed without consideration,..... ..... and that the ancestral estate was so much encumbered that its profits were insufficient to defray the charges for interest. The Indian Contract Act had not been passed on the 28th March, 1869, when the deed on which suit is brought was executed. We need not therefore consider whether under the provisions of that Act it would be void. But if the consideration was immoral, as the Court below has held, it would be void under the law administered **[480]** by the Courts of this country before the Act was passed. In our judgment the consideration was not immoral. The annuity was created not in consideration of future cohabitation, which would be an immoral consideration, but to make provision for a woman for whom it was incumbent on the honour of the settlor to make some provision. Nor, as the law stood when the deed was executed, would it have been held that such a contract was void for want of consideration.....There remains, however, a plea which has not formed the subject of an issue in the Court below. Before the appellant can recover from the respondent, it must be shown that the respondent has received funds available to meet the claim from the profits of Lakhnaura or other property of the deceased. We remand this issue for trial under S. 354.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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APPEL-
LATE
CIVIL.

1 A. 483 =
2 Ind. Jur.
389.

EIDAN (*Defendant*) *v.* MAZHAR HUSAIN (*Plaintiff*).
[14th August 1877.]

1 A. 483 = 2 Ind. Jur. 389.

1. *Mahomedan Law—Prompt or exigible dower.*

When, at the time of marriage, there has been no express stipulation as to whether dower should be prompt or deferred, payment of a portion of it should be deemed to be prompt or payable on demand.

What portion of the dower should be payable promptly must be decided, in the first instance, according to custom and, in the absence of custom, with reference to the status of the woman and the amount of the dower.

2. *Mahomedan Law—Restitution of conjugal rights—Act VI of 1871 (Bengal Civil Courts Act).*

A suit by a Mahomedan against his wife for restitution of conjugal rights must be decided with reference to the principles of Mahomedan Law and not by the general law of contract (Act VI of 1871).

3. *Pleas in such a suit.*

The wife is not precluded, by the circumstance that she did not demand her dower before leaving her husband's house, from demanding it when restitution of conjugal rights is claimed; and the circumstance that they have already cohabited with consent since their marriage, does not preclude her from refusing further cohabitation until the portion of the dower payable to her is paid. Vide 8 W.R.P.C. 3 = 11 M.I.A. 551, in which the Privy Council held, under the law corresponding to S. 24 of Act VI of 1871, that a suit by a Mahomedan for restitution of conjugal rights must be determined with reference to Mahomedan law. H.C.R.N.W.P., 1874, p. 94.

As to the general power of a wife to refuse herself, see 3 W.R. 93. Other cases on the point. 2 Bom. H.C.R. 307—W.R. 1864, p. 252—6 M.H.C.R., 9.

[1 & 2—F., 8 A. 149 (161) = 6 A.W.N. 53, 1 A. 506 (507); **2 & 3—Overruled**, 8 A. 149 (170) (F.B.); **2 & 3—N.F.**, 11 M. 327 (328).]

In a suit by a Muhammadan for restitution of conjugal rights, the defendant pleaded that until her dower was paid the plaintiff was not under the Muhammadan Law entitled to such restitution. Consequently a question arose whether her dower was prompt or deferred. Though the dower was fixed at Rs. 5,000, yet at the time of marriage it was not specified whether it was prompt or deferred. The Court of first instance dismissed the suit. The lower appellate Court overruling the contention that where there was no specification the entire dower was prompt, remanded the case to the first Court, in order that an enquiry might be made as to whether any, and if any, what custom existed as to the amount of dower exigible where there was no specification as to the dower being prompt or deferred. On the finding of the first Court that there was no custom in existence, the lower appellate Court taking into consideration the social status of the defendant gave the plaintiff a decree for restitution of conjugal rights on the payment of Rs. 1,000 to the defendant. The defendant appealed to the High Court. The plaintiff objected that there had been no demand of her dower and as such the lower Court's decree should not have been conditional on the payment of dower.

JUDGMENT.

[485] PEARSON, J.—The view that dower, when the payment of it has not been stipulated to be deferred, should be deemed to be payable on demand, appears to me to be most reasonable and most in accordance with the dictates of common sense; but although it is stated by Macnaghten to be the rule of the Muhammadan law, I am constrained to hold in concurrence with the lower Courts that the greater weight of authority is in favor of the doctrine set forth in Baillie's Digest, p. 126. The inquiry into the custom with the view of determining the portion of the dower-debt payable promptly was therefore proper; and when the question could not be decided by reference to custom, it was proper to determine it with reference to the status of the woman and the amount of the fixed dower. I see no reason to think that the lower appellate Court has not exercised a sound discretion in awarding one-fifth of the total amount of that dower as the portion of which the appellant may fairly claim prompt payment .....I would disallow the objections taken by the respondent under S. 348 of the Procedure Code.....The first is also bad, for the circumstance that the appellant did not demand her dower before leaving the respondent's house does not preclude her from demanding it when restitution of conjugal rights is claimed; and the circumstance that they have already cohabited with consent since their marriage does not preclude her from refusing further cohabitation until the portion of her dower payable to her has been paid (see *Abdool Shukkoor* v. *Raheemoonnissa*) (1). The case is one governed by the Muhammadan law and not by the general law of contract. The appeal should in my judgment be dismissed with costs.

STUART, C.J.—The question of dower in this case arises under peculiar circumstances and appears to demonstrate another anomaly in the Muhammadan law on this subject. The claim to dower is not **[486]** made directly by the wife, but by way of answer to a suit at the instance of her husband the plaintiff for restitution of his conjugal rights. She on the other hand, while admitting her intimacy with the plaintiff and that she lived in his house, denies that she was ever married to him, and although thus contending that she is not his wife she nevertheless claims the rights of one. The Subordinate Judge finds as a fact (agreeing in this respect with the Munsif) that a marriage between the parties did take place. Any contract, however, between them as to dower is, from the very nature of the case, and especially having regard to the defendant's plea, necessarily excluded, and her claim to dower, therefore, must rest entirely on the Muhammadan law applicable to a woman in her position. She claims in the way explained Rs. 5,000 and that she is entitled to demand it as prompt dower, and to have it paid before she returns to the plaintiff's house. The plaintiff, the husband, admits the amount, but says that as there was no agreement as to the nature of it, it must be presumed to be deferred dower. It might be supposed reasonable that before a woman could put forward her claim to the dower at all she ought in the first place to put herself in the right position for asking it by doing her duty as a wife by her husband, and by returning to cohabitation with him, especially as it cannot be said that she left his house because of his refusing her dower. But this reasonable and natural state of things does not appear to find a place in Muhammadan law, according to the principles of which system, on the contrary, a wife can refuse herself to her husband till her dower, being prompt, has been satisfied. But in the present case

(1) H.C.R., N.-W.P. 1874, p. 94.

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although the amount is admitted, and, in the absence of proof to the contrary, must be regarded as prompt, yet the Subordinate Judge considers Rs. 5,000 to be excessive, basing the opinion apparently on his estimate of the defendant's character, whom he describes as a prostitute "belonging to a like family," and he considers that one-fifth of the amount claimed as prompt dower is sufficient. I am not disposed to quarrel with this conclusion, nor with his order as to costs. I would therefore dismiss the special appeal, and, as to costs of this Court, I would direct that both parties should bear their own.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

1877 AUG. 14. — FULL BENCH. — 1 A. 512.

BHIKHAN KHAN AND ANOTHER (*Plaintiffs*) *v.* RATAN KUAR (*Defendant*).

[14th August 1877.]

1 A. 512.

1. *Suit by co-sharer against Lambardar's representative for share of profits—Jurisdiction—S. 93 (N.W.P.) Rent Act.*

(By the Division Bench). A suit by a co-sharer, in an undivided mahal against the representative of a deceased lambardar for his share of the profits due from the deceased, is a suit cognizable by the Revenue, and not by the Civil Courts (S. 93, N.W.P. Rent Act). (Full Bench Ruling in the unreported case of *Ashraf-un-nissa* v. *Umrao Begam*—(*Vide* footnote to 1 A. 512, *F*).

2. *Profits when due—Limitation.*

(By a majority of the F.B.). For the purpose of limitation, profits are ordinarily to be considered due as soon as there is a divisible surplus in the hands of the lambardar, after payment of Government revenue and village expenses. Where, by agreement or custom, a date is fixed for taking accounts and dividing the profits, any divisible profits, which may have accrued prior to that date, is due on that date: and the divisible profits in respect of any arrears which may be collected after that date, are due at the time they reach the hands of the lambardar or his agent.

Per Stuart, C.J. and Spankie, J.—In the absence of custom or agreement as to the date when the profits are to become due, they become due on the last day of the agricultural year, as fixed by Acts XVIII and XIX of 1873.

[1—**F.**, 4 A. 412 = 2 A.W.N 78; **D.**, 5 A. 438 (**F.B.**) = 3 A.W.N. 69; **R.**, 14 A. (381) (400) (**F.B.**) = 12 A.W.N. 143.]

In a suit by the plaintiffs, co-sharers in a mahal, for a share of the profits of the mahal for 1278 Fasli, instituted on 29—6—1874, alleging that the profits for that year had been collected by a deceased co-sharer and lambardar, before his death, that their share of these profits became due and payable on 1—7—1871 but had not been paid to them,—the defendant, (the widow of the deceased co-sharer and lambardar and his heir in possession of the estate) set up as a defence that the suit was, under S. 93, Act XVIII of 1873, cognizable by a Revenue Court, and that, as the profits of the year 1278 Fasli became due, not on 1—7—1871 but on 3—6—1871 when that agricultural year ended, the suit was barred by limitation, not having been brought within three years from the latter date. The first Court, holding that the suit was cognizable by a Civil Court, dismissed it, on the ground that it was barred by limitation. The lower appellate Court, without deciding whether the suit was cognizable by a Civil Court or a Revenue Court, held that it was barred by limitation

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under S. 94, Act XVIII of 1873. On appeal to the High Court, the plaintiff contended that the suit being cognizable by a Civil Court, the period of limitation applicable to it was that laid down in Art. 118, Sch. II of Act IX of 1871, and not that in S. 94 of Act XVIII of 1873, and that, even if the period of limitation applicable was three years and such period was computed from the end of 1278 Fasli, that year did not end on 3—6—1871 but on 30—6—1871, and the suit was within time. The respondent objected, under S. 348 of Act VIII of 1859, that the suit was cognizable by a Court of Revenue.

[514] STUART, C.J. and PEARSON, J., before whom the appeal came on for hearing, referred to a Full Bench the question how the day on which the profits are due to, and claimable by, co-sharers in a mahal is to be ascertained.

ORDERS OF REFERENCE.

PEARSON, J.—A recent ruling of the Full Bench of this Court (1) has declared a suit of the nature of the present to be cognizable by **[515]** the Revenue and not by the Civil Courts. We must therefore, in pursuance of that ruling, admit the validity of the objection urged by the respondent, under S. 348 of Act VIII of 1859, to the extent that the Subordinate Judge was incompetent to take cognizance of the suit. The lower appellate Court was, however, warranted in disposing of the appeal preferred to it by the provision of S. 207 of the new Rent Act, and under that or the following section, we are also bound to deal with the appeal before us. The first plea fails in reference to the ruling above mentioned.

The question raised by the second plea next presents itself for consideration. By S. 94 of the Act above mentioned a suit for a share of the profits of a mahal must be brought within three years from the day on which the share became due. But the law does not fix the day on which the share becomes due. It may be fair and reasonable to hold that it becomes due on the last lay of Jait of the fasli year, but it would be not less fair and reasonable to hold the last day of the agricultural year, as defined in Act XIX of 1873, to be the day from which the period of limitation should run. Again, it might be held that when by agreement or by custom a particular day had been fixed for the distribution of profits in any mahal, or for a settlement of accounts, the time should run from such day. But where no such day has been fixed by agreement or custom, there would still be room for doubt. I would refer the question how the day on which the profits are due to, and claimable by, co-sharers in a mahal is to be ascertained, to a Full Bench.

STUART, C.J.—The ruling of the Full Bench referred to by Mr. Justice Pearson was strongly dissented from and is still strongly dissented from by me as matter of law. But if not only in this suit but in all other similar cases I am absoultely bound by that ruling, then of course I must hold that the respondent's objection is well founded, and it was taken in the Court of first instance; S. 207 of the Rent Act therefore strictly applies.

That section is in the following terms:—"If in any such suit such objection was taken in the Court of first instance, but the appellate Court has before it all the materials necessary for the determination of the suit, it shall dispose of the appeal as if the suit had been instituted in the right Court." The nature of the suit **[516]** here referred to and the objection are described in S. 206, which is as follows:—"In all suits instituted in any Civil or Revenue Court, in which an appeal lies to the District Judge or High Court, an objection that the suit was instituted in

(1) 1 A. 512 (Foot-Note).

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the wrong Court shall not be entertained by the appellate Court, unless such objection was taken in the Court of first instance, but the appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court." It thus appears that "the suit" and "the objection" are the same in both sections, but the manner in which the objection is to be treated is very different. S. 206 applies, by implication, where the objection had not been taken in the Court of first instance, and goes on to provide that the objection shall not be entertained, *i.e.*, shall not be looked at, shall not be taken cognizance of or in any way noticed, but shall be altogether disregarded, and the appeal shall proceed as if the objection had never been taken at all; and, therefore, where, as in the present case, the suit had been instituted in the Civil Court, that Court shall be deemed the right Court, that is S. 206. S. 207, as I have stated, applies where the objection had been taken in the Court of first instance, and where, by implication, the objection has been entertained and allowed, and it goes on to provide for the case where the appellate Court has before it all the materials necessary for the determination of the suit, in which case the appellate Court "shall dispose of the appeal as if the suit had been instituted in the right Court," which, in the present case, must be understood to be the Revenue Court, and of course according to revenue law. That being so, the limitation of three years prescribed by S. 94 of the Rent Act of course governs. But I share the doubt and difficulty expressed by Mr. Justice Pearson respecting the date from which the limitation is to run. On this subject I concur in the reference to the Full Bench proposed by Mr. Justice Pearson.

JUDGMENT OF THE FULL BENCH.

[516] PEARSON, TURNER, and OLDFIELD, JJ., concurring.—The lambardar collecting rents on account of himself and the other co-sharers **[517]** in a revenue-paying mahal is entitled to apply the collections, firstly, to the payment of Government revenue and village-expenses, and then, after deducting what (if anything) is due to himself as *haq lambardari*, is bound to divide surplus collections among the several co-sharers in proportion to their shares. Ordinarily then profits are due as soon as there is a divisible surplus in the hands of the lambardar. But it not unfrequently happens that by agreement or custom a date is fixed for taking the accounts and dividing the profits. In this case any divisible surplus which may have accrued prior to that date is due on the date so fixed, and the divisible profits in respect of any arrears which may be collected after that date are due at the time they reach the hands of the lambardar or his agent.

SPANKIE, J.—The share, it appears to me, becomes due at the end of the agricultural year, when the rents have been collected and the Government revenue has been paid. The village accounts should then be made up. Probably custom or agreement between the shareholders regulates the practice. A Court dealing with a question of this nature should ascertain whether there is any custom or agreement between the shareholders to which it might refer for the determination of the date from which limitation should run. Where there is no custom or agreement the safest guide would be the end of the agricultural year as defined in Cl. 8, S. 3 of Act XIX of 1873, that is to say, the thirtieth day of June. This also is the date fixed in the Rent Act as the day upon which the agricultural year expires—*vide* Ss. 31, 34, and 35 of Act XVIII of 1873. It may be said that the lambardar may not have been able to collect the rents and that there are no profits to distribute, or that each share is less

than the shareholder is ordinarily entitled to receive. In such a case the share would still be due at the close of the agricultural year on the assumption that the rents have been collected, and it would be for the lambardar to show that there were no profits, and that he had exercised all due diligence as lambardar and trustee for the sharers in collecting the rents and income of the estate. So in all disputes between co-sharers, whatever might be the nature of the defence, the share would become due at the expiration of the agricultural year. I would therefore say that where no custom is found to exist regulating the practice, or where **[518]** there is no agreement between the shareholders on the point, the share becomes due on the 30th June in each year.

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STUART, C.J.—I concur substantially in the opinion of Mr. Justice Spankie. I observe in the case that was before Mr. Justice Turner and myself in April of last year, *Girdhari Lal* v. *Lahori* (1). Special Appeal No. 1336 of 1875, in which we made a remand, we expressed the opinion that the limitation of three years ran "from the date when the profits became payable," or otherwise, as we go on to explain, "in the absence of any custom or agreement to the contrary, profits became due from the time when they reach the lambardar's hands," which I suppose must be taken to be at the end of the agricultural year, that is, in this case, on the 30th of June of each year. But it might be well to inquire whether there is any custom or agreement on the subject in the district of Aligarh, where the property here in suit is situated.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

1877 AUG. 22. — FULL BENCH. — 1 A. 625.

EMPRESS OF INDIA v. KASHMIRI LAL. [22nd August 1877.]

Crim. Pro. Code, 1872, Ss. 435, 436, 467 to 471—Offence under S. 193, Penal Code, whether an offence in contempt of Court—Jurisdiction of Magistrates.

Held, by the Full Bench (Stuart, C. J., dissenting):—An offence under S. 193, Penal Code, committed before a Court, is not only an offence against public justice, but also a contempt of the Court's authority. Therefore, a Magistrate cannot try himself, by reason of the provisions of S. 473, Crim. Pro. Code, a charge under S. 193, Penal Code, if the false evidence has been given in his own Court.

[R., 14 A. 354 (355); **D.**, 4 A. 322 (325, 327).**]**

Application to the High Court for the exercise of its powers of revision under S. 297 of Act X of 1872.

REFERENCE TO THE FULL BENCH.

PEARSON, J. referred to the Full Bench the questions (i) whether an offence under S. 193 of Act XLV of 1860 is a contempt of Court within the scope of S. 473 of Act X of 1872, and (ii) whether a Magistrate before whom such an offence is committed, being competent to try it himself, is precluded from doing so himself by S. 471 of Act X of 1872, and is bound to send the case for trial or commitment to another Magistrate.

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(1) Unreported.

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1 A. 625.

JUDGMENT OF THE FULL BENCH.

[626] STUART, C. J.—I have given the questions submitted by this reference and the authorities bearing upon them my anxious consideration, and I cannot hold that the offence defined by S. 193 of the Indian Penal Code is within the meaning and scope of S. 473 of the Criminal Procedure Code. I regret to say that I fail to appreciate the Madras and Bombay rulings which were referred to at the hearing. These rulings, as well as the argument that was maintained before us on behalf of the appellant, express, I must be allowed to say, somewhat loosely and inartificially the general view of the bearing of the Penal and Procedure Codes in regard to offences of this nature. But we must not generalise in such a matter. There can be no doubt that in a certain sense there is involved in the crime of perjury an offence both against the authority of Courts and of public justice; but a more precise question is before us in this reference, and, arising as it does in a criminal case, it should be answered with as much precision and exactness as possible. The question then is, not whether the offence here is as one against the authority of a Court or against public justice, or of both kinds, but whether the precise and particular offence defined by S. 193 of the Penal Code is a contempt within **[627]** the meaning and scope of S. 473 of the Procedure Code. I am of opinion that it is not. With the exception of the law provided by Ch. X of the Penal Code and Ch. XXXII of the Procedure Code, no legal definition has been given, so far as I am aware, by any authority recognised by the law of India, Civil or Criminal, of the expression "Contempt of Court," and we can only arrive at a conclusion on such a question as this by comparing the terms of S. 193 of the Penal Code with the provisions of Ch. X of that Code and Ch. XXXII of the Procedure Code to which I have referred, and by considering whether S. 193 fairly comes within the scope of these provisions. Now the offence defined by S. 193 is distinct and precise in itself, and it forms part of Ch. XI of the Penal Code, which deals with the subject of false evidence and of offences against public justice. On the other hand the immediately preceding Ch. X treats of the contempts of the lawful authority of public servants, and within that chapter the excepted matters in S. 473 are to be found, and it appears to me that by no straining of language or meaning could the offence defined by S. 193 of the Penal Code be brought within the sanction of Ch. X generally, or specially within the offences intended by the exceptions mentioned in S. 473 of the Procedure Code.

The other question in this reference is whether a Magistrate before whom the offence under S. 193 is committed, being competent to try it himself, is precluded from doing so by S. 471 of the Procedure Code and is bound to send the case for trial or commitment to another Magistrate. I have again carefully considered this question, and feel obliged to state that I deliberately and advisedly adhere to my judgment in the case of *Queen* v. *Jagat Mal* (1), by which I ruled that, as the offence under S. 193 of the Penal Code was one of those included in the category contained in S. 471 of the Procedure Code, the Magistrate there, who was of the first class, had therefore power to try and commit, and could commit either to himself or to the Sessions Court, or send the case for inquiry and commitment to any other Magistrate with the like powers, but that the first mentioned Magistrate was not precluded by S. 473 from trying the offence himself, as he is not, I consider, in the present case.

[628] The offence under S. 193 of the Penal Code being included in

(1) 1 A. 169.

the procedure provided by S. 471 of the Procedure Code is not merely a contempt in any general sense, but a distinct and substantive offence in itself, which, in my judgment, a Magistrate may commit to and try by himself.

PEARSON, J.—S. 473 of Act X of 1872 recognises the offences to which S. 472 refers as offences committed in contempt of the authority of a Court, and those are the same as are indicated in S. 471 as being mentioned in Ss. 467, 468, and 469. S. 467 speaks of the offences described in Ch. X of the Indian Penal Code not falling within Ss. 435 or 436 of the Criminal Procedure Code. S. 468 speaks of the offences against public justice described in Ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, and 228 of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court. S. 469 speaks of offences relating to documents described in Ss. 463, 471, 475, 476 of the Indian Penal Code, when the document has been given in evidence in any Civil or Criminal Court. It appears to me to follow as a necessary conclusion that the offences above-mentioned are all contempts of the authority of a Court within the scope of S. 473, and cannot be tried by the Court before or against which they may have been committed.

Under this view the answer to the reference must be that the Court in which the offence described in S. 193 of the Indian Penal Code has been committed cannot try the offender. It is unnecessary to determine whether he is precluded from doing so by S. 471 of the Indian Penal Code. Otherwise I should have been disposed to adhere to my ruling in the case of *Queen* v. *Gur Bakhsh* (1).

TURNER, J.—No good reason is assigned for limiting the term "offence committed in contempt of its own authority" in S. 473 of the Criminal Procedure Code to offences defined in and punishable under Ch. X. of the Indian Penal Code, and therein described as offences against the lawful authority of public servants. It must therefore be taken to embrace all offences which are recognised as contempts of the authority of a Court of justice. The offence of giving false evidence is such an offence, and reading S. 473 of the Criminal Procedure Code with the sections that immediately precede it, **[629]** it does not appear to admit of doubt that the Legislature intended that the offence of giving false evidence should be so regarded.

In Ss. 435 and 436 the Code prescribes the procedure to be adopted for the punishment of contempts of Court when immediate action is called for by the nature of the offence. In Ss. 464-473 it deals with offences of the same character which generally admit of more deliberate action. To prevent the oppressiveness of frivolous proceedings by hostile parties, it requires in Ss. 467, 468, and 469 that a complaint of any offence specified in those sections shall not be entertained without sanction of the nature described in S. 470, and among the offences specified in S. 468 is the offence described in S. 193 of the Indian Penal Code. In S. 471 it declares the procedure to be followed when the Court before which any offence specified in Ss. 467, 468 and 469 is committed itself takes action and declares the Court competent to *commit* or send the case for inquiry to any Magistrate having power to *try* or *commit*. In S. 472 it empowers a Court of Session to charge a person for any "*such*" offence, if the offence be triable by the Court of Session exclusively, and to *commit or hold to bail and try* such person on its own charge; and lastly in S. 473 it declares in the most explicit language that, except as provided in Ss. 435, 436, and 472, no

(1) 1 A. 193.

1877 AUG. 22. FULL BENCH. 1 A. 625.

Court shall try any person for an offence committed in contempt of its own authority. It seems clearly to have been intended, so far as is consistent with public convenience, to secure to a person accused of any such offence a trial free from the prejudice which the Judge before whom the offence is alleged to have been committed would be likely to entertain. For these reasons I am of opinion that the Magistrate was incompetent to try the accused.

SPANKIE, J.—I am prepared to accept the ruling of the Madras and Bombay High Courts on the points referred to us, cited during the argument. An offence under S. 193 committed before a Court appears to be not only an offence against public justice, but also a contempt of the Court's authority. S. 435 of the Criminal Procedure Code too does not limit the offences to which it refers to those only to be found in Ch. X of the Penal Code, for an offence under S. 228, Ch. XI, is imported into the section. Reading Ss. 471, 472, and 473 of the Criminal Procedure Code together, I conclude that a Magistrate cannot try a charge under S. 193 of the **[630]** Penal Code if the false evidence has been given in his own Court, and that no Court other than the Court of Session can try any person for an offence committed in contempt of its own authority.

OLDFIELD, J.—I adhere to the opinion which I expressed in the case of *Queen* v. *Kultaran Singh* (1) that the Court before which an offence under S. 193 of the Indian Penal Code is alleged to have been committed cannot try the case. I think the terms of S. 471 of the Criminal Procedure Code are sufficiently clear on this point. I so far modify the view I then took as to hold that an offence under S. 193 of the Penal Code may be considered an offence committed in contempt of the authority of the Court, and therefore S. 473 of the Criminal Procedure Code will also operate to prevent the Court trying any person for such an offence committed before it.

FULL BENCH.

PRESENT:

Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

1877 AUG. 27. FULL BENCH. 2 A. 573= 5 Ind. Jur. 95.

SUGRA BIBI (*Plaintiff*) *v.* MASUMA BIBI (*Defendant*).

[27th August 1877.]

2 A. 573=5 Ind. Jur. 95.

Mahomedan Law—Dower.

Under the Mahomedan Law of the *Shia* sect, a widow is entitled to claim the whole of the dower agreed by her deceased husband, at the time of the marriage, to be given to her, irrespective of his means at the time of marriage or at the time of his death.

[F., 9 Bom. L. R. 188 (198); R., 13 C. W. N. 153.]

In a suit in which the plaintiff, the widow of one Tasadduk Husain, deceased, sued *in forma pauperis* the defendants, the mother, brother, and two sisters of the deceased, his heirs, claiming to recover from his estate Rs. 51,000, being the amount of her "deferred" dower, the defendant Masuma Bibi, mother of Tasadduk Husain, set up as a defence to the suit that Tasadduk Husain had settled a dower on the plaintiff "equal to the dower settled on Fatima, *viz.*, ten dirms, or Rs. 107, according to the law of Imamia prevailing among the Shias," to which sect the parties belonged, alleging in her written statement as follows:—"In fact all the

(1) 1 A. 129.

members of the plaintiff's family and that of Tasadduk Husain have acted all along in accordance with this custom: at the time of Tasadduk Husain's marriage his circumstances and those of his father and the family of the plaintiff were not in such a state as to admit of fixing the dower at such a large amount, the payment of which was impossible: if it was fixed it was merely for the sake of show, its payment not being intended." The material portion of the judgment of the first Court was as follows:—" Although such a large sum of money is said to have been settled on plaintiff as dower, no deed of settlement is forthcoming: it is proved that Tasadduk Husain possessed no independent means at the time of his marriage with plaintiff, and had not commenced practising as a pleader: his father, who was employed as a mukhtar or agent in Azamgarh, although possessed of some property, was not in a position to settle a dower of Rs. 51,000 on his son's bride: nor is there any conclusive evidence to show that this was the proper dower of female members of the family of plaintiff's father: under these circumstances, I am unable to credit the statements of the plaintiff's witnesses, that Tasadduk Husain at once agreed to settle the above-mentioned dower on plaintiff, and incline to accept the testimony of defendant's witnesses, who unanimously testify that the dower of Fatima, or about Rs. 107, was settled on plaintiff, an amount which appears to be more reasonable and suited to the then circumstances of the parties: among the plaintiff's witnesses is her maternal uncle, Nisar Husain, whose testimony appears to be very exaggerated, and who declares that similar amounts of dower were invariably settled on each and every female member of the family of the bride and bridegroom, which appears to be absurd and is rebutted by the evidence of defendant's witnesses, who deny his presence at the time of the marriage-contract, and he moreover is shown to be biassed against defendants: I therefore find as a fact that the amount of dower settled on plaintiff was Rs. 107 and not Rs. 51,000, and that the first defendant, who has succeeded to the estate of the deceased, is liable to pay it." The plaintiff appealed from the decree of the Court of first instance to the High Court.

JUDGMENT OF THE DIVISION BENCH.

[575] STUART, C. J.—This is one of those extraordinary and embarrassing cases which the Muhammadan law offers as puzzles to the European mind. The plaintiff, appellant, is a pauper, and as such she sues to recover no less a sum than Rs. 51,000 from the estate of her deceased husband, although that estate, it was well known when the suit was brought, amounted only to something between rupees two and three thousand. Now, in any system of law appealing to one's sense of justice and claiming in that respect, I do not say respectful, but intelligible acceptance among rational beings. one would suppose that as regards the two sums I have named a Court of Law might be permitted to exercise a discretion by means of which the widow's claim might be reduced to the possibilities of the case. But it would appear that we are not allowed so to escape from a hopeless and helpless dilemma, for we are told that we must either give this pauper plaintiff Rs. 51,000, or Fatima's portion of 10 dirms amounting to Rs. 107. There is, it seems, no middle course. We are not even to substitute for the Rs. 51,000 the whole of the husband's estate of two or three thousand rupees much less to apportion her such a sum as under such circumstances European widows are obliged to be content with. Such a case appears to be beyond the reach of intellectual apprehension, the suggested law is visionary, and the facts are of a somewhat intangible character.

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But as to the facts, they appear to be these: The parties and their families were and are Shias. The plaintiff was married to her husband, Tasadduk Husain, on 7th May 1843, and the marriage subsisted until the 26th July 1874, when Tasadduk Husain died. At the time of his marriage with the plaintiff, he settled upon her, according, it is said, to the custom of the family, a dower of Rs. 51,000, **[576]** although at the time he possessed no independent means of his own, and had even then not been admitted as a pleader, although he afterwards appears to have practised in that professional position with some little success. What was the exact extent and value of the property he left at his death does not very clearly appear. One witness states that his profits were between four or five hundred rupees a year, and it is not unlikely that by means of professional savings and property inherited from his father, who, it is stated, practised as a mukhtar, Tasadduk Hussain may have left behind him some two or three thousand rupees. It is, however, unnecessary to consider these and other figures of a similar kind, for the rule of the Muhammadan law which we are asked to recognise and administer in this case is one that puts the case quite beyond the limits of arithmetic in any aspect. Here is a case in which a woman, herself a pauper, seeks to recover dower to the extent of Rs. 51,000, although when the settlement of this dower was supposed to be made, the husband, the settler, had not a rupee in the world to call his own. Nevertheless the claim is stated to be justified by the Muhammadan law among the Shias, which, it is said, places no limit to the maximum of dower, no matter what the extent of the husband's estate may or may not be, or whether he had any estate at all. Now, even if such were really and undoubtedly Muhammadan law among Shias, I trust I may be pardoned if I hesitate to admit that it would be reasonable to expect the Judges of a High Court to administer such a law. But although it was strongly urged at the hearing that such was unquestionably sound Muhammadan law, I have not for myself been able to discover any rule of the kind so absolutely laid down in any recognised authority, whether Shia or Sunni. In Baillie's well-known Digest of Muhammadan law, published in 1865, dower is said to be "incumbent" on a husband; but how can it be incumbent on him that is imposed on him as a duty and obligation if the thing to be done is an impossibility, and that it relates to money and property which have no existence, a state of things which by the way that author himself recognises when he expounds that "when something is mentioned as dower which is not in existence at the time, as, for instance, the future produce of certain trees or of certain land, or the gains of a slave, the assignment is bad, and the woman is entitled to her proper **[577]** dower," this "proper dower" being explained to be dower appropriate to the wife's family and social position. But it is further stated in the same work that "dower is unlimited in amount," but it is not said that it is unlimited irrespective of the actual extent and value of the husband's property. On the other hand, I find it laid down in a judgment of the Calcutta Sudder Dawanny Adawlat, Vol. I, page 277, that anything possessing a legal value may be given in dower, that is, of course, a legal value at the time of marriage and settlement. Did the Rs. 51,000 in the present case possess at that time, or did it ever possess, and does it possess now, a legal value? Then in another ruling of the same Court, page 267 of the same volume, it is laid down that the amount of dower is recoverable from the real and personal property left by the husband in preference to the claims of heirs, a ruling which appears to me to disparage and discredit such a dower claim as this. Again in the Tagore Law

Lectures of 1873, page 348, it is asserted that property assigned as dower must be specified and in the husband's possession at the time of the assignment, which would otherwise be invalid: a proposition which does not appear to be intended to apply otherwise than to dower generally, whether prompt or deferred. Then in regard to the Shias, we are told by Mr. Baillie in his work on this system published in 1869, page 68, that among them "there are no bounds to the quantity or value of the dower, which is left entirely to the will of the husband and wife, so long as it is capable of appreciation, that is, not totally destitute of value, like a single grain of wheat, for example." But this also is a text which fails to determine the question under consideration within appreciable or intelligible limits. I could understand the doctrine laid down if it meant, or could be understood to mean, quantity or value of dower as a recoverable charge on the husband's estate. Then as to "the will of the husband and wife," such language is surely the idlest verbiage, unless it can be shown that there was something on which the husband and wife's will could be exercised upon. The expression, however, that the dower must be "capable of appreciation, *i.e.*, not totally destitute of value like a single grain of wheat," seems to bring the rule within one's powers of apprehension, although there appears to me to be no reason why the appreciation, should not be equally applied to visionary or im-[578]possible dower, to the case, for example, of the husband not having himself a single grain of wheat, but yet settling a dower of Rs. 51,000 on his wife The result, in short, of the authorities appears to be that while some texts might possibly suggest the broad principle contended for in this appeal, it is nowhere laid down absolutely and expressly by any authority on the Muhammadan law that dower, limited or unlimited, is to be regarded without regard to the husband's estate, and that unlimited dower may mean and be accepted as dower of the value, it may be, oftentimes the value of that estate, so that her husband at the time of his marriage, although not possessed of a single pice, might yet settle as dower upon his wife lakhs and crores of rupees! Now this is not too extravagant an ideal of the principle of Muhammadan law in question, for as a proposition, it must to that full extent be maintained, supported, and affirmed as Muhammadan law before the plaintiff, appellant, can succeed in this case.

As to the custom on this subject among Shia families, I am not satisfied that such a custom has been satisfactorily proved in this case, but even if it were undoubtedly the practice among Shia ladies, I should hesitate to allow such practice to determine so serious a question. Nor can I recognise, as a sufficient reason for such a practice, that among the Shias a childless widow is precluded from taking any share in the estate of her deceased husband, for surely that is a difficulty that could be met by an express settlement which would give the wife, at the time of the marriage, a reasonable share of, or if you please the whole of, her husband's property. This doctrine, in short, contended for, of unlimited dower infinitely transcends the necessity of the case as stated. But again, in excuse of this alleged singular and anamolous rule as to dower, it is suggested that it is intended to protect Muhammadan wives against the facility for divorce, which can be capriciously used against them by their husbands, seeing that dower takes effect from the wife's divorce or the husband's death. But this explanation I am unable altogether to appreciate, for the conseqences of divorce might be fully guarded against by allowing the wife her proper dower, or even such dower as may comprise the whole of the husband's then available estate. Again, it has been said that the amount of the husband's estate, out of which the dower might

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[579] have to be paid, could not be known at the time of the contract. But that does not appear to me to get rid of the difficulty, or I had rather said the preposterous and visionary absurdity of the alleged rule which has no foundation in any rational hope or expectation, but is solely referable to an idle and nebulous fiction which, in the case of parties like those in this appeal, could never be imagined to descend to the earth in the shape of actual cash or property. But it has also been urged that to allow a wife in the name of dower to carry off the whole of the husband's available estate instead of a fixed sum, however large, might have the effect of defeating the rights of the heirs, or, in other words, might finally determine the inheritance of his property. My answer to this, however, is that such a result entirely depends upon the extent of the husband's property, for, as in the present case, a dower might be named so large as hopelessly to absorb the whole property, leaving the heirs with nothing but the mere name of heirs. Altogether I must decline to accept such a view of Muhammadan law, and unless compelled to do so by the supreme ruling of Her Majesty's Privy Council, I must decline to administer or apply it in any case.

In conformity with the tenor of the remarks I have offered, I might have felt disposed to have given the plaintiff reasonable dower out of her husband's estate—say one-third or even half of all the property he left—but that it appears I am not permitted to do. On the other hand, her claim and contention in the suit is so visionary and intangible that I feel unable to reduce her dower to any palpable character or amount beyond the minimum given by the Subordinate Judge. I would therefore affirm the judgment of the Subordinate Judge and dismiss this appeal, but under the circumstances, without costs.

PEARSON, J.—In my opinion the evidence adduced by the plaintiff is better entitled to credit than the evidence adduced by the defendant, respondent, and the reasons assigned by the Subordinate Judge for his decision of the issue relating to the amount of the dower in question are not valid. Deeds of settlement are not usual, but it is not unusual to settle a dower out of proportion to the means of the husband; probably not many Mumammadans at the time of their marriage are possessed of much independent estate or means. [580] The absence of a deed of settlement in this instance, and the circumstance that Tasadduk Husain was not possessed of large means at the time of his marriage, are insufficient grounds for discrediting the claim and the averments on which it is based. Tasadduk Husain would naturally be expected to fix a dower for his wife similar in amount to the dower which had been usually fixed for the ladies of her family on the occasions of their marriage; and that amount is shown to be Rs. 51,000. The plaintiff's witnesses are mostly her relations, but they are persons who are likely to know the real facts in question, *viz.*, what was the usual dower in the family, and what was the dower actually agreed to be given by Tasadduk Husain. Inasmuch as, according to the doctrine of the Shia sect, a childless widow is precluded from taking any share in the estate of her deceased husband, it is not surprising that the relatives of ladies about to be married should stipulate for the settlement on them of a dower that would constitute an adequate provision for them in the event of their surviving their husbands. It may be that the estate of Tasadduk Husain will not furnish more than such a provision for the plaintiff, his widow. I would reverse the lower appellate Court's decree, and decree the claim and appeal, with costs recoverable from the estate left by Tasadduk Husain aforesaid.

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The plaintiff appealed from the judgment of Stuart, C. J., to the Full Bench, under Cl. 10 of the Letters Patent.

JUDGMENT OF THE FULL BENCH.

PEARSON, J.—The first two grounds of the appeal appear to be incontrovertible. The plaintiff is doubtless entitled to the whole of the dower which her late husband agreed to give her, and which was fixed not in reference to his means at the time of marriage, but to the value which she possessed in the matrimonial market, that value being mainly determined by the local position and traditions, the surroundings and antecedents of her family. The contract cannot be set aside or treated as a nullity because he was ccmpara-[581]tively poor when he married, or has not left assets sufficient to pay the debt, but on the contrary may be enforced so far as is possible. But in this instance it happens that, if a dower of Rs. 51,000 had not been agreed to by him, she would have been entitled to a dower of that amount, because such an amount has been customarily fixed as dower for ladies belonging to the family of which she is a member. Her claim is maintainable irrespectively of any contract on the part of her husband, but I nevertheless allow in full the third ground of the appeal, and would only add that, as the estate left by Tasadduk Husain is probably not worth Rs. 5,000, it was wholly needless for the plaintiff to have falsely represented her dower as amounting to Rs. 51,000. All that she can gain would be equally gained by representing the amount to have been Rs. 5,000. There is, however, no reason to doubt that her real dower is Rs. 51,000, although she will be unable to realise more than a small portion of it.

With these additional remarks I adhere to my judgment of the 30th April last, and would decree the claim and this appeal with costs in all the Courts.

TURNER, J.—However great the objections which may be taken to it, it is unquestionably the practice for Muhammadan gentlemen to settle on their wives dowers without regard to the extent of their own incomes, and when satisfactory proof is adduced that a settlement of dower has been made *bonâ fide*, a lady is entitled to enforce her claim for the whole amount, although it may be in excess of the fortune which on her marriage the husband possessed or could have been expected to acquire. No doubt when a large sum is claimed on account of dower, the lady is bound to meet the improbability suggested by the quantity of the claim, but if the evidence produced by her is sufficient to establish the claim, the Court cannot reduce her dower to an amount which it deems reasonable, nor can it refuse her a decree altogether for any sum in excess of the amount which her opponents are willing to concede her. Regard being had to the usage in this country, the dower claimed by the appellant is not preposterously large, that we could on this ground only refuse credit to her witnesses. It is true that large dowers are less common among Shias than among Sunnis, [582] but even among the former they are occasionally settled: the usage of the lady's family is perhaps more regarded than adherence to the advice of some of the doctors of the laws.

In the case before us, we consider the appellant's witnesses are more reliable and generally of better position in life than the witnesses called by the respondent. They have sworn, and we see no reason to doubt their evidence, that the appellant's dower was fixed at Rs. 51,000, and in corroboration of their statements on this point they also appear to be stating the truth in asserting that this dower was not in excess of the sum usually settled on ladies of the appellant's family. We would there-

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fore decree the appeal, and reversing the decrees of the Division Bench and of the Court of first instance, decree the claim with costs.

SPANKIE, J.—I agree with the opinion expressed by Mr. Justice Pearson, delivered when the suit was heard by the Division Bench. It appears that there is nothing to add to it. If we believe the evidence for the plaintiff, then the dower was specified, and there was no doubt or uncertainty about it. The weight of evidence is in favour of the plaintiff's case, since the amount fixed is stated by the witnesses, members of the family and others likely to know, to be Rs. 51,000. I would therefore decree the appeal with costs.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

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CRIMINAL JURISDICTION.

1 A. 497 = 2 Ind. Jur. 463

EMPRESS OF INDIA v. ABUL HASAN.

[9th November 1877.]

1 A. 497 = 2 Ind. Jur. 463.

Penal Code, S. 211—False charge, what constitutes.

The offence referred in S. 211, I.P.C., consists not in the prosecution of a false complaint, but in the making of it.

[F., 1 A. 527, 6 C. 582 = 8 C.L.R. 255, 4 A. 182 (183), 7 M. 292 (293) = 1 Weir 186; R., 6 C. 496 = 7 C.L.R. 467, 14 C. 707 (711) (F.B), 22 B. 596.]

JUDGMENT.

[498] In this case Abul Hasan went to the police-station and accused Ser Mal of having stolen certain surgical instruments from the dispensary at Atrauli. This complaint was made with the intention that it should be reported to the Magistrate and that thereon proceedings should be taken against Ser Mal. At the suggestion of Abul Hasan, the police immediately searched the premises occupied by Ser Mal, and there found, in a place which could be readily reached from the outside of the house, the articles alleged to have been stolen. The police, finding that Abul Hasan had recently a quarrel with Ser Mal about the non-payment of some fees for medical attendance, and seeing that the articles were placed in a spot unlikely to have been selected by the owner of the premises, but in which they might have been deposited by any person outside the house without attracting the attention of the inmates, in forwarding a report to the Magistrate intimated that the charge made was false. The Magistrate, after making a second inquiry through the tahsildar, came to the same conclusion and refrained from instituting any proceedings against Ser Mal. Abul Hasan was, however, summoned to answer the charge of having instituted a false complaint of a criminal offence, and on this charge he was convicted. On appeal the Judge acquitted him, holding that the charge of false complaint could not be sustained because the Magistrate had not inquired into the charge of theft, and in support of his judgment the Judge relied on the ruling of a Bench of the High Court, Calcutta—*The Queen* v. *Bishoo Barik* (1). We may point out that in that case proceedings on the original charge were actually pending when the charge of false complaint was instituted and determined.

(1) 16 W. R. Cr., 77.

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CRIMINAL JURISDICTION.

1 A. 497 = 2 Ind. Jur. 463.

whereas in the case before us no proceedings were pending on the [499] original charge when proceedings were instituted against Abul Hasan. Whether it would be a sufficient answer to a charge of false complaint that the complaint had not been determined and that proceedings were still pending, we need not now determine, for in this case no proceedings had been instituted. The offence consists not in the prosecution of a false complaint but in the making of it. The case of *The Queen* v. *Subbanna Gaundan* (1) is precisely in point. We concur in the ruling of Chief Justice Scotland in that case and in the grounds on which that ruling proceeds. The ground therefore on which the judgment of the Sessions Judge proceeds is bad in law. The evidence adduced by the prosecution satisfies us that the original charge was made and that it was false, and warrants the inference that Abul Hasan knew it was false, and made it with the intention of injuring Ser Mal. The conviction was therefore proper, and the sentence is certainly not too severe. The appeal is allowed, the judgment of acquittal passed by the Sessions Judge is set aside, and the conviction and sentence affirmed.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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NOV. 10.

PRIVY COUNCIL.

3 Cal. 645 = 3 Suth. P.C.J. 472 = 3 Saraswati's P.C.J. 769.

On Appeal from the Court of the Commissioner of Rae Bareilly, Oudh.

THAKOOR SHERE BAHADUR SING *v.* THAKOORAIN DARIAO KOER.

[10th November 1877.]

3 Cal. 645 = 3 Suth. P.C.J. 472 = 3 Saraswati's P.C.J. 769.

1. *Title conferred by Government under sanad—Grantee may constitute himself a trustee.*

Though the title conferred by Government under a sanad is absolute and overrides all other titles, nevertheless, the grantee under Government may, by an express declaration of trust or by an agreement to hold in trust, constitute himself a trustee for another.

2. *Grantee under Government—Evidence that he is only trustee.*

The Courts cannot, on the ground that the title under a Government Sanad is absolute, decline to consider evidence relied on by a party to a suit to show that the grantee really holds for him as a trustee.

[1—F., 1 O.C. (sup.) 24 (33); D., 3 O.C. 250 (258); 2—R., 9 O.C. 113 (115), 10 C.W.N. 1065 (1074).]

JUDGMENT.

[651] SIR ROBERT COLLIER:—This case has not been tried in a manner altogether satisfactory. Without, however, referring to the previous proceedings, their Lordships think it enough to advert to the final judgment appealed against. The learned Commissioner gave his judgment in these terms:—"Basant Sing died during the rebellion of 1857, and the alleged adoption of the plaintiff is said to have taken place in April 1858. Before this the general confiscation of the land of Oudh had been declared by the British Government, and it was only in May 1858 that a summary settlement was made with the defendant. At the time, therefore, of the alleged adoption, the title to the estate

(1) 1 Mad. H. C. R., 30.

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vested neither in the deceased Basant Sing nor in the plaintiff, nor in the defendant, but in the British Government. Even if it be allowed that there was adoption of plaintiff, and that this, in accordance with Hindoo law, conferred upon him all the right of a [652] posthumous son of Basant Sing, still neither he, nor Basant Sing himself, if he were to rise from the dead, can assail the title under which the defendant holds." So far their Lordships agree with the learned Commissioner, but they are not able to agree with him in the view which he expresses in the second paragraph of his judgment. The learned Commissioner appears not to have been sufficiently acquainted with the tenor of some recent decisions, whereby, although undoubtedly the doctrine is affirmed that the title conferred by the Government is absolute and overrides all other titles, nevertheless it has been held that the grantee under the Government may, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee. The learned Commissioner proceeds in these terms :— "It has, however, been held by the Courts on various occasions that a free gift was made by the Government, and I am entirely of this opinion. The adoption of two letters, said to have been written by the defendant, both of which are set forth in the plaint, placed, it is contended, the defendant in the position of trustee. One letter addressed to the plaintiff implies nothing more than a promise to put him in possession of the estate on his becoming of age. The second letter, addressed to Baboo Amrez Sing, between whose daughter and plaintiff a marriage was arranged, is to the same effect as the letter addressed to the plaintiff. I can see nothing in these letters to place the plaintiff and defendant in the position respectively of beneficiary or *cestue que trust* and trustee."

Their Lordships are of opinion that the letters here referred to, if proved (and, as far as they are at present informed, they do not seem to have been proved or disproved), may, coupled with surrounding circumstances, constitute sufficient evidence on which the Court would be justified in holding that the defendant had declared herself or had agreed to be a trustee on behalf of the plaintiff. They think it desirable, therefore, that the suit should be sent back to the Courts in Oudh for the purpose of determining this question. Those Courts will enquire, in the first place, whether the letters are genuine : in the next place, as to the date on which they were written ; and [653] thirdly, as to the circumstances under which they were written and other surrounding circumstances ; and among those circumstances undoubtedly will be the question of the adoption or non-adoption by the defendant of the plaintiff under the will of her husband ;— this question being, as before explained, material only as a circumstance bearing upon the question of whether or not she has agreed to be or declared herself to be a trustee, but not in itself constituting any title on the part of the plaintiff.

Their Lordships, in the imperfect acquaintance which they have at present with the facts of the case, think it more convenient to remand the case in these general terms than to settle issues themselves. Either party will be at liberty to propose for the consideration of the Court any issues which they may think material to raise the questions which have been just indicated, and the Court will doubtless raise the proper issues, and determine the questions according to the law as now laid down.

Their Lordships think it right to add that the delay of the plaintiff in not having brought the action until ten years had passed after he had become of age, and his laches in this respect will not entitle him to an account for a period before the commencement of this suit.

Their Lordships will therefore humbly recommend Her Majesty to discharge the decree and orders appealed from, and to remand the suit to the Court of the Commissioner of Ray Bareilly for him to re-try and determine the same, each party being at liberty to propose such issues as they may think material to be settled for trial by the Commissioner.

The costs of both parties of the appeal will be taxed, and a certificate sent with a direction to the Court below to deal with them as costs in the cause.

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3 Cal. 645 = 3 Suth. P.C.J. 472 = 3 Saraswati's P.C.J. 769.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Turner.

DIRGAJ SINGH AND OTHERS (*Plaintiffs*) *v.* DEBI SINGH AND ANOTHER (*Defendants*). [14th November 1877.]

1 A. 499 = 2 Ind. Jur. 464.

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—
APPELLATE CIVIL.
—
1 A. 499 = 2 Ind. Jur. 464.

1. "*Mortgagor's legal representative*"—*Reg. XVII of 1806, S. 8.*

The term "mortgagor's legal representative" used in the Regulation was intended to apply to all or any persons who, at the date of the notice of foreclosure, possess a title to the equity of redemption, whether absolute or defeasible, of the mortgage. [**F.**, 2 N.L.R. 113.]

2. *Subsequent mortgagee entitled to notice of foreclosure.*

Accordingly, where land, the subject of a conditional sale, was mortgaged to a second mortgagee, *held* that the latter is entitled to notice of foreclosure; and foreclosure proceedings taken without notice to him are invalid as against him. He is entitled to have the opportunity of coming in to redeem the mortgage by conditional sale so as to preserve his security. (See 3 W.R. 230 and 6 W.R. 230.)

Suit for possession of the shares conditionally sold to the plaintiffs in 1864 (and mortgaged in 1870 to Debi Singh, a defendant in the suit), the mortgage to the plaintiffs having been foreclosed.

ORDER OF REMAND BY THE HIGH COURT.

[500] The pleas set out in the memorandum of appeal show valid grounds of objection to the decree of the lower appellate Court. The appellants' deed of conditional sale was executed in 1864, the respondent's deed of mortgage in 1870. Now the mortgagor could only convey to the respondent such a title as he himself had, namely, a title subject to the conditional sale and the legal consequences of the sale. Consequently the appellants were entitled to take proceedings for foreclosure without discharging the alleged mortgage-debt due to the respondent. Such proceedings have been taken, but the respondent now alleges that he had no notice of them. If the mortgage made to the respondent was merely colourable and the original mortgagor remained solely interested in the property subject of course to the conditional sale, this notice to the respondent was not necessary, but if the mortgage made to the respondent did in fact create an interest in the property in his favour he was entitled to notice, and it must be ascertained whether he received such notice. The lower appellate Court must try the following issues: Had the respondent at the time the foreclosure proceedings were commenced a *bonâ fide* interest in the property? If so, was notice of foreclosure served on him? The lower appellate Court will return its finding on these issues, when ten days will be allowed for objections.

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The Subordinate Judge determined on these issues that at the time the foreclosure proceedings commenced Debi Singh was in possession of the shares as mortgagee, and was still in possession as such, and that no notice of foreclosure was served on him.

On the return of these findings, the High Court delivered the following.

JUDGMENT.

[501] The facts found by the Court below are no longer disputed, and we accept the findirgs. We entirely concur in the more recent rulings (1) that the term mortgagor's "legal representative" used in the Regulation (XVII of 1806) was intended to apply to all or any persons who at the date of the notice possess a title to the equity of redemption whether absolute or defeasible under the mortgage. The respondents were as mortgagees entitled to notice, and the foreclosure proceedings as against them are invalid. They were entitled to have the opportunity of coming in to redeem the mortgage held by the appellants so as to preserve their own security, and the issue of notice to them was indispensable to bar them by foreclosure. The appeal is dismissed with costs.

1 A. 499 = 2 Ind. Jur. 464.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Turner.

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AJNASI KUAR (*Judgment-debtor*) *v.* SURAJ PRASAD (*Decree-holder*).

[14th November 1877.]

APPEL-LATE CIVIL.

1 A. 501.

Decree for performance of particular act—Execution of decree—C.P.C. (1859), S. 200.

1 A. 501.

When a decree directs the performance of, or abstinence from, a certain act, there must be clear evidence of disobedience by the person so directed, before the decree can be executed against him.

When in a decree for restitution of conjugal rights, the plaintiff's mother-in-law, who had been impleaded as a defendant, was directed to refrain from preventing the plaintiff's wife from returning to him, *held*, in an execution petition for attaching the property of the mother-in-law, that her action in permitting her daughter, who was of age, to reside in her home after decree, did not constitute such interference, on her part, with the return of her daughter, as would justify execution against her.

The decree-holder in this case—the respondent—who held a decree against his wife for restitution of conjugal rights and against his wife's mother—the appellant—directing her to restrain from preventing his wife returning to him—, in his application for execution of the said decree, prayed, in the event of his wife not being sent back to his house, for attachment of certain property of the judgment-debtors and for their arrest and imprisonment under S. 200, Act VIII of 1859. The Munsif not being satisfied with the objection of the wife's mother to the execution of the decree against her, and observing that she did not give her unqualified assent to her daughter living with her husband, and that therefore it could not be held that she had not opposed her daughter's return to her husband, directed execution to issue, and this order was affirmed by the Judge. The wife's mother appealed to the High Court.

(1) See 3 W.R. 230, *per Phear*, J., also 6 W.R. 230.

JUDGMENT.

[502] TURNER, J.—There is no evidence that there has been any interference on the part of the appellant with the return of her daughter to the respondent since the date of the decree. Something more must we think be shown than that the daughter who is of age is still permitted to reside in the appellant's house. We must therefore allow the appeal and order the release from attachment of the appellant's property. No costs will be allowed to either party to this appeal either in the Court below or in this Court.

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1 A. 501.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

PRAG DAS (*Plaintiff*) *v.* HARI KISHN AND ANOTHER (*Defendants*).

[19th November 1877.]

1 A. 503 = 2 Ind. Jur. 465.

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NOV. 19.
APPELLATE CIVIL.
1 A. 503 = 2 Ind. Jur. 465.

Hindu law—Hindu widow divesting herself of her rights—Rights of reversioners.

The act of a Hindu widow, in divesting herself of her interest in her husband's property, does not operate as a forfeiture so as to bring in the next reversioner, who cannot, therefore, sue either for possession or for a declaration of his reversionary right. [F., 2 A.W.N. 11.]

JUDGMENT.

[503] OLDFIELD, J.—Ram Din, who died in 1872, left three sons surviving him, Lalji, Prag Das, and Hari Kishn. The first died in September, 1874, leaving a childless widow, Gopal Dai. The subject of this suit is the property left by Lalji. The plaintiff, Prag Das, sues his surviving brother Hari Kishn, and Gopal Dai, the widow, to establish his right and to recover possession of half Lalji's property, on the averment that the three brothers held separate **[504]** property, and that the widow had colluded with Hari Kishn and allowed him to take possession in his own right of all the property of the deceased by which act she had forfeited her interest. Hari Kishn pleaded that he is the heir of the deceased, as deceased and he had lived in union. He allows that a partition had taken place at their father's death, but it was only plaintiff's share which was divided off, and the widow supports him in his allegation that he and deceased had lived in union, and avers that no alteration has taken place in the nature of the possession exercised on the property since Lalji's death, and adds that Hari Kishn's son was considered to be his heir by deceased, but she makes no specific mention of any title as heir by adoption to deceased. The Subordinate Judge found that the deceased held a separate estate and that in consequence his widow, Gopal Dai, is his heir, and that no act has been shown on her part to divest her of the estate and give plaintiff, the reversioner, immediate possession. It appears that at the death of Lalji there were disputes as to the succession, and Hari Kishn obtained mutation of names of the whole estate in his favour and possession also, but the Subordinate Judge seems to think that he had only formal possession, that there has been nothing done by the widow injurious to his reversionary interest, and that this is not the time to decide on any right in future to which the plaintiff may become entitled and he dismisses the suit.

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1 A. 503 = 2 Ind. Jur. 465.

The pleas in appeal on the plaintiff's part amount to this, that on the facts proved the plaintiff is entitled to a decree for the whole claim, and at any rate that his reversionary right in the property should have been protected by giving him a declaration of it, and by restraining the defendant from dealing with the property in a manner injurious to the plaintiff's title.

The respondents have filed objections under S. 348 to the finding that the deceased held a separate estate. It will be convenient first to dispose of their objections, and on this point we agree with the Subordinate Judge. There is ample evidence that the shares of all three brothers were separated from each other after their father's death. The evidence alluded to by the Subordinate Judge appears to us conclusive on the point. There are admissions by the brothers of division, proceedings such as mutation of names in the revenue records only consistent with the fact that such division **[505]** had taken place, and separate bankers' accounts, and separate dealings with the property, all pointing to a division of Lalji's estate from both his brothers. On the other side all that the respondents' evidence necessarily shows is commensality between Lalji and Hari Kishn; while some of their witnesses admit ignorance as to their monetary transactions. There is no doubt that there was a partition effected at Ram Din's death, and there is no evidence of any re-union, nor indeed is re-union alleged.

With reference to the plaintiff's appeal, looking to the facts and allegations of the respondents, it seems clear that Hari Kishn asserted his own title as heir of Lalji, and that he was supported in doing so by the widow, who recognised him as the heir, and that he has obtained possession of the estate; and it does not appear that this is a mere formal possession but one which has given him the exercise of all the rights of an owner. Anything short of this is opposed to the allegations of the widow, who distinctly states in her written statement that Hari Kishn is in undivided possession of all the property in the same manner as he was in conjunction with her husband, and that there has been no change or alteration whatever since her husband's death; all this amounts to a possession as owner and one that would count adversely to the widow.

However, accepting such to be the case, the act of the widow divesting herself of her interest in the estate in favour of Hari Kishn will not operate as a forfeiture, so as to bring in the reversionary heirs. Hari Kishn's possession cannot on this ground be interfered with while she lives, and no other ground for interference has been alleged or made out, and therefore the claim fails and has been properly dismissed, for it is one asking for a declaration of a present right and possession in the property, nor can the Court declare that plaintiff will have a right of succession after the widow's death, but we may say that any reversionary rights which he may hereafter succeed in establishing are not affected by the widow's divesting herself of her interest in Hari Kishn's favour. We affirm the decree of the lower Court and dismiss the appeal. Each party will pay their own costs of this appeal.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock and Sir Montague E. Smith.

On appeal from the Commissioner and Judicial Commissioner of Oudh.

BRIJ INDAR BAHADUR SINGH *v.* RANEE JANKI KOER.
LAL SHUNKER BUKSH *v.* RANEE JANKI KOER.
LAL SEETLA BUX *v.* RANEE JANKI KOER. [20th November 1877.]

1 C.L.R. 318=3 Suth. P.C.J. 474=5 I.A. 1=3 Saraswati's P.C.J. 763=Bal. 148.

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1 C. L. R. 318=3 Suth. P.C.J. 474=5 I.A. 1=3 Saraswati's P.C.J. 763=Bal. 148.

1. *Right acquired under Talukdari sunnud—Act I of 1869, Ss. 3, 22.*

(a) The positive limitations regarding successions which are contained in S. 22 of Act I of 1869, are in no way controlled by the provisions in the 3rd section of the Act, namely, that the right acquired by virtue of a Talukdari sunnad should be subject to all the conditions affecting the Talukdar contained in the sunnad under which the estate is held.

(b) Act I of 1869 discussed.

2. *Hindu Law—Woman's estate—Separate property of woman—Dayabhaga—Mitakshara.*

Woman's separate property according to the Mitaksbara and according to the Dayabhaga discussed at length [11 M.I.A. 189=10 W R. 3 (P.C.) *R.*].

[1—F., 18 C. 111 (113) ; **R.**, 23 A. 369 (378), 25 A. 476 (489) ; **2—F.**, 32 A. 189 (192), 12 C. 348 (350), 11 B. 285 (302) (**F.B.**), 28 M. 1 (7).**]**

JUDGMENT.

[318] SIR BARNES PEACOCK.—These three appeals were argued together. In each of them the appellant was plaintiff in a separate suit instituted by him against the respondent in the Court of the Deputy Commissioner of Pertabghur, to recover possession of Talooka Pawansi, in Pergunnah Dingwas, in the province of Oudh. In each case the plaintiff claimed to have become entitled to the talook, by right of inheritance, upon the death of Thakoorain Kablas Koer, the mother of the defendant.

[319] The property in dispute was formerly part of the estate of Rai Chein Singh, the great-grandfather of Mypal Singh. Mypal Singh held it under the Native Government down to the time of his death, in 1260 Fuslee, corresponding with the year 1852-53.

Upon his death he left two widows; the first married was Mussamat Subhao Koer, and the second the above-mentioned Thakoorain Kablas Koer. By his first wife, Subhao Koer, he had two daughters, of whom the elder, Jaganath Koer, was the mother of the appellant, Brij Indar Bahadur Singh. The other died without issue. By his second wife, Thakoorain Kablas Koer, he had one daughter, Ranee Janki Koer, who married Rai Bajai Bahadur Singh, and is the defendant in the suits, and the respondent in each of the three appeals.

At the time of the annexation of Oudh the estate was in the possession of the aforesaid Kablas Koer, to whom it had descended as the surviving widow of her deceased husband, Mypal Singh.

In 1858 the estate was confiscated by the British Government by virtue of Lord Canning's Proclamation of the 15th March in that year.

The summary settlement for 1858-59 was made with Kablas Koer. In the kubooleut dated 20th April 1858, executed on her behalf on that occasion, she was described as the widow of Lall Mypal Singh, and it

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appears from an administration paper put in evidence in Brij Indar's case (Record, page 8), that Kablas Koer admitted that in virtue of the ancestral right of her husband the regular settlement had been made with her.

A sunnud was afterwards granted to her by Government, by which the full proprietary right, title, and possession of the estate was conferred upon her and her heirs for ever, subject to certain conditions which are not material with reference to the present case. It was also declared to be another condition of the grant that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture, but that she and all her successors should have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever she should please. It was also further declared that, as long as the obligations imposed by the [320] grant should be observed by her and her heirs in good faith, so long would the British Government maintain her and her heirs as proprietor of the estate.

It is extraordinary that this sunnud is without date, at least it so appears in the copy put in evidence in each of the three suits; but it must have been subsequent to the date of the letter from Major Mac Andrew, the Deputy Commissioner, of the 4th February 1861 (Record Seetla Bux's case, page 4), for he there states that if Kablas would file a deed of will in the terms of the proposal therein contained, she would receive a sunnud for the estate from Government. It must also have been after the date of her petition in answer, dated 15th March 1861, in which she asks to have a sunnud for life granted to her. It is exceedingly inconvenient, but it often happens in records sent up from the Courts in Oudh, that documents are without dates. Their Lordships mention this that the attention of the Judicial Commissioner may be drawn to the subject.

The letter from Colonel MacAndrew, to which reference has just been made, and the petition of Kablas in answer to it, were relied upon in the argument on the part of the appellants, in order to show that under the grant to her and her heirs the heirs of her husband must have been intended. They appear, however, to their Lordships strongly to support the view that the grant to Kablas and her heirs was not made through inadvertence, and that her heirs were intended.

In the letter Colonel MacAndrew says, "Among the Thakoors of Dingwas there is no one next of kin to the husband of the Thakoorain who may be declared as heir, and according to the Circular Orders she has power, after the receipt of the sunnud, to alienate her estate by will to any one." He gives reasons why she should make a will in favor of Seetla, and concludes by saying, "If you file a deed of will in terms of the above proposal, you will receive a sunnud for the estate from the Government." (Record, p. 4.) In her petition in answer, after pointing out her objection to execute a will in favor of Seetla Bux, she concludes, "I myself am at a look-out, and as soon as I get a person of high family, good character, and condescending manners, such as will answer my choice, I will let your honor know. Meanwhile, it will be an act of grace on your part to [321] confer a sunnud on me for life. On no account am I willing to adopt Seetla Bux and Shunker Buksh. I therefore pray that, on receipt of the report from Pertabghur district, my objections herein laid down may be fully taken into consideration."

The Government after this, and after having had time for considering the expediency of granting to Seetla Bux the succession to the estate

upon the death of Kablas, conferred the estate upon her and her heirs male, according to the law of primogeniture, without even mentioning the status of Kablas as a widow, either in the operative words or in describing her. If, therefore, the letter and petition could properly be taken into consideration in construing the Sunnud, with a view to ascertain the intentions of Government, they would operate more against than in favor of the claims of Seetla and Shunker.

Upon the death of Kablas, in August 1872, the appellant, Brij Indar, claimed to inherit as the son of Jaganath Koer, the daughter of Subbao, the first wife of Mypal, and the rival wife of Kablas.

Lal Shunker Buksh and Lal Seetla Bux each claimed as a distant collateral relative of Mypal, the deceased husband of Kablas. Each was a son of Ragnath Singh, who was a great-grandson in the male line of Rai Chein Singh, who was the great-grandfather of Mypal Singh.

Seetla was the son of the first wife of Ragnath, and Shunker, who was born before Seetla, was the son of the second wife. Each claimed to be male heir according to the law of primogeniture.

The Deputy Commissioner dismissed the suit of Brij Indar, and also that of Shunker Buksh, and his decrees in those suits were affirmed by the Commissioner. There was, therefore, no appeal to the Judicial Commissioner in either of those cases, and in each of them the appeal to Her Majesty in Council is from the judgment of the Commissioner. In the case of Seetla Bux, the Deputy Commissioner decreed for the plaintiff. The Commissioner, upon appeal, reversed that decree, and decreed the talooka to the defendant, Janki Koer, and upon appeal to the Judicial Commissioner he affirmed the decree of the Commissioner. The appeal of Seetla Bux to Her Majesty in Council is, therefore, from the decree of the Judicial Commissioner.

The case is an important one, and was very ably argued on [322] behalf of each of the parties, and their Lordships have very carefully considered all the arguments which were urged, and the authorities which were cited in support of the claims of the several appellants.

The first question to be considered is whether the estate, in the event of the intestacy of Kablas, descended to her heirs or to the heirs of her husband. Upon this point their Lordships entertain no doubt.

They consider that the sunnud conferred, and was intended to confer, a full proprietary and transferable right in the estate upon Kablas and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life, with full power of alienation, and with remainder to the male heirs of her husband, in the event of her dying intestate without having alienated it in her lifetime.

If the interest which Kablas, as the widow of her deceased husband, originally took in the property had remained unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord Canning's Proclamation, by which it was declared that "the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." In disposing of that right by the sunnud, the Government granted to Kablas and her heirs male, according to the law of primogeniture, the full proprietary right and title to the estate.

The title, however, does not depend entirely upon the sunnud, for in 1869 Act No. I of that year was passed to prevent, as appears from the

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preamble, doubts as to the nature of the rights of certain talookdars and others in the estates which had been conferred upon them by the British Government, and as to the course of succession thereto.

By S. 2 the word "talookdar" was defined, and it was declared to mean "any person whose name is entered in the first of the lists mentioned in S. 8."

The name of Thakoorain Kablas Koer was entered in the first of such lists. It was also entered in the second of the lists mentioned in S. 8 as one [323] whose estate, according to the custom of the family on and before the 13th February 1856, ordinarily descended to a single heir.

By S. 10 of the Act, list No. 1 is conclusive evidence that Kablas was a talookdar within the meaning of the Act, and there can be no doubt that the estate in dispute is one of the estates referred to by the Act, and that by virtue of S. 3, Kablas Koer must be deemed to have acquired by the sunnud a permanent heritable and transferable right in the estate in dispute.

It was contended by Counsel that a trust was created, and that Kablas took the estate upon trust for those who would have been entitled to it if it had not been confiscated. To hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift, or bequest, was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships are of opinion that no trust was created by the sunnud or by the Act of 1869; and there is no evidence that a trust was created in any other manner.

As regards the succession, their Lordships are of opinion that the limitation in the sunnud was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of S. 22 of that Act. By that section it was enacted that if any talookdar whose name should be inserted in the second, third, or fifth of the lists mentioned in S. 8, or his heir or legatee, should die intestate, such estate should descend in manner therein described.

Their Lordships do not consider that the positive limitations in that section are in any way controlled by the provision in S. 3 of the Act, that the right acquired by virtue of the talookdary sunnud should be subject to all the conditions affecting the talookdar contained in the sunnud under which the estate is held. They understand the conditions referred to in Cl. 4 of that section to be the conditions of loyalty and good service mentioned in the letter of the 19th October 1859, republished in the first schedule of the Act, and to the other conditions of a similar nature, such as those [324] of surrendering arms, destroying forts, etc., contained in the sunnud.

It was contended in the Lower Court, on the part of Brij Indar, that he being the son of a daughter of a rival wife, and having been treated by Kablas in all respects as her own son, came within the meaning of Cl. 4 of S. 22; but it was found by both the Lower Courts that there was no proof that he had been so treated, and their Lordships entirely agree in that finding. It is unnecessary, therefore, to express any opinion as to whether he was the son of a daughter of Kablas Koer, the talookdar, within the meaning of the Clause.

It having been decided that Brij Indar did not come under Cl. 4, S. 22, neither of the plaintiffs is within the description contained in Cls. 1 to 10, both inclusive.

The case is, therefore, to be governed by Cl. 11, which is as follows:—

"Or in default of any such descendant, then to such persons as would have been entitled to succeed to the same under the ordinary law to which persons of the religion and tribe of such talookdar or grantee are subject."

In the absence of any special custom applicable to the particular tribe or family to which Kablas belonged (as to which advertence will be made hereafter), the ordinary law applicable to persons of her religion and tribe is the Mitacshara.

Chapter 2, S. 11, treats of the separate property of a woman, and of the distribution of it. In par. 1 of that section it is said, "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property."

It was stated in the course of the argument by the learned Counsel for Shunker Buksh, that in the original of Par. 1, Cap. 2, S. 11 of the Mitacshara, and of Par. 12, Cap. 4, S. 1 of the Dayabhaga, the words translated as "separate acquisition" are not used, and that the proper translation is "and the like," or "and such like." It does not appear to their Lordships to be important whether this is so or not. The learned Counsel may be correct. But the words "and the like" or "and such like" [325] would show that the author did not intend to limit his definition to the particular kinds of property therein enumerated. This is very clear when the subsequent paragraphs are referred to.

At Par. 4, Cap. 2, S. 11 of the Mitacshara it is said, "The enumeration of six sorts of woman's property by Menu, 'What was given before the nuptial fire, what was presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the six-fold property of a woman' (Menu, 9, 194), is intended, not as a restriction of a greater number, but as a denial of a less."

The Dayabhaga is to the same effect. Par. 18, Cap. 4, S. 1, is as follows:—

"Since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number six as specified by Menu and others is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property. *That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control.*"

Again, in the Mitacshara, Par. 2, Ch. 2, S. 11, it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Menu and the rest "woman's property."

Again, Par. 3, "The term 'woman's property' conforms in its import with its etymology, and is not technical; for if the literal sense be admissible, a technical acceptation is improper."

There is a note to Par. 2, above quoted, with reference to property obtained by inheritance, and their Lordships' attention was called to it by the learned Counsel for Shunker Buksh; but as the estate in dispute did not come to Kablas by inheritance, it is unnecessary to determine whether immoveable property acquired by a woman by inheritance is "woman's property." It has been decided that a woman cannot, even according to the Mitacshara, alienate immoveable property inherited from

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1 C.L.R. 318=3 Suth. P.C.J. 474=5 I.A. 1=3 Saraswati's P.C.J. 763= Bal. 148.

her husband, and that upon her death it descends to the heirs of her husband, and not to her heirs—*Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 Moore's Indian Appeals, 175. (1)

The question does not arise in this case whether, if the grant [326] had been made to Kablas in her husband's life-time, the property would have been her peculiar property, over which her husband would have had no dominion or control (*see* Dayabhaga, Chap. 4, S. 1, Pars. 20 and 23); for the property was granted to Kablas after her husband's death. The talooka must, in their Lordships' opinion, be considered to have been the property of Kablas at the time of her death.

A woman's property having been described in the first eight paragraphs of the section, the distribution of it is then propounded—"her kinsmen take it if she die without issue;" but it is only in the event of her dying without issue that her kinsmen succeed.

Par. 9 goes on: "If a woman die 'without issue'—that is leaving no progeny—in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith described."

Par. 10. "The kinsmen have been declared generally to be competent to succeed to a woman's property." The author now distinguishes different heirs, according to the diversity of the marriage ceremonies. The property of a *childless* woman married in the form denominated Brahma, or in any of the four unblamed modes of marriage, goes to her husband; but, if she leave progeny, it will go to her daughter's daughters. In other forms of marriage, as the Asura, etc., it goes to her father and mother on failure of her own issue."

The words "daughter's daughter" are made clear by Par. 15: "On failure of all daughters, the grand-daughters in the female line take the succession, under the text, 'if she leave progeny it goes to her daughter's daughter.'" And, again, by Par. 12, "In all forms of marriage, if the woman leaves progeny—that is, if she have issue—her property devolves on her daughters. In this place, by daughters, grand-daughters are signified; for the immediate female descendants are expressly mentioned in a preceding passage: 'The daughters share the residue of their mother's property after payment of her debts.'"

Par. 13. "Hence, if the mother be dead, daughters take her property in the first instance."

Par. 16 deals with the case of a multitude of grand-daughters, and is not applicable to the present case.

A custom of the tribe was set up and relied upon to the effect [327] that the property of a Bissein could be inherited only by a Bissein, and that it descended to collateral male heirs in preference to a daughter.

The Commissioner, in his judgment, said that the custom among Chattris that collaterals are preferred to daughters is no doubt true, but it cannot be said to be specially proved in the case of Bissein Chattris. The Judicial Commissioner, however, was of opinion that the plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession (Record in Seetla Bux's Case 100).

Their Lordships concur in that view, and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute

(1) 10 W.R. P.C. 3; 2 Suth. P.C.R. 49.

property of a woman. Their Lordships are, therefore, of opinion that, under Cl. 11, S. 22, the estate descended to the defendant (respondent) as the person entitled under the ordinary law to which persons of her mother's religion and tribe were subject; and being of that opinion, it is not necessary to consider whether, if Kablas had died without issue, either of the plaintiffs would have been entitled to succeed to the estate.

The Judicial Commissioner held that the persons entitled to succeed must be sought amongst the heirs of the husband, and not of the widow. Record, p. 100.

In this view of the case their Lordships, for the reasons above stated, cannot concur. The decree of the Judicial Commissioner was notwithstanding correct; for he, holding that the defendant was heir to her father, Mypal, dismissed the appeal against the decree in her favor.

Their Lordships hold that that appeal was properly dismissed upon the ground that the talook descended to her as heir to her mother, who, at the time of her death, was the talookdar, and had a permanent heritable right in the estate.

Their Lordships will therefore humbly recommend Her Majesty to affirm the decrees of the Commissioner in the respective cases of Brij Indar and of Shunker Buksh, and to affirm the decree of the Judicial Commissioner in the case of Seetla Bux.

The appellants in each of the appeals must pay the respondent's costs in that appeal.

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1 C.L.R. 318=3 Suth. P.C.J. 474=5 I.A. 1=3 Saraswati's P.C.J. 763=Bal. 148.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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APPELLATE CIVIL.
1 A. 506.

TAUFIK-UN-NISSA (*Plaintiff*) *v.* GHULAM KAMBAR (*Defendant*).

[21st November, 1877.]

1 A. 506.

Muhammadan Law—Dower.

When, at the time of marriage, there has been no stipulation as to the nature of the dower, *i.e.*, whether it should be prompt or deferred, a portion of it should be deemed to be prompt; and custom cannot be referred to for deciding this question. What portion of the dower must be considered prompt, is a question to be decided with reference to custom, the position of the woman and the amount of the dower named in the contract. [1 A. 483 and Habib-un-nissa *v.* Nizamuddin A.H.C's decision, dated 31st July, 1877, *Unrep.*, *Approved.*]

JUDGMENT.

[507] OLDFIELD, J.—This is a claim to recover Rs. 25,000 as prompt dower. It is not disputed that the amount of dower stipulated for at marriage was Rs. 51,000, and it is admitted that it was not specified at the time whether the dower was prompt or deferred. The plaintiff contends that, under such circumstances, the entire amount is exigible as prompt dower on demand, though she only claims in this suit a portion. The defendant contends that in such a case the custom of the place should be referred to, and by the custom of Budaun the entire dower is to be considered as deferred. The lower Court has dismissed the claim, with reference to what it holds to be the custom. It considers that when there has been no specification of dower, the law requires that a reference should be made to

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custom to determine not only the proportion of the dower which shall be considered to be prompt, but whether any at all shall be so considered, and it holds that in Budaun it is the custom to consider the whole as deferred. This judgment cannot be supported. The law on the point is that stated in Baillie's Digest from the *Fatawa Kazee Khan*, which has been followed by this Court in recent decisions—*Eidan* v. *Mazhar Husain* (1); *Habib-un-nissa* v. *Nizam-ud-din*, decided the 31st July, 1877 (2). When nothing has been said as to the character of dower, the Court may determine the amount to be considered prompt with reference to the position of the woman and the amount of the dower named in the contract, taking into consideration at the same time what is customary. The reference to custom appears to be in respect of the proportion to be held as prompt, and it does not appear to have been contemplated to refer to custom to decide whether or not the entire dower should be deferred. We have been shown a translation of an extract from Jami-ur-rumuz, a commentary on Mukhtasar Vakaya, which will, however, bear another construction. However this may be, we do not concur with the Subordinate Judge in holding that any custom is proved by which the entire dower is considered deferred. * * * * **[508]** We hold that neither by law or custom is the plaintiff debarred from obtaining prompt dower, and we consider Rs. 17,000, or one-third of the total dower, a reasonable sum to award. We reverse the decree of the lower Court and decree accordingly with all costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

1877 NOV. 22. APPELLATE CIVIL. 1 A. 508.

IMAM ALI AND OTHERS (*Decree-holders*) *v.* DASAUNDHI RAM (*Judgment-debtor*). [22nd November 1877.]

Several claims in one suit—Final decree of Appellate Court—Limitation.

When there are two decrees in the same suit, one of them being that of the District Judge with reference to one portion of the claim adjudicated on by the District Munsiff on remand and coming again before him on appeal, and the other being a later decree of the High Court, affirming the other portion of the claim, without disturbing the District Judge's order of remand, limitation for execution as to the two portions of the claim does not run from the dates of the two decrees respectively, but only from the date of the High Court's decree, which is the final decree of the Appellate Court in the suit.

JUDGMENT.

[509] The question before us is whether the appellant's decree is incapable of execution by limitation. He sued in the Munsif's Court for possession of certain land and to recover damages. The Munsif decreed possession but dismissed the claim for damages. An appeal was preferred to the Judge, who (28th February, 1873), affirmed the decree giving possession and remanded the case, under S. 351 of Act VIII of 1859, for adjudication as to the amount of damages due. An appeal was preferred from the Judge's decision to the High Court on the 23rd May, 1873, and was pending till 6th March, 1874, when the decision as to possession was modified and the Court did not interfere with the order of remand made

(1) 1 A. 483. (2) Unreported.

by the Judge. In the meantime the Munsif, on the 25th April, 1873, decreed damages, and an appeal was preferred to the Judge who decided it on the 7th June, 1873. It will be seen that the Judge's order is prior to the date of the High Court's decision in the appeal before them. Appellant now takes out execution of the Judge's decree of the 7th June, 1873. If the three years' limitation is to run from the former date, the application is barred, and this is the view taken by the lower Courts. But this view is erroneous. Where there has been an appeal, the limitation will run from the date of the final decree of the appellate Court. We hold this to be the decree of the High Court and not that of the Judge, the 7th June, 1873; the former was passed after the Judge's decree of the 7th June, 1873, and must be held to be the final decree of the appellate Court and to have finally determined the entire claim. The lower Courts seem to consider that there may be several final decrees of an appellate Court in one and the same case, giving separate periods of limitation for separate portions of a claim in one and the same suit, and they refer to the High Court's decree as final on the point of possession and so affording a period of limitation for that portion, and the Judge's decree as final on the point of damages and **[510]** affording another period of limitation for that portion of the claim, but this view is erroneous, both decrees cannot be final within the meaning of the limitation law. We reverse the order of the lower Court and remand the case for execution in due course. Costs to abide the result.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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NOV. 22.
APPELLATE CIVIL.
1 A. 510=2 Ind. Jur. 499.

LACHMAN BIBI AND ANOTHER (*Decree-holders*) *v.* PATNIRAM AND ANOTHER (*Judgment-debtors*). [22nd November 1877.]

1 A. 510=2 Ind. Jur. 499.

Decree in favour of a firm in name of Agent—Application for execution by his successor not named in decree—Effect of application to keep decree in force—Limitation Act (1871), Sch. II, Art. 167.

Where a decree is erroneously passed in favour of a firm in its agent's name and applications for execution are put in by its agent not named in the decree, such applications are not invalid, but are good and sufficient to keep the decree alive.

[D., 23 A.W.N. 172, 26 A. 19.]

A decree was passed *ex parte* in the name of Kishan Lal described as the agent of the firm of Megh Raj Herbilas. On 10—5—1870, the date when the decree was passed, application for execution was made by Kishan Lal. On 8—12—1871, 30—5—1872 and on 13—4—1875, Mohan Lal, the successor in office to Kishan Lal made applications for execution of decree as the agent of the firm. Lachman Bibi and Katu Bibi, claiming to be proprietors of the said firm, applied for execution on 15—2—1877. The objection of the judgment-debtor that the former applications for execution of decree were insufficient to keep the decree in force, being disallowed by the first Court, the lower appellate Court allowed it, observing as follows:—"The application made to the Court on the 8th December, 1871, was not made by the decree-holder then on the record, *viz.*, Kishan Lal, but by another person; it was therefore not a petition to execute the decree, and as all the other applications for execution were made by

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persons other than the decree-holder, execution of the decree must be considered barred." On appeal to the High Court, the appellants contended :—

(i) that the Judge erred in holding that Kishan Lal was himself the decree-holder ;

(ii) that the decree itself showed that it belonged to the firm of which the appellants were proprietors ;

(iii) that proceedings in execution of the decree were taken by the appellants from time to time in the name of their agent for the time being ; and,

(iv) that there was no reason in law why they should not take execution, and execution was not barred by limitation.

JUDGMENT.

[511] TURNER, J.—Owing to an error in procedure the decree was passed in the name of Kishan Lal, described as the agent of the firm of Megh Raj Herbilas, but it was then, as on subsequent occasions and is now, admitted that it was passed in favour of the firm of which the appellants assert they are and were the owners. The second and subsequent applications for execution, with the exception of the one now before the Court, were taken out by Mohan Lal, who succeeded Kishan Lal as the gomashta of the firm. However irregular the proceedings have been, we are not prepared to hold they are invalid. We must set aside the order of the Judge disallowing the application as barred by limitation, and remand the case for the decision of the other pleas raised. Costs of this appeal will abide and follow the result.

FULL BENCH.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

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1 A. 518=
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500.

ALTAF ALI (*Judgment-debtor*) *v.* LALJI MAL AND ANOTHER (*Decree-holders*). [3rd December 1877.]

1 A. 518=2 Ind. Jur. 500.

Claim for mesne profits against trespasser—Allowance for cost of collection, etc.

Where a person enters upon, and holds possession of, lands of the lawful owner, in the exercise of a *bona fide* claim of right, he may be allowed such costs of collecting the rents of the lands as the owner might, if he had been in possession, have incurred. But where he is in possession without any *bona fide* belief that he is entitled to do so, he cannot be allowed such costs although he may still claim necessary payments such as Government revenue or ground rent.

Per Stuart, C. J. :—Whether the trespasser is a *bona fide* trespasser or not, he must be allowed such costs of collection as the owner might have incurred.

[R., 22 A. 262 (265) ; **Exp.**, 23 A. 252 ; **F.**, 24 A. 376 (380)=22 A.W.N. 90.**]**

In an application to recover in execution of a decree the mesne profits of certain villages accruing between the date of the decree and the date on which possession of the villages was obtained under the decree by the decree-holders, the judgment-debtor contended, among other matters, that the expenses of collecting the rents should be deducted from the sum claimed by the decree-holders ; but the Court of first instance refused to

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1 A. 518 = 2 Ind. Jur. 500.

make this deduction on the ground that the judgment-debtor had been in wrongful possession of the villages. The judgment-debtor appealed to the High Court.

ORDER OF REFERENCE TO THE FULL BENCH.

[519] STUART, C. J., AND PEARSON, J., before whom the appeal came on for hearing, referred the case to a Full Bench, the order of reference being as follows :—

In reference to the second plea in appeal, we observe that the lower Court, in refusing to allow the appellant to charge the estate with the expenses of collection in any shape has relied on the precedent of the 29th November, 1862, No. 780 (1), which, however, only followed the ruling in an earlier case, No. 271 of 1854, decided on the 28th January, 1856, by Begbie, Harington, and M. Smith, JJ., to the effect that a commission on such an account can only be allowed when the possession of the party claiming the same was not wrongful (2). No subsequent ruling of this Court to the contrary has been brought to our notice. But it would appear from the decisions of the Calcutta High Court, dated the 24th January, 1867, in case No. 876 of 1866 (3)—dated the 6th March, 1867, in case No. 875 of 1866 (4)—and the 8th April, 1868, in case No. 621 of 1867 (5), that a different principle is adopted by that Court, and that it is held equitable and reasonable to allow the charges of collection to be defrayed out of the mesne profits of an estate, even when the expenditure has been made by a person wrongfully in possession, on the ground that the rightful owner, had he been in possession, would have had to bear them. We ask the Full Bench to consider and determine which of the two views is the sounder and more correct.

JUDGMENT OF THE FULL BENCH.

[520] STUART, C.J.—It appears to me that the Calcutta rulings referred to in the order of reference expound the law correctly. The Subordinate Judge says that the defendant held possession of the villages without any reason or right, and he therefore concludes that he is not entitled to any collection-fee or village-expenses; but in this view he is clearly mistaken, not only on the authority of these Calcutta rulings, but on the principle that any claim such as is made against the defendant here must be founded on wrong towards the plaintiff (Addison on Torts, p. 11); and the plaintiff can show no such wrong by the fact that the defendant, although wrongfully in possession, had merely made payments which the plaintiff himself, or any other owner, would have had to meet. A recent decision of the Calcutta Court (Kemp and Pontifex, JJ.) (6) appears to recognise the same principle, where it was held that no suit for damages as between joint owners on undivided estates will lie in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue, the meaning of which ruling appearing to be that no wrong can be pleaded in such a case as the present by the defendant, whether a *bona fide* trespasser or not, paying the Government revenue, for that must be paid *as from the land*, and no matter by whom, whether legally or merely ostensibly in possession.

The English case of *Wood* v. *Morewood* (7) was an action for an injury to the plaintiff's reversion in certain closes by making holes

(1) S. D. A., N.-W.P., 1862, Vol. ii, 246. (2) S. D. A., N.-W.P., 1856. p. 49.
(3) 7 W. R., 78. (4) 7 W. R., 230. (5) 9 W. R., 457.
(6) 1 C. 406. (7) 3 Q. B., 446.

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and excavations and getting coals, with a count in trover for coals, and Baron Parke told the jury that "if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coal field had been purchased from the plaintiff." In another English case, *Dee* v. *Hare* (1), referred to in Mayne on Damages, Ed. 1856, p. 255, it was laid down that "if the defendant has made any payment while in possession for which plaintiff would be liable, [521] as ground-rent, he is entitled to have it taken in reduction of damages." But the principle thus recognised appears to me to go further, and I think justify me in holding that, whether the defendant is a trespasser *bona fide* or not, he is entitled as against the rightful owner to be credited with all such payments in respect of the land as these collection-fees and other village-expenses.

PEARSON, TURNER AND SPANKIE, JJ., concurring.—When in the exercise of a *bona fide* claim of right a trespasser enters on and holds the property of another, the owner is sufficiently compensated by receiving an amount equivalent to the net profits he would have himself received had he been in possession. In such a case then such costs of collection as are ordinarily incurred by the owner might fairly be allowed to the trespasser as well as such sums as must of necessity be paid, as, for instance, Government revenue. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bona fide* belief that he is entitled to do so, where in defiance of the rights of another he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground-rent, it is not imperative on the Court, in estimating the damages, to allow the wrong-doer even such charges as would ordinarily, but voluntarily, be incurred by an owner in possession, but the Court may refuse to sanction the deduction of such charges—*Wood* v. *Morewood* (2).

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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DEC. 3.
APPELLATE CIVIL.
1 A. 521.

ABADI BEGAM (*Defendant*) *v.* INAM BEGAM (*Plaintiff*).

[3rd December 1877.]

1 A. 521.

1. *Muhammadan Law—Pre-emption—Formalities—Agent.*

The formalities to be observed under the Muhammadan law by a person claiming a right of pre-emption, may be observed for him by his agent or manager.

2. *Muhammadan Law—Pre-emption—Relinquishment.*

The right of pre-emption is void if the pre-emptor relinquished the purchase in plain terms, and any indication of acquiescence in the sale to another on the part of the pre-emptor would also vitiate his claim. But a claim relinquished upon misinformation of the amount of sale consideration, or of the property sold may be resumed when the real facts become apparent.

[F., 28 A. 691 (692) = 3 A.L.J. 798 = A.W.N. (1906), 177, 35 C. 575 (612).]

Suit for pre-emption in respect of a dwelling-house founded on the Muhammadan law of pre-emption by vicinage.

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(1) 2 C. & M., 145.

(2) 3 Q.B., 440.

JUDGMENT.

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1 A. 521.

[522] SPANKIE, J.—The second plea, too, cannot be maintained. The first Court found on the evidence of five witnesses that, immediately on hearing of the sale, the plaintiff fulfilled the conditions of the Muhammadan law by immediately asserting her claim and by affirmation before witnesses. The Judge affirmed this finding. The claim was made by the plaintiff's husband, but nothing was shown **[523]** to us to support the plea that a claim so made was invalid. On the contrary, it appears to us that an agent or manager, as in this case, the husband for his wife, may legally assert a pre-emptive claim. The point was not seriously disputed before us.

It was orally argued that the Judge had erroneously held that a refusal before a sale, which was all that could be proved in this case, does not vitiate a right of pre-emption advanced by the purchaser after the sale, provided there is no delay.

The plea was not taken in the memorandum of appeal and it is doubtful how far any refusal to purchase has been established. We may, however, observe that, if anything is proved, it does not go beyond a refusal of the plaintiff to purchase at the rate demanded by the vendor, on the ground that the actual sale-price was less than that demanded from the pre-emptor. The plaintiff offered to deposit any sum that the Court found to have been the actual purchase-money, and has all along asserted that the sale-price was Rs. 130 and not Rs. 200. As we read the Muhammadan law on this point, we find that the right of pre-emption is void if the pre-emptor relinquishes the purchase in plain terms, and any indication of acquiescence in the sale to another would also vitiate a claim after the sale on the part of the pre-emptive claimant. But a claim relinquished upon misinformation of the amount of sale-consideration, or the property sold, may be resumed when the real facts become apparent. Whether this be so or not, we should, where there had been no absolute surrender or relinquishment of a claim, but where the refusal was simply in consequence of a dispute as to the actual sale-consideration, hesitate to hold that, after the completion of the purchase by a stranger, the right of pre-emption could not be resumed. It would be our duty to follow the dictates of equity. It would neither be just nor equitable to lay down so hard a rule, as that a refusal to purchase before the actual completion of a sale to another would in all cases bar a subsequent claim, when the right of pre-emption accrues after the completion of the purchase.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

1877
DEC. 6.
APPEL-
LATE
CIVIL.
1 A. 524.

SAHIB ZADAH AND OTHERS (*Defendants*) *v.* PARMESHAR DAS AND ANOTHER (*Plaintiffs*). [6th December 1877.]

1 A. 524.

Usufructuary mortgage—Redemption—Conditional decree.

Where a suit is brought for redemption on the footing that the defendants are usufructuary mortgagees, and that the mortgage has been satisfied out of the usufruct, and a decree is passed in favour of plaintiff on the footing that the mortgage had not been satisfied but that the plaintiff ought to pay a certain sum before redemption, such conditional decree is not improper.

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DEC. 6.
APPEL-
LATE
CIVIL.
1 A. 524.

In a suit to recover possession of certain lands founded on the allegation that the defendants had obtained possession of them from the plaintiffs as usufructuary mortgagees, and that the mortgage-debt had been satisfied from the usufruct of the lands, both the Courts below decided that the defendants were in possession of certain of the lands as usufructuary mortgagees, and gave the plaintiffs a conditional decree in respect of those lands. The defendants appealed to the High Court contending that inasmuch as the plaintiffs had sued on the allegation that the mortgage-debt had been satisfied and it had been found that this was not the case, the plaintiffs were not entitled to a conditional decree.

JUDGMENT.

[525] TURNER, J.—We are not satisfied that a conditional decree was improper in this case. It does not appear that the appellants ever rendered any accounts, indeed, they denied they were in possession as mortgagees, and inasmuch as no agreement had been made as to the amount at which the profits should be estimated, it was impossible for the respondents to have ascertained before suit what sum, if any, was due by them. The more proper course would have doubtless been for the respondents to have offered to pay what might be found due. Seeing that whether the decree is altered or not, the respondents may immediately pay the balance and demand possession, and the appellants could not legally refuse it, we think it unnecessary to interfere with the decree in this case.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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DEC. 7.
APPEL-
LATE
CIVIL.
1 A. 525.

HUSAIN BAKSH (*Decree-holder*) *v.* A. D. MADGE (*Judgment-debtor*).

[7th December 1877.]

1 A. 525.

Execution of decree—Application to enforce or keep in force a decree—Limitation—Act IX of 1871, Sch. II, Art. 167—C.P.C. (1859), Ss. 212 and 285.

An application, under S. 285 of the C.P.C. (1859) for the transmission of a decree to another Court, together with a certificate of non-satisfaction of the decree, is an application to enforce or keep in force a decree within the scope and meaning of Art. 167, Sch. II, of the Limitation Act (1871), and an application for execution made within three years from the date of such application is within time.

[F., 1 A. 580 (581) (F.B), 2 A. 284.]

An application under S. 285 of Act VIII of 1859, made by the decree-holder to the Civil Judge of Lucknow on the 28th May, 1875, for the transmission of the decree dated 20th February, 1874, together with the certificate that satisfaction of the decree had not been obtained, to the District Court of Allahabad, was granted. The present application for the execution of the decree was made on the 5th April, 1877, under S. 212 of Act VIII of 1859 to the District Court of Allahabad which held that it was barred. The decree-holder appealed to the High Court.

JUDGMENT.

[526] PEARSON, J.—The Judge apparently holds the present application, dated 5th April last, for the execution of the decree of the 20th

February, 1874, to be barred because no previous application of the nature described in S. 212, Act VIII of 1859, had been made. But such an application could not well be made to the Court which passed the decree, if the decree could not be executed within its jurisdiction. The only application which could usefully be made to the Lucknow Court was that which was made to it on the 28th May, 1875. The remark that no application under S. 212 was made at the same time is of no weight or importance. The question is whether the application of the 28th May, 1875, was not one to enforce or keep in force the decree within the scope and meaning of Art. 167, Sch. ii, Act IX of 1871. It is difficult to conceive any other object which the applicant can have had in view in making the application than the enforcement or keeping in force the decree. The idea of *mala fides* is preposterous. The application was a necessary and decided step towards the execution of the decree in the Allahabad district. Under these circumstances we cannot but regard it as an application within the terms of Art. 167 aforesaid; and the present application being within three years from the date of that application is within time. The view we take **[527]** of the nature of the application of 28th May, 1875, is supported by a decision of a Bench of this Court, dated 22nd ult., in miscellaneous special appeal No. 64 of 1877, *Banki Behari*, appellant v. *Musammat Rahsi*, respondent.

We reverse the lower appellate Court's order of 20th June last, and, decreeing the appeal with costs, direct that the application be allowed and proceeded with.

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1 A. 525.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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APPELLATE CRIMINAL.
1 A. 527.

EMPRESS OF INDIA v. SALIK [7th December 1877.]

1 A. 527.

Penal Code, S. 211—False charge, what constitutes.

If a false charge had been made and if it is not pending at the time of the trial of the accused, an offence under S. 211 has been committed.

[R., 6 C. 496=7 C.L.R. 467, 28 B. 596 (599).]

This case merely follows *Reg.* v. *Subbanna Gaundan*, 1 M. H. C. R. 30, already followed in *Empress of India* v. *Abul Hasan*, 1 A. 497; (1) and as such it has not been reported in the Indian Law Reports, Allahabad Series.

(1) See p. 392, *supra*.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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3 Suth. P.C. J. 490=3 C. 315=3 Saraswati's P.C.J. 781.

On Appeal from the Judicial Commissioner of Oudh.

MUSSUMAT BANNOO AND OTHERS *v.* KASHEE RAM.

[7th December 1877.]

3 Suth. P.C.J. 490=3 C. 315=3 Saraswati's P.C.J. 781.

Hindu law—Family property—Presumption.

In a Hindu family, living together or having their entire property in common, the ordinary presumption is that everything in the possession of any one member belongs to the common stock; such a presumption does not arise if there has been a division of the family property and a separation in the family.

In this case, the ordinary presumption of Hindu law applicable to a joint family, was rebutted by the circumstances of the family, the *onus* of establishing the contrary, which lay on the member who disputed it, had not been discharged by him.

[F., 9 C. 237 (243); R., 8 B. 154 (157), 15 B. 201 (206), 19 A.W.N. 214, 2 C.P.L. R. 87.]

JUDGMENT.

[490] SIR MONTAGUE SMITH.—This is a suit brought in the Court of the Civil Judge of Lucknow, by Kashee Ram, a nephew of Ram Dyal, who died in the year 1873, against Mussumat Bannoo and Mussumat Munna, the widows of Ram Dyal, and Munna Lall his grandson, the son of his daughter. The claim is for an eight-annas share or one-half of all the property in possession of Ram Dyal at the time of his death. The property consists principally of moveable property, but the claim includes a pucca house and shop.

The claim is based on the foundation that Ram Dyal at the time of his death was a member of a joint family, consisting of himself, and of the plaintiff Kashee Ram and his brother Kasho Ram,—those two being the sons of Ram Buksh, a brother of Ram Dyal. Kasho Ram did not join in this suit. The state of the family was this: Ram Gholam left four sons, Sheo Buksh, Ram Bilas, Ram Buksh, and Ram Dyal. Sheo Buksh and Ram Bilas are dead: one dying without a widow or children, and the other leaving a widow only. Ram Buksh had two sons, Kashee Ram, the plaintiff, and Kasho Ram. Ram Dyal had no son. The **[491]** plaintiff admits in his plaint that his grandfather Ram Gholam divided the ancestral property amongst his four sons, though, according to his statement, the four sons did not take separately, but Sheo Buksh and Ram Bilas took one half jointly and so formed a separate family, and the other half was allotted to Ram Buksh and Ram Dyal. He contends that Ram Buksh and Ram Dyal remained a joint family. On the part of the present appellants, the defendants, it is stated that the division by Ram Gholam was not into two parts, as Kashee Ram contends, but that each of the sons took a separate share.

There is no distinct proof, one way or the other, as to the nature of that division, but undoubtedly a division was made, and it may be taken as against the plaintiff that at all events the family was divided into two groups at that time. It further appears that in the life-time of Ram Dyal, Kashee Ram, the plaintiff, and his brother Kasho Ram, as between

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themselves, separated, and therefore the family was still further broken up. It also appears that, whatever the division of the property may have been by Ram Gholam, all the members of the family lived separately, and there was no commensality between them. In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the *onus* of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the plaintiff's case, and therefore as he seeks to recover property which was in the possession of Ram Dyal, and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property to which he and his brother Kasho Ram, as surviving members, were entitled.

It may be stated that the issue in the case, which is the only one material to be decided, raises distinctly that question. The issue is, "Was the plaintiff joint with Ram Dyal at his death?" The evidence is extremely scanty, and what there is of it is very unsatisfactory. That remark was made by the Commissioner upon the appeal from the Civil Judge, and was also made by the Judicial Commissioner when the question came before him on the right of appeal.

Now the evidence upon which the Civil Judge mainly relied in giving judgment in favor of the plaintiff consists of a statement in his petition, which it is said was admitted by Ram Dyal. That petition occurred in this way: it seems that eight annas of a mouzah called village Uttardhona had been purchased in the name of Ram Dyal. Kashee Ram applied to have a four-annas share of that village entered in his name in the khewat; and his petition, which contains the statement relied on, is this: "The eight-annas share in the village Uttardhona was purchased from joint ancestral money; that by virtue of inheritance the petitioner is also sharer of four annas in the same—nay, the petitioner is up to this day in possession of the entire eight annas; that on the land belonging to the village, petitioner has also established a gauj, etc.; that as the khewat has not, as yet, been financially prepared, the petitioner prays that, out of the eight-annas share possessed by him, four annas may be recorded in his name in the khewat." Before commenting on this petition, it may be as well to see what Ram Dyal said in answer to it in his counter-petition filed in the Settlement Department, which he afterwards verified by his deposition. His statement is to this effect: "That the plaintiff's nephew, Kashee Ram, had, on the 11th September, 1868, instituted a claim in your Honour's Court, to have the four-annas share out of the eight annas in village Mansipur entered in his name; that the plaintiff admits the claim; that the plaintiff has amicably divided the above village into two equal shares; that as the khewat of the aforesaid village is now under **[492]** preparation, the plaintiff files this petition as a confession of the claim, and prays that the four-annas share may be entered in the name of the plaintiff in the khewat register." In his deposition he added, "That the four-annas share claimed by Kashee Ram, plaintiff (who is the real nephew), may be recorded in the khewat in equal shares, in the names of both Kashee Ram and Kasho Ram, who are real brothers, and that he agrees to this, and has no objection whatever." An order was made upon these petitions, which is this: "As Ram Dyal has admitted

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that four annas belongs to him and the other four annas belongs to defendants, ordered that four annas be recorded in equal shares in the name of Kashee Ram and Kasho Ram (the real brothers), and the other four annas in the name of Ram Dyal alone."

The contention on the part of the plaintiff is that he, having stated that the eight annas of the village was purchased with joint ancestral money, and that statement not being denied, but admitted by Ram Dyal, there is proof that at that time the estate was joint. Their Lordships think that the statement in the petition was receivable in evidence. It was objected that it was not admissible. because it was a mere statement by Kashee Ram himself. If it had remained so, the objection must have prevailed; but it is a statement admitted and assented to by Ram Dyal, and an order, founded upon what is called an amicable settlement, was made upon it. It was, therefore, clearly admissible in evidence, and the only question is as to the effect of it and of the transaction itself.

Undoubtedly, it is an admission that at the time of the purchase, whenever that was, there was joint ancestral money, out of which the price came. The date of this purchase nowhere appears; but from the statement which occurs in the petition, it probably was in the life-time of Ram Buksh, the father of Kashee Ram. Giving a reasonable construction to that statement, it by no means establishes that the whole of the property held by Ram Dyal was joint. It merely proves that there was some joint ancestral money which furnished the funds for this purchase. Taking, therefore, the admission alone, it is by no means conclusive or even satisfactory evidence of the case which the plaintiff must establish before he can succeed in this suit.

But the further statements in this petition, and the transaction itself, really make in favor of the defendant's case. Kashee Ram, the petitioner, whilst he says that the eight annas were purchased out of joint ancestral money, asserts that he is a sharer of four annas, and a sharer by virtue of inheritance. Now if the family were really joint at this time, he would not be entitled to any specific share of this property, and to come in and demand to have his name entered on the khewat for four annas, as his specific share; he would be in the position of a joint sharer in the whole, like any other member of the family. But he claims a specific share, as if, although there had not been a partition by metes and bounds, the family had previously agreed to divide the property into specific shares. His petition is assented to in those terms, and the order is made in conformity with it. But if this were not the inference to be drawn from the statement in this petition, the transaction itself by which they divide this property shows that they had then become separate, and leads very strongly to the presumption that they were not, from that time at least, a joint family. It should be stated that Kasho Ram did not join in the proceedings, but it appears that the fourth share was entered in the joint names of the two brothers.

Ram Dyal remained the owner of the other fourth, and this transaction afterwards took place regarding it. He entered into an arrangement with Kashee Ram to transfer to him these four annas, Kashee Ram engaging to pay Rs. 100 a year to Ram Dyal for his maintenance, and upon his death Rs. 50 a year to each of his widows,—the survivor to receive the whole Rs. 100; and further, if the estate was sold or mortgaged, he was to have half of the price if sold, or of the money raised upon it if mortgaged. That transaction was carried out by the [493] proceedings for mutation of names, which are set out in the Record at page 20. In his deposition in these proceedings, Kashee Ram stated that Ram Dyal

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"has a four-annas share in the above village, which has been awarded to him by the Settlement Court, and recorded in the khewat." This transaction again seems utterly inconsistent with their remaining joint as to their property. The shares in this estate, which appears to have been of some value, were treated as the separate property of each; Ram Dyal dealing with one-fourth entirely as his own, transferring it to Kashee Ram, who put himself under the obligation to pay a price which may be taken as a good consideration for the transfer.

Then Ram Dyal's subsequent conduct is consistent with his supposing that he was the owner of the property which remained in his possession. On the 14th December 1869, he made the deed of gift to his grandson Munna Lall, which the present suit seeks to set aside. It was a gift of all his property, when he was desirous of constituting his grandson, who lived with him, his heir. He being then old, was apparently desirous of placing his property in the hands of those whom he wished to succeed to him. He had, as already stated, transferred to his nephew, upon the terms which had been adverted to, his share in the village; and the rest of his property, which was principally personal, he gave to his grandson.

That deed was made in the year 1869, and was registered immediately after its date, namely, on the 17th December. Kashee Ram certainly knew of the deed, because he filed a petition objecting to its registration. His petition is dated on the 17th December, the day on which the deed was registered, and in it he no doubt states that Ram Dyal and the petitioner's father had a joint interest in the property, but he contented himself with filing that petition, and took no proceedings whatever during Ram Dyal's life-time to set aside the deed.

Now, if he was satisfied of the justice of his claim and his ability to prove it, one would have expected that in Ram Dyal's life-time he would have taken some step to get rid of this deed, which dealt with property to which he was, according to his own case, entitled. However, he took none until Ram Dyal, who could have given the best explanation of the *status* of the family and nature of the property, was dead.

This being the state of things when Ram Dyal died, the plaintiff's case is certainly not assisted by what subsequently took place. On the contrary, presumptions against the truth of his case arise from some of these proceedings. The first proceeding is a petition under Act XIX of 1841,—a petition by the two brothers Kashee Ram and Kasho Ram, in which they claim as nephews of Ram Dyal to be his legal heirs. Their statement is "Ram Dyal, our uncle, died on the 6th April 1873, and we, the petitioners, are the legal heirs," and they pray in that petition to have a list of the property made, and that it may be placed in their charge, suggesting that the widows would squander it.

In the first place, the claim thus made is not in its terms a claim as surviving members of a joint family. They claim as Ram Dyal's legal heirs; but proceedings in Oudh not being always carefully and technically expressed, much reliance is not to be placed on that circumstance. But the remark which was made in one of the Courts below, that the plaintiffs did not seem to know what property there was at the time of Ram Dyal's death, certainly affords ground for an inference against their claim. It appears that one of them at least was a man of business. Kasho Ram was a money-lender. There was a shop in which at one time the nephews seem to have had an interest; and if they had really during Ram Dyal's lifetime held all the property jointly with him, it is incredible that they should not have interfered with it during his lifetime to such an

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extent at least as to be able to say what it was at the time of his death. It appears from the evidence of the witnesses who were called by the plaintiff that the business of the shop was given up some time before Ram Dyal's death. There appears to [494] have been no demand for any account or any interference with what remained of the stock of the business, nor any claim to the profits which may have been derived from it.

The widows applied for the certificate of heirship, and, though opposed by Kashee Ram, the certificate was granted to the widows by the Court in June 1873. Then there was a suit by the widows for the Rs. 100 a year, which, under the arrangement before referred to, Kashee Ram was under an obligation to pay to them, and they succeeded in that suit. It is to be remarked that a defence was set up in that suit, which entirely failed,—a fraudulent defence, that by a subsequent deed Ram Dyal had cancelled the deed to Kashee Ram, and released him from the annuity, and had made a gift of the four annas to Kasho Ram. The Judge found that no such deed had been executed.

This is all the documentary evidence in the case. Beyond it there is some parol evidence by two witnesses; but when that evidence is looked at, it is utterly insufficient to sustain the plaintiff's case. Indeed, much of it is contradictory of it; and whilst it would be difficult to say that it proves the case of the defendants, there is no difficulty in asserting that it does not prove that of the plaintiff. The first witness, a man called Cheytram Chowdhri, says he knew the parties. He says, "I cannot say if their business were separate or joint, but when they worked by his advice it looks as if it were joint. I did not see any division, nor did I ever hear of division from ancestors." And then, lower down, he says, "Ram Dyal's dealings had ceased six months before the gift to Munna; he was ill; *he had no ancestral property.*" If this man had any means of knowledge, he negatives the plaintiff's case; if he had no means of knowledge, he cannot prove it.

The other witness was a partner of Ram Dyal, and he says, "I and Ram Dyal were partners up to five or six years ago. It lasted five years after the mutiny. I and he got eight-annas share each." Therefore it seems that this witness had one half of the business. "I worked; money was credited in the name of Ram Dyal and Kasho Ram in Nowabee; after the mutiny Kasho Ram and Kashee Ram's names only were used." That may have been for some reason arising out of the mutiny. "No division occurred; he kept the shop for the boys. I can't remember their father's name." Now the utmost that this witness's evidence goes to prove is that the nephews had some interest in the shop; but that may have been the case without their being interested in the general property in the possession of Ram Dyal as ancestral property. They may have been partners in this shop, and if so, they would be entitled to a share of the proceeds; but this suit is not brought to ascertain the profits of the shop; and, as has been already said, if there were any profits of the shop, it is strange they should not have been asked for and ascertained in the lifetime of Ram Dyal.

On the whole, therefore, their Lordships, if they had to form their opinion of the evidence as a Court of First Instance, would have come to the conclusion that it was insufficient to sustain the plaintiff's case.

With regard to the judgments, they are not of a nature to induce their Lordships to act on their authority, after the opinion they have themselves formed of the evidence. The Judges evidently felt great hesitation in coming to a conclusion in the plaintiff's favor, and their reasons for it are not altogether satisfactory. The Civil Judge appears to have based his

decision upon the ordinary presumption of Hindoo law applicable to a joint family. He says the presumption of law is that property is ancestral and not self-acquired,—is joint and not separate. This, no doubt, is the ordinary presumption; but the Judge does not appear to their Lordships to have given sufficient weight to the circumstances of this family, which rebutted the ordinary presumption. If the Judge had not acted upon the presumption, it is plain that the evidence taken alone would have been insufficient, in his own opinion, to have led him to the conclusion at which he arrived.

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[495] Then the judgment of the Commissioner sustaining that of the Civil Judge is also placed on infirm ground. It will be sufficient to read the concluding paragraph, "The case is not a very satisfactory one, and I do not think Ram Dyal and Kashee Ram were joint at the death of the former, but there is fair proof that they were joint within limitation, and no separation is alleged. I therefore decline to interfere with the finding of the lower Court, and dismiss the appeal, with costs." If this judgment is taken literally, it negatives the issue which was raised in the case; but what the Commissioner evidently means is, that there being, as he thinks, fair proof that the family were joint at the time of the proceedings respecting the entry in the khewat to which reference has been made, there was no subsequent evidence of separation. Well, if it could be taken as an ascertained fact that the family were joint at that time, there might not be sufficient evidence to show a subsequent separation; but, when the proof comes to be analysed, the error of the Commissioner's judgment seems to be in assuming that fact as a safe point of departure upon which he might decide the case.

The subsequent judgments of the Commissioner and of the Judicial Commissioner merely turn upon the question of the right to appeal to Her Majesty,—a question which has become immaterial in consequence of the special leave which has been obtained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to reverse the judgments of the Courts below, and to direct that the suit be dismissed, with costs in all the Courts below; and the appellants will have the costs of this appeal.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Spankie.

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MUTHRA *v.* JAWAHIR AND OTHERS. [15th December 1877.]

1 A. 527.

CRIMINAL JURISDICTION.

Penal Code, Ss. 188, 441—Plying boat for hire three miles from a public ferry—Disobedience to order duly promulgated by a public servant.

The plying of a boat for hire, three miles from a public ferry leased to the complainant, would not constitute the offence of criminal trespass.

1 A. 527.

But if, in spite of a prohibition from plying a boat for hire at or in the immediate vicinity of public ferries, a person continues to do so, he renders himself liable to punishment under S. 188, Penal Code, for disobedience of such order.

[R., 6 C. 496=7 C.L.R. 467, 22 B. 596 (599).]

This was a reference to the High Court, under S. 296 of Act X of 1872, by Mr. J. H. Prinsep, Sessions Judge of Cawnpore.

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CRIMINAL JURISDICTION.

1 A. 527.

On the complaint of the lessee of a public ferry on the Jumna at Barah, that the accused, residents of a village situated some three miles to the north-west of his ferry, where there was no authorised public ferry, were in the habit of plying boats for hire illegally, thereby diminishing the profits of his ferry, the officiating Magistrate of the District directed Mr. Carter the Joint Magistrate to take up and dispose of the case. Mr. Carter charged the accused persons under S. 447, I.P.C., and having tried them summarily acquitted them, they according to him, not being apparently legally punishable under that section. The District Magistrate, with a view to obtain the orders of the High Court, submitted the case to the Sessions Court which referred it to the High Court, observing that the case should, in its opinion, be governed by S. 6 of Reg. VI of 1819, and the accused were liable to punishment for disobeying any orders which might have been previously issued to them as well as for criminal trespass on the rights of the lessee, which matters, however, should form the subject of fuller inquiry and that the Acts and Circulars Act VIII of 1851, Act XV of 1854, Circular No. 22 of 1874 dated 19—9—1874 referred to by the Magistrate of the District, as they related to the levy of tolls on roads and bridges, floating or stationary, did not appear to it to apply.

The parties to the case were unrepresented.

JUDGMENT.

[529] SPANKIE, J.—I am not prepared to say that the Joint Magistrate has improperly acquitted the accused, who was charged with criminal trespass. This offence is defined in S. 441 of the Indian Penal Code as follows: "Whoever enters into or upon property in the possession of another, with intent to commit an offence (offence denotes a thing made punishable by the Penal Code), or to intimidate, insult, or annoy any person in possession of such property or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass." From the statement of the Officiating Magistrate of the District, it would appear that the criminal trespass charged consisted in accused plying a boat for hire on the Jumna, three miles to the north-west of the public ferry at Barah, which had been leased to the complainant. Mr. Carter, the Joint Magistrate, considers that no offence as defined in S. 441 of the Penal Code was committed, and looking at the terms of the section, and the admitted fact that the accused had plied the boat at a distance of *three* miles from complainant's ferry, I concur with Mr. Carter's view of the case.

S. 6, Regulation VI of 1819, prohibits all persons from employing a ferry-boat plying for hire at or in the *immediate vicinity* of public ferries without the previous sanction of the Magistrate. If, in the case of a prohibition distinctly made known to a person, he continued to ply a boat for hire at or in the immediate vicinity of a public ferry, the Magistrate doubtless is empowered by the Penal Code to punish him for his disobedience of such order.

Act VIII of 1851 enables the Government to levy tolls on public roads and bridges, and S. 6 relates to a distinct offence, defined in the section, committed against the person appointed to collect the toll at a public ferry or bridge, and also to the offence of unlawfully and extortionately demanding a higher rate of toll than that fixed by the schedule to the Act. It would hardly apply to the particular case before the Court..... ..... The Court, as at present advised, sees no ground for interference under S. 297 of the Criminal Procedure Code.

CRIMINAL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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1 A. 530 = 2 Ind. Jur. 466.

EMPRESS OF INDIA v. KAMPTA PRASAD. [15th December 1877.]

1 A. 530=2 Ind. Jur. 466.

Penal Code, Ss. 161, 165—Bribery.

A police officer employed in a Criminal Court to read the diaries of cases investigated by the police, and to bring up in order each case for trial with the accused and witnesses, brought up, in the usual manner, a case in which two persons were charged with the offence of theft. After conviction and sentence of the accused in that case, a sum of money, the proceeds of the theft, was made over to the complainant. The police officer asked for and received from the prosecution a portion of that money. There was no evidence that the money was given with any of the objects mentioned in S. 161, Penal Code. *Held*, that the police officer could not be convicted under S. 161, I.P.C., as the money was not promised and given as a reward for his performance of his duty in Court, but was liable to be punished under S. 165.

Kampta Prasad, a police officer, employed in the Court of a Magistrate to read the diaries of cases investigated by the police and to bring up in order each case for trial with the accused and witnesses, after a case of theft (the proceeds of the same being Rs. 3) had been decided by the Court in which the accused were convicted, and the proceeds of the theft had been made over by the order of the Court to Chattra, the prosecutor in the case, asked for and received from the prosecutor a portion of such money. So Kampta Prasad was convicted by the District Magistrate of an offence under S. 161, I.P.C. The Sessions Judge on appeal set aside the conviction observing as follows:—"I think there is no reasonable doubt that the appellant took a small gratification of one rupee from a plaintiff in a criminal case. There is, however, no evidence whatever produced which proves or makes it even very probable that this gratification was given with any of the objects mentioned in S. 161 of the I.P.C., under which section the appellant has been punished. The payment was made probably exactly as described by the giver as '*dasturi*' that is, a customary payment made to a person clothed with a little brief authority irrespective of any return or consideration for the payment. Such an offence is probably punishable under S. 29 of Act V of 1861, and in this view of the case I alter the finding of the lower Court and modify its sentence, and order Kampta Prasad to be imprisoned under S. 29 of Act V of 1861, for one month from the 10th September last."

The case was reported for the orders of the High Court.

REFERENCE BY SPANKIE, J.

[531] SPANKIE, J.—The Sessions Judge appears to me to be right in his view of this case in so far as it is affected by S. 161 of the Indian Penal Code. Under the terms of S. 161 of the Penal Code, the gratification must be taken by a public servant as a motive or reward for doing or forbearing to do any official act, or for showing, or forbearing to show in the exercise of his official functions, favour or disfavour to any person, &c., &c. But it is not pretended here that the one rupee paid to the accused was given to him as a motive or reward for any official act, or for showing or forbearing to show favour or disfavour in the exercise of his official acts. There was no agreement between the parties and indeed no previous connection. The accused was the person attached to the Deputy

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CRIMINAL JURISDICTION.

1 A. 530 = 2 Ind. Jur. 466.

Magistrate's Court to bring up police-cases for trial. He is the police clerk in the Magistrate's office, and he was not the police-officer who sent in the case nor connected with the police-inquiry. The party who gave the rupee himself stated that it was asked for and taken as "*dusturi*" after the case had terminated and the accused persons had been convicted. The giver of the rupee had been the original prosecutor. It seems to me that the section requires that the gratification should be taken with the view of doing or forbearing to do an official act, or for showing or forbearing to show favour or disfavour in the exercise of official functions. It is not taken after the act has been done, and without some previous understanding. I do not find evidence in this case that the money was promised and given as a reward for the accused's performance of his duty in Court.

It appears to me that S. 165 more nearly applies, and that as the accused was the subordinate of the Deputy Magistrate who had tried and closed the case, and asked for a reward, the one rupee after the case was over, he is guilty of accepting "a valuable thing," and without reference to any particular motive or reward for doing or **[532]** forbearing to do an official act. However, I am desirous that the record should go before a Bench, or that it should be heard before myself and another Judge, as the Hon'ble Chief Justice may direct. I therefore send the case to the Registrar in order that it may be laid before the Hon'ble Chief Justice.

ORDER OF THE HIGH COURT.

STUART, C.J.—In accordance with Mr. Justice Spankie's suggestion I directed this case to be brought before the first Bench of the Court, consisting of Mr. Justice Spankie and myself, and the case has been attentively considered by me.

I believe that Mr. Justice Spankie remains of the opinion expressed in the note issued by him previously to the case being brought before us, and I quite agree with him that S. 161 of the Penal Code has no application to the facts, and I must express my surprise that the Officiating Magistrate should have so misconceived the law. The motive or reward explained in S. 161 has obviously no application whatever to such a case as this. But, on the other hand, I scarcely think that the one rupee which was given by, or possibly extorted from, Chattra, can be regarded as in the nature of "*dusturi*." It appears to me to be too considerable for that, for it was nearly one-third of the whole sum recovered by Chattra. "*Dusturi*" is a customary payment very much less. It varies I believe, throughout India from two to four pice on the rupee, and therefore *dasturi* in the present case should not have exceeded two annas, if it was proper for Kampta, the policeman, to accept anything of the kind, which I do not think it was. Probably the offence might come under S. 29 of the Police Act, Act V of 1861, for in taking the rupee Kampta appears to have clearly violated the Police instruction—see these on "gratifications."

But I also agree with Mr. Justice Spankie that such a case at this is covered by the terms of S. 165 of the Penal Code. The only question is whether the rupee here was a "valuable thing" within the meaning of that section. The value must, I think, be looked at with reference to the proportion it bears to the money or property of which it forms part, and here the rupee was rather less than a third of the whole sum obtained by Chattra from the Criminal Court. I therefore consider that in lieu of the conviction before the Judge, and of the sentence passed by him, Kampta may be **[533]** convicted under S. 165 of the Penal Code,

and that he should suffer four months' simple imprisonment. I would also order him to pay a fine of one rupee, and in default to suffer one month's additional imprisonment, such additional imprisonment to cease when the fine is paid or is recovered by process of law.

SPANKIE, J.—I concur with the Hon'ble Chief Justice on the propriety of the conviction under S. 165, and in the sentence proposed. The conviction of accused and sentence passed by the Sessions Judge under S. 29 of Act V of 1861 is annulled, and the prisoner is convicted under S. 165 of the Indian Penal Code, and a warrant must issue accordingly.

1877
DEC. 15.

CRIMINAL JURISDICTION.

1 A. 530 = 2 Ind. Jur. 466.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1877
DEC. 18.

APPELLATE CIVIL.

1 A. 533.

HASAN ALI AND ANOTHER (*Plaintiffs*) *v.* MEHDI HUSAIN AND OTHERS (*Defendants*). [18th December 1877.]

1 A. 533.

Mahomedan Law—Guardianship.

When a Mahomedan woman, who was in possession of immoveable property on her own account, and on account of her minor nephew and niece, of whose person and property she acted as *de facto* guardian, sold the property in good faith and for valuable consideration for the discharge of ancestral debts and for the necessary purposes of herself and the minors, *held*, in a suit brought by the minors for cancelment of the sales and for possession, that the sales were proper and binding on the minors under Mahomedan law, according to which the right of the heirs is connected with the estate on the sole condition of its being free from incumbrances.

[**F.**, 26 A. 22 = 23 A.W.N. 183; **R.**, 20 B. 199 (201), 26 M. 734 (739), 9 O.C. 97 (100); 11 C.W.N. 71 (75) = 4 C.L.J. 485 = 34 C. 36, 11 C.W.N. 160 (161) = 4 C.L.J. 578 = 34 C. 65, 23 P.W.R. 1907 = 43 P.L.R. 1907 (**F.B.**)]

Suit for possession of certain shares in a dwelling house and in certain villages by cancelment of sales of the property by Musammat Husaini, who, being in possession of certain real property, on her own account and on account of her nephew and niece, minors, of whose persons and property she had assumed charge in the capacity of guardian, sold the property in good faith and for valuable consideration, for liquidating ancestral debts and for the necessary purposes and wants of herself and the minors.

JUDGMENT.

[534] We may, however, observe that we should be disposed to accept the Judge's finding on the merits. Even if the plea that Musammat Husaini was not the legal guardian of the appellants when she made the sales was good, we think that the plea is not one to be taken in special appeal for the first time; no such objection was made below; and further it does not appear that the plaintiffs came into Court offering their shares of the ancestral debts on account of which the sales were effected (1). On the contrary, they denied any necessity for sale, and seek to repudiate the transactions. But we are not satisfied that we are not within Muhammadan law in this case (2). We must look to the position

(1) *Pana Ali v. Sadik Hosein*, H.C.R., N.W.P., 1875, p. 201; *Sahee Ram* v. *Abdul Rahman*, H.C.R., N.W.P., 1874, p. 268.

(2) *Hamir Singh* v. *Zakia*, 1 A. 57.

1877 DEC. 18. — APPELLATE CIVIL. — 1 A. 533.

of the parties, the circumstances of the case, and the facts, found by the Judge. Musammat Husaini was one of the heirs of the property, and was manager on behalf of the childrer—her nephew and niece. Their father and mother had died, and there was no one to take care of the orphans. The father had been in straitened circumstances before his death. The debts [535] of deceased had to be satisfied. Their discharge is a matter of necessity, and as observed in the Full Bench decision quoted above (1), the right of the heirs is connected with the estate on the sole condition of its being free from incumbrance. Musammat Husaini was in possession of the property, whatever it was, on her own account, and on behalf of the minors, and, in that character, it would seem that she could act for them. In about five years after his death she was compelled to sell the property covered by the deeds of sale the landed portion of which was already mortgaged for more than Rs. 3,000 to satisfy the debts and for other necessary family purposes and wants. She thus was enabled to bring up the children and maintain and marry them. Whatever she did was done openly, and the Judge has found that the consideration was duly paid, that the sales were affected to pay the ancestral debts and that they were paid and to meet pressing necessity for the benefit of the minors. Under these circumstances, we agree with the lower appellate Court that the Muhammadan law and principles of equity and justice are binding on the plaintiffs who have not in their petition of plaint assigned any reason or grounds for repudiating the act of Musammat Husaini.

With these observations, which go to all the pleas in appeal, we dismiss the appeal and affirm the judgment of the lower appellate Court with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1877 DEC. 19. — APPELLATE CIVIL. — 1 A. 535 = 2 Ind. Jur. 468.

WALI-UL-LA (*Plaintiff*) *v.* GHULAM ALI (*Defendant*).

[19th December 1877.]

1 A. 535 = 2 Ind. Jur. 468.

1. *Objection in Special Appeal taken for first time at hearing—Arbitrators' procedure.*

Where, in a suit decreed on an award, an objection vitally affecting the arbitrators' procedure was for the first time, urged at the hearing, not having been preferred in the lower Court and even in the memorandum of special appeal, *held*, that the Court could not ignore it.

2. *Power of arbitrator to administer oath other than in prescribed form.*

An arbitrator has no power to administer an oath other than in the prescribed form.

The matters in dispute, in a suit for recovery of money, were referred to arbitration at the parties' request. During enquiry by the arbitrators, on the plaintiff offering to be bound by the oath of the defendant administered on the Koran, the defendant agreed to the same, and the arbitrators administered to him the oath, and made an award in accordance with the evidence taken by them on such oath. The plaintiff's application to set aside the award was refused by both the lower Courts. On special appeal to the High Court, the plaintiff for the first time contended, the

(1) *Hamir Singh* v. *Zakia*, 1 A. 57.

contention not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such an oath to the defendant and the evidence so taken could not form a valid basis and the award was therefore void.

JUDGMENT.

[537] PEARSON, J.—A far more serious objection to the procedure of the arbitrators has been here orally urged by the learned counsel for the appellants, *viz.*, that the arbitrators were not legally competent to administer the oath to the respondent under S. 10 of Act X of 1873, which only empowers a Court to administer such an oath as is mentioned in S. 8 thereof. The arbitrators were persons authorized by law to take evidence, and for that purpose to put witnesses upon oath or affirmation according to the provisions of the law for the examination of witnesses, but they do not constitute a Court, and are not empowered to administer an oath of the nature mentioned in S. 8 of the Oaths Act. Their proceeding in administering such an oath to the respondent in this case was therefore invalid as being without warrant of law, and consequently his statement, made on an oath so illegally administered, cannot form a valid basis of an award. I am constrained to admit the strength of this objection, which being one vitally affecting the arbitrators' procedure cannot, I think, be ignored by us, although it was not preferred in the lower Courts, and is not to be found in the memorandum of special appeal. I would decree the appeal, set aside the decree of the lower Courts and the award in conformity with which it has been passed, and remand the case to the Court of first instance for fresh disposal under S. 351 of Act VIII of 1859, with an instruction that the costs of the litigation up to this time should follow the event.

SPANKIE, J.—The objection which my honourable colleague would admit was never urged in the first Court, nor in appeal. It is not even one of the pleas in the memorandum of special appeal in this Court. It was raised for the first time at the hearing of the appeal. I am doubtful whether we should entertain the objection. The lower appellate Court disposed of all the pleas taken by the appellant, and its **[538]** judgment and that of the first Court was in accordance with the award. Assuming that the learned counsel was at liberty to take the plea, I would reject it because there is no question that the appellant offered to abide by the defendant's oath on the Koran, that his offer was contained in a written petition to the arbitrators and accepted by the defendant. He was bound by his agreement, made with the free consent of both parties competent to make it, and for a lawful object, *viz.*, the ascertainment of the truth by means which the petitioner, plaintiff, considered most likely to be successful, and which the defendant accepted. The plaintiff, in my opinion, should be held bound by the evidence of the defendant, given under an obligation imposed upon him, and fulfilled in the manner required by the plaintiff himself. But going beyond this, I would say that I do not find that there is any section in Act X of 1873 which would make it unlawful for the arbitrators to administer an oath on the Koran to a party willing to be sworn upon it. It is conceded that arbitrators are authorised to administer an oath; they are also persons, if the Oaths Act applies to them, who by that Act are "persons having by consent of parties authority to receive evidence." They, however, are not a Court within the meaning of S. 8 of the Act. A Court of Justice includes a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when the Judge or body of

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1 A. 535 = 2 Ind. Jur. 468.

Judges is acting judicially—S. 20 of the Indian Penal Code. Moreover, the Indian Evidence Act thus defines the meaning of the Court which receives the evidence in the judicial proceeding referred to in S. 8 of the Oaths Act. "Court" includes all Judges, Magistrates and all persons, *except arbitrators*, legally authorised to take evidence—S. 3. I am therefore disposed to conclude that S. 8 refers to parties and witnesses in every judicial proceeding actually before the Court for the purpose of giving evidence, or who may offer through their representatives actually before the Court to give evidence in any form held binding by them. But I am not prepared to extend section to arbitrators, who do not appear to be fettered by the Act or bound to communicate the offer of a party or witness to be sworn in any particular form to the referring Court for sanction. It seems to me that if arbitrators are not lawfully empowered by the Oaths Act to do what a Court is empowered to do by S. 8, their act in administering [539] an oath or affirmation to any witness in any form "common amongst or held binding by persons of the same race or persuasion to what he belongs and not repugnant to justice or decency, or not purporting to affect a third person" is covered by S. 13, in which there is not only no exclusive mention of the term Court, but in fact the word is not to be found there at all. The section which is in a different chapter from S. 8 runs thus: "No omission to take any oath, or make any affirmation, *no substitution* of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of the witness to state the truth." If the arbitrators in this case were authorised to affirm witnesses in the manner now in force in our Courts, and they substituted an oath on the Koran by request of one of the parties assented to by the other party, the substitution, under S. 13 of the Act, does not invalidate the evidence, and therefore does not render void the award founded on that evidence. I therefore would affirm the judgment of the lower appellate Court, and dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1878
JAN. 2.
APPEL-LATE CIVIL.
1 A. 539 = Ind. Jur. 609.

MADHO DAS (*Plaintiff*) *v.* KAMTA DAS (*Defendant*).

[2nd January 1878.]

1 A. 539 = 2 Ind. Jur. 609.

Inheritance among Sanyasis.

Among Sanyasis, a right of inheritance, strictly so called, to the property of a deceased *guru* depends upon nomination of a *chela* made by him in his own life-time, which nomination is generally confirmed by the *Mahants* of the neighbourhood assembled together for the purpose of performing the funeral obsequies of the deceased. Where no nomination has been made, the succession is elective, the *Mahants* and the principal persons of the sect in the neighbourhood choosing from amongst the disciples of the deceased *guru* the one who may appear to be the most qualified to be his successor, and installing him then and there as his successor.

In the absence of these conditions, a *chela* cannot claim to succeed to the property of his *guru*. (S. D. A., N.W.P., 1864, Vol. I, 512, *F.*).

[R., 11 C.W.N. 167 (*n*), 8 C.L.J. 499.]

1878

JAN. 2.

APPELLATE CIVIL.

1 A. 539 = 2 Ind. Jur. 609.

This was one of two suits instituted by M and G respectively, (both being founded on the plaintiff's right of succession to the property of the deceased Paras Ram, as his *chela* or disciple), against one Kamta Das, for possession of a certain village. In these suits the allegation made by the defendant was that the village had been presented to his *thakurdwara* at Ajudhia by Paras Ram. The first Court holding that the defendant's allegation was not proved and that G being the sole disciple of Paras Ram was entitled to the village in question, decreed in his favour, dismissing M's suit. M and the defendant appealed. The lower appellate Court while concurring with the first Court in thinking that the defendant's allegation was not proved, *held* that as M was the senior disciple of Paras Ram he had a preferential right to the said village. However, M's appeal was dismissed and that of the defendant allowed, as the lower appellate Court thought that neither of the suits was maintainable, since neither of the plaintiffs had declared himself to have been chosen mahant or elected such after the death of Paras Ram, nor had it been shown what was the custom of succession *re* the shrine belonging to Paras Ram. Both the plaintiffs preferred an appeal to the High Court.

JUDGMENT.

[540] SPANKIE, J.—With reference to former precedents of the late Sudder Dewanny Adawlut of these Provinces, we cannot say that the Subordinate Judge was in error in dismissing both claims for the reasons assigned by him, since it was not for him to make out a title which neither plaintiff alleged **[541]** for himself as his ground of action. But he was right in noticing the defect, because it had been pleaded by the defendant in appeal.

It has been laid down by the late Sudder Dewanny Adawlut (1) that amongst the general tribe of fakirs called Sanyasis (and the plaintiffs here appear to be of the description) a right of inheritance strictly so speaking to the property of a deceased *guru* or spiritual preceptor does not exist; but the right of succession depends upon the nomination of one amongst his disciples by the deceased *guru* in his own lifetime, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together for the purpose of performing the funeral obsequies of the deceased. Where no nomination has been made the succession is elective, the *mahants* and the principal persons of the sect in the neighbourhood choosing from amongst the disciples of the deceased *guru* the one who may appear to be the most qualified to be his successor, installing him then and there on the occasion of performing the funeral ceremonies of the late *guru*.

Neither plaintiff avers that he was nominated by the deceased Paras Ram during his life and confirmed afterwards, nor does either assert that, in consequence of Paras Ram's omission to nominate a successor, he had been elected after the latter's death by the neighbouring *mahants* and members of the sect: but both plaintiffs have based their claim on inheritance and discipleship, which would not be sufficient to establish a right of succession. We therefore dismiss the appeal and affirm the judgment of the lower appellate Court with costs.

(1) In *Nirunjun Birthee* v. *Padaruth Barthee*, S.D.A., N.W.P. 1864, Vol. I, 512.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1878

JAN. 2.

JEONI (*Plaintiff*) *v.* BHAGWAN SAHAI AND ANOTHER (*Defendants*).

[2nd January 1878.]

APPEL-LATE CIVIL.

1 A. 541 = 2 Ind. Jur. 680.

Effect of an order under S. 246, C.P.C. (1859)—Limitation.

The finality and conclusiveness of an order under S. 246, C.P.C., passed on a claim preferred to property attached in execution of a decree, cannot be affected by the circumstance that, owing to the decree being otherwise satisfied after the order, the property attached has not been brought to sale.

Where, under the above circumstances, the unsuccessful claimant, more than a year after the order, brought a suit against the parties to the decree for the establishment of his proprietary right to the property attached, *held* that the suit was barred by limitation. (1 A. 381 (**F B.**), *F.*)

Bhagwan Sahai had caused a certain dwelling house to be attached in execution of a decree held by him against the plaintiff's husband as the property of her husband. The plaintiff had then preferred a proprietary claim to the house, which was disallowed by the Court executing the decree by an order made under S. 246, Act VIII of 1859 on 14—11—1874. Two days after the date of such order, the plaintiff's husband satisfied Bhagwan Sahai's decree. More than a year after the date of such order, the plaintiff sued Bhagwan Sahai and her husband to establish her proprietary right to the dwelling house, alleging that the plaintiff's husband had fraudulently mortgaged it to Bhagwan Sahai. Both the Courts below dismissed the suit as barred by limitation. The plaintiff then appealed to the High Court.

JUDGMENT.

[543] SPANKIE, J.—The first plea would fail if we hold that the suit should have been brought within one year from the date of the order passed under S. 246 of Act VIII of 1859. For it is the order then made which, if contested at all, must be contested within one year, and after that date cannot be questioned. The Full Bench decision of this Court in *Badri Prasad* v. *Muhammad Yusuf* (1) has conclusively settled this point. Whether the decree was settled after the order was made has no bearing on the point at issue. Having examined the record of this case and the order made under S. 246, Act VIII of 1859, there cannot be a doubt that the plaintiff was, and now is, entirely bound by that order, and that she cannot now re-assert her title to the house, which was not allowed as against the judgment-debtor and decree made in 1874.

(1) 1 A. 381.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1878
JAN. 2.

LACHMAN SINGH AND ANOTHER (*Defendants*) *v.* SANWAL SINGH (*Plaintiff*). [2nd January 1878.]

APPELLATE CIVIL.

1 A. 543.

1 A. 543.

C.P.C. (1859), S. 7—Subsequent cause of action consequent on discovery of fraud.

Where plaintiff sued for and obtained a decree for a declaration of his right to a share in a mortgage-debt, *held*, that S. 7, C.P.C., was no bar to a subsequent suit by him for the recovery of his share of the amount due under the mortgage, afterwards discovered to have been fraudulently received by the same defendant prior to the first suit. (H.C.R., N.W.P., 1871, p. 27, *R.*)

JUDGMENT.

[544] OLDFIELD, J.—The plaint in the former suit is badly drawn up, but the claim, so far as the mortgage-debt is concerned, was clearly **[545]** for a declaration that the plaintiff was entitled to a fifth share in the sum lent under the mortgage-deed. The plaintiff stated the principal sum to be Rs. 5,600, and his own share in that sum Rs. 1,120. He did not sue to recover any portion of the debt. He claimed by right of succession, and his cause of action was the obstruction offered by the defendants to his possession of the family estate (1). It appears that at the time he instituted the first suit the defendant had realised the original debt with interest to the amount of Rs. 8,624. The plaintiff had no knowledge of this fact which was concealed from him; and he now sues to recover his share of that sum. We find that the defendant wrongfully appropriated the assets of the estate, and the Judge's finding is to the effect that he dishonestly concealed from the plaintiff information that he had realised the debt. We have thus the element of fraud introduced into the transaction and giving another cause of action to that on which the former suit was brought. We concur with the Judge in holding that, under the circumstances, S. 7 of Act VIII of 1859 cannot be applicable to bar this suit. We notice that a similar view was taken by this Court in *Bulwant Singh* v. *Chittan Singh* (2), and without endorsing or accepting all that is in that judgment, we consider that it expresses the course that we should adopt in this case. We dismiss the appeal with costs.

APPELLATE CIVIL.

1878
JAN. 2.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

DURGA PRASAD (*Plaintiff*) *v.* KHAIRATI AND OTHERS (*Defendants*). [2nd January 1878.]

APPELLATE CIVIL.

1 A. 545=2 Ind. Jur. 680.

1 A. 545= 2 Ind. Jur. 680.

Powers of Appellate Court.

An appellate Court must confine its decision to the points put in issue by the parties before it. It cannot, of its own motion, raise points in favour of a respondent who remains *ex parte*.

(1) He obtained a decree in the first suit, declaring his right to the share claimed.
(2) H.C.R., N.W.P., 1871, p. 27.

1878

JAN. 2.

APPELLATE CIVIL.

1 A. 545 = 2 Ind. Jur. 680.

JUDGMENT.

[546] OLDFIELD, J.—It appears that the defendants-respondents, executed a deed of mortgage in favour of plaintiff on the 9th June 1873, for a consideration of Rs. 1,000, which was payable in one year, and the purport of the deed is to give possession to the plaintiff. On the same date another deed was executed by which the defendants agreed to take a lease of the property on payment of rent, for the due payment of which the property was hypothecated in the deed. The rent not having been paid, the plaintiff sues to recover arrears of rent, principal and interest, Rs. 164-7-1, by enforcing the charge on the property, together with interest, subsequent to institution of the suit, and to obtain possession of the mortgaged property. The defendants appeared in the Court of first instance by their pleader and asked for an adjournment to enable them to put in their defence; this was refused, and they failed to put in any reply to the claim, and the Court of first instance decreed the claim for possession and the principal amount of rent, and dismissed the claim for interest. The plaintiff then preferred an appeal to the Judge on the matter of interest. The defendants did not defend the appeal notwithstanding that the Judge summoned them to appear in person. The Judge has held that, under S. 37 of Act XXIII of 1861, he is at liberty to open the whole case on the appeal preferred by the plaintiff, and as he considered the Court of first instance was not justified in refusing to allow time to the defendants to prepare their answer to the suit, and also that, looking into the deeds, there is reason to think that the claim to be put in possession of the mortgaged property is not maintainable, and that the second deed is invalid for want of registration, he has reversed the decree of the first Court and remanded the suit for **[547]** re-trial on the merits. under S. 351 of Act VIII of 1859. This decision is open to the objection taken on special appeal.

S. 37 of Act XXIII of 1861 gives the appellate Court the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits. But the Judge's order cannot be supported under this section. He has held that there has been an improper consideration and admission of evidence affecting the merits of the claim, although these matters were never put in issue in the appeal before him. The Judge should have confined himself to deciding the matters put in issue by the parties. S. 337 of Act VIII of 1859 shows the circumstances under which a Court may reverse or modify a decree in favour of plaintiffs or defendants who have not appealed, but this section does not apply to the case before us. The defendants might have appealed or preferred objections under S. 348, and in that case the Judge would have had to decide the question raised, but they never appeared to defend the appeal, and, we may add, have not done so in this Court. The only question before the Judge was that raised by the appellant, the plaintiff, and he should have confined his decision to that question.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1878

JAN. 2.

APPELLATE CIVIL.

1 A. 547.

UMRAO BEGAM (*Judgment-debtor*) *v.* THE LAND MORTGAGE BANK OF INDIA (*Decree-holder*). [2nd January 1878.]

1 A. 547.

N.W.P. Rent Act, S. 9—Transfer of right of occupancy-tenant in execution of decree.

Section 9 of the N.W.P.Rent Act appears to have been enacted in the interest of landholders who may presumably waive the privilege it confers on them. It cannot, therefore, be interpreted as preventing a landholder from causing the sale, in execution of his own decree, of the occupancy right of his own judgment-debtor in land belonging to himself. (1 A. 353 (**F.B.**), *D.*)

[Affirmed, 2 A. 451; **D.**, 7 A. 511 (513), 7 A 878 (**F.B.**).**]**

The decree-holder, who had purchased the proprietary rights of the judgment-debtor in a certain village at a sale held on 23—10—1876, applied for the sale of the right of occupancy acquired by the judgment-debtor, under S. 7, Act VIII of 1873, in the sir-land appertaining to such proprietary rights. The Court of first instance overruled the objection of the judgment-debtor that under S. 9 of that Act such right of occupancy was not transferable, on the ground that the provisions of S. 9 of that Act were not applicable to sales in execution of decrees but only to voluntary transfers. The judgment-debtor appealed to the High Court raising the same contention.

JUDGMENT.

[548] PEARSON, J.—The lower Court's view that S. 9 of the Rent Act applies to private transfers of occupancy rights only and not to sales of such rights in execution of decree is, in the general form in which it is stated, opposed to the Full Bench ruling of this Court, dated 19th February, 1877 (1). But in the case out of which that ruling arose the person who sought to bring to sale an occupancy right possessed by his judgment-debtor in a holding was not the zamindar, the proprietor of the land. In the present case the decree-holder is himself the zamindar. The section appears to have been enacted in the interest of landholders, who may presumably waive the privilege it confers on them. It would be unreasonable to hold that a landholder should not be free to cause the sale in execution of his own decree of the occupancy right of his own judgment-debtor in land belonging to himself. Such a case cannot fall within the scope of the Full Bench ruling above mentioned. We therefore dismiss the appeal with costs.

APPELLATE CIVIL.

1878

JAN. 2.

APPELLATE CIVIL.

1 A. 549= 2 Ind. Jur. 834.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

KANAHI RAM (*Plaintiff*) *v.* BIDDYA RAM (*Defendant*).

[2nd January 1878.]

1 A. 549=2 Ind. Jur. 834.

1. *Hindu Law—Putting out of caste—Guardianship.*

A Hindu, who is outcasted by his community for attempting to marry his daughter, eleven years old, for a money consideration to an impotent old man of seventy, does not thereby lose his right to her custody as guardian.

(1) In *Ablakh Rai* v. *Udit Narain Rai*, 1 A. 353.

1878

JAN. 2.

APPEL-LATE CIVIL.

1 A. 549 = 2 Ind. Jur. 834.

Even assuming that there is a rule to that effect, it cannot be enforced by the Courts. (Act XXI of 1850.)

2. *Medical examination of a person as to impotence—Court's power.*

The Courts have no power to order the medical examination of a person as to his impotency.

[F., 167 P.L.R. 1901, 28 A. 233 (235) = 2 A.L.J. 663 = A.W.N. (1905), 205.]

In a suit for possession and custody of the minor daughter of the defendant who had been deprived of his caste by the members of his brotherhood on account of intending for a money consideration to give his infant daughter in marriage to a man both old and impotent, the plaintiff also claimed an injunction restraining the intended marriage and a declaration of his right to give the defendant's daughter in marriage to a fit and proper person. Both the lower Courts dismissed the suit and the plaintiff preferred a special appeal to the High Court.

JUDGMENT.

[550] PEARSON, J.—This case has been argued before us at great length, and the conclusion at which I have arrived, after consideration of all that has been said on both sides, is that the suit as brought is not maintainable. The appellant has, in my opinion, failed to show that, because the defendant has been put out of caste by the members of his brotherhood on account of his intending to give his infant daughter, aged eleven years, in marriage to a man by name Phunda Ram, said to be more than seventy years old and impotent, in consideration of receiving from him about Rs. 400, he (the defendant) has, according to Hindu law, lost his right as guardian to the custody of the said girl; and such a contention, even were it supported by Hindu law, must be disallowed in reference to the provisions of Act XXI of 1850. The claim on the appellant's part on the basis of that contention to have the custody of the girl himself as her guardian in lieu of her father, and, as such, to be declared empowered to arrange for her marriage to a suitable husband, cannot therefore be conceded. Assuming that in a suit properly brought for that purpose, and on proof of Phunda Ram's physical disqualification for marriage, the Courts could interfere so far in the matter as to restrain the defendant from marrying his daughter to that person, it would not be necessary to proceed so much further as to deprive the defendant of his rights or to relieve him of his duties as a father. The lower appellate Court has held the assertion respecting Phunda Ram's impotency not to be substantiated. It is urged that the lower Courts should have caused Phunda Ram to be examined by the Civil Surgeon, but no provision of law authorising such a procedure has been pointed out. Phunda Ram was not even **[551]** a party to the suit. It has been stated in the course of the argument before us that under Hindu law a marriage may be dissolved on the ground of the bridegroom's impotency. If this statement be correct, it is satisfactory to think that, should the defendant insist in carrying out his intention, the girl may, if entitled to claim it, have a remedy at law. Although the appellant may not have been entitled to bring this suit as her guardian or to claim her guardianship, his action in the matter is attributable to commendable motives, and in dismissing his appeal, not without reluctance, I would dismiss it without costs, and in affirming substantially the decrees of the lower Courts, I would modify them in so far as they order the costs of the defendant to be paid by the plaintiff.

STUART, C. J.—I have taken a little time to consider this case, for I confess I was anxious, if I possibly could, to give the plaintiff the remedy

he seeks. In our order of the 13th June last (1) it is justly remarked "that the marriage of a girl eleven years old to a man of seventy years old is, on the face of it, an immense injury to the girl, and an extreme abuse of the father's authority as her guardian:" and having heard the case out, in fact and in law, I still adhere to that remark, and I would, if I could, prevent this marriage. But I regret to say that, having fully considered it in all its bearings, as well with respect to the peculiar principles and precepts of the Hindu law as on the other legal grounds which were maintained at the hearing, I have arrived at the same conclusion as that expressed by Mr. Justice Pearson. No doubt it would have been better if the old man. Phunda, the would-be bridegroom, had been a party to the original suit, but it is too late to consider that now, even if he had been prejudiced by the order we now make. So far, however, as he is concerned the result is substantially favourable to him, although I should be glad to learn that the marriage does not take place.

I also agree with Mr. Justice Pearson that this appeal should be dismissed without costs of the Courts below. I would order each party to bear his own in both.

1878
JAN. 2.
APPELLATE CIVIL.
1 A 549 = 2 Ind. Jur. 834.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

1878
JAN. 10.
FULL BENCH.

CHAMAILI RANI (*Defendant*) *v.* RAM DAI (*Plaintiff*).

[10th January 1878.]

1 A. 552 = 2 Ind. Jur. 836.

1 A. 552 = 2 Ind. Jur. 836.

Court Fees Act, 1870, S. 17--Meaning of expression "Distinct subjects."

The expression "distinct subjects" in S. 17 of the Court Fees Act means distinct causes of action or distinct kinds of relief.

[F., A.W.N. (1904), 210, 27 A. 186 (189); **Ap.**, 3 A.108 (**F.B.**); **Cons.**, 2 A. 676 (**F.B.**), 16 A. 401 (403) = 14 A.W.N. 124.]

REFERENCE TO THE FULL BENCH.

The Court (STUART, C. J., and SPANKIE, J.) referred to the Full Bench for an opinion as to the meaning of the words "distinct subjects" in S. 17 of Act VII of 1870.

JUDGMENT OF THE FULL BENCH.

[553] STUART, C.J.—It appears to me that the meaning of the words "distinct subjects" in S. 17 of Act VII of 1870 is shown with sufficient clearness in that section itself, when it states that "the plaint or memorandum of appeal shall be chargeable with the *aggregate amount* of the fees to which *the plaints or memoranda of appeal in suits embracing separately each of such subjects* would be liable under this Act." This, I think, can only mean that the two or more distinct subjects are to be so chargeable as being distinct causes of action. The words "*plaints* or memoranda of appeal in *suits*" in the section show this to my mind conclusively, and it is not enough that the distinct subjects should be merely separate and distinct matters embraced in the claim.

(1) This was an order granting, under S. 193 of Act VIII of 1859, an injunction restraining the defendant from carrying out the intended marriage, pending the determination of this special appeal.

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FULL BENCH.

1 A. 552 = 2 Ind. Jur. 836.

But, on the other hand, I am of opinion that this interpretation of S. 17 of the Court Fees Act does not in the least degree affect the correctness of the calculation submitted by the office in the case which has given rise to this reference, for it is very clear to me that each of the separate distinct subjects mentioned in the report might be separate causes of action in separate suits, and therefore whether viewed in that light or merely as distinct and separate matters of claim, the correct fee chargeable in this case is that suggested by the Assistant Registrar (1).

TURNER, J.—Seeing that the fee to be charged in such cases is the aggregate of the fees to which the plaints in suits embracing separately each of the subjects would be liable under the Act, I am inclined to think that "distinct subjects" mean distinct causes of action or distinct kinds of relief; *e.g.*, if a suit is brought for the recovery of an inheritance, although the inheritance might consist of distinct properties and properties differing in kind, the fee would be computed on the aggregate value of the one subject of suit. But where a suit is brought (i) for the recovery of an inheri-**[554]**tance, (ii) for an injunction, and (iii) for the amount of a bill-of-exchange accepted by the defendant, each of these three subjects would be distinct, and the fee chargeable would be the aggregate of the fees chargeable in respect of each subject if sued for in a separate suit. On the report now submitted by the office it is not possible to determine the proper fee. When the record is before the Court it can be ascertained what are the subjects to which the appeal relates.

PEARSON, J.—I concur in the view taken by my learned colleague, Mr. Justice Turner.

SPANKIE, J.—I adhere to the opinion which I expressed when this question was argued by Pandit Ajudhia Nath before the referring Bench, which opinion I believe the learned Chief Justice shared. But it became necessary to refer the question as a doubt had been expressed elsewhere as to the meaning of the words "distinct subjects" in S. 17 of the Court Fees Act.

I regard the words as meaning every separate matter distinctly forming a subject of the claim. The section runs thus: "Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act." The fee to which each of the distinct subjects embraced by the suit is liable, if a separate suit were brought, is first to be ascertained and then the aggregate amount of all the items is to be charged. The words "multifarious suits" in the margin have no reference to S. 8 of Act VIII of 1859 in the sense suggested by

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(1) Under the order of the Court the following report was made by the Assistant Registrar :—"The claim embraces different subjects, and under S. 17 of the Court Fees Act the Court fees should apparently have been calculated on each subject-matter, and not on the aggregate value, as has been done. The fees should be calculated as follows:

				Court-fees.		
	Rs.	A.	P.	Rs.	A.	P.
1.—For possession (on five times the jama) ...	4,315	1	2	245	0	0
2.—For a house, value	4,100	0	0	230	0	0
3.—For wasilat	5,243	3	2	285	0	0
4.—For damages	648	0	0	48	12	0
Total ...	14,306	4	4	808	12	0

On the aggregate amount the stamp (for Rs. 610) is sufficient, but this apparently is not correct as stated above. It should have been calculated under S. 17 of the Court Fees Act, and the stamp is therefore insufficient by Rs. 198-12-0."

the learned pleader for appellant, that we are to read the words "two or more distinct subjects" as if they were "two or more distinct causes of action;" and the second clause in S. 27 that "nothing in the former part of the section shall be deemed to affect the power conferred by the Code of Civil Procedure, S. 9" simply affirms what is laid down in S. 9 that, where two or more causes of action are joined in the same suit, and the Court shall be of opinion that they cannot conveniently be tried together, the Court may order separate trials of such causes of action to be held.

I would reply that the Assistant Registrar has calculated the fees strictly in accordance with the provisions of S. 17 of Act VIII of 1870.

1878 JAN. 10. — FULL BENCH. — 1 A. 552 = 2 Ind. Jur. 836.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1878 JAN. 18. — APPELLATE CIVIL. — 1 A. 555.

GUMANI AND ANOTHER (*Plaintiffs*) *v.* RAM CHARAN AND OTHERS (*Defendants*). [18th January 1878.]

1 A. 555.

Specific Relief Act, S. 27—Misjoinder of causes of action.

In a suit for the specific performance of an agreement to execute a deed of sale of certain immoveable property and for possession of the same, which impleaded not only the party to the agreement, but also persons who, subsequent to the agreement, purchased the property at an execution sale, on the ground that they did so in bad faith with notice of the agreement, *held*, considering the terms of S. 27 of the Specific Relief Act, that the suit was not necessarily bad for misjoinder of causes of action.

For enabling Ram Padarath and Ram Charan. two brothers, to sue for a certain share in a certain village as their joint and undivided property, the deceased husband of the plaintiffs, taking an agreement from the former on 7—5—1873 and from the latter on 10—12—1874, for the conveyance of three-fourths of the share should they obtain a decree in respect of it, and advanced certain monies. The brothers having succeeded in their litigation, and their rights and interests in their decrees being sold in execution of a certain decree, the plaintiffs brought the present suit against Ram Charan and the auction-purchaser to enforce the agreement of 10—12—1874, and for possession of the specified share. A similar suit was brought against Ram Padarath and the auction-purchaser for enforcing the agreement of 7—5—1873. The first Court and the lower appellate Court dismissed both suits on the ground that the auction-purchaser was not a party to the agreements and there was consequently in the suits a misjoinder of causes of action. On special appeal to the High Court, the plaintiffs contended that there was no misjoinder of causes of action.

JUDGMENT.

[556] SPANKIE, J.—We think that the lower appellate Court has too readily assumed that, because the auction-purchaser was no party to the contract to sell to plaintiff, the suit is bad for misjoinder. It is part of the plaintiff's case that the auction-purchaser at the time of his purchase was aware of the original contract in favour of the plaintiff, and that he and the defendant Ram Charan were acting in collusion and to the injury of the plaintiff. Under Cl. (*b*), S. 27, Act I of 1877, a contract may be enforced against any party to it or any other person claiming under him

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1 A. 555.

by a title arising subsequently to the contract, *except* a transferee for value who has paid his money in good faith and without notice of the original contract. The claim therefore is not necessarily bad for the reason assigned by the lower Courts. The defendants who were parties to the original contracts in the cases before us may be said to have admitted them, as Ram Charan did not defend the suit against him, and Ram Padarath in the other suit acknowledged the justice of the claim. It is true that the auction-purchaser contends that these defendants are in collusion with the plaintiff to injure him.

The Court would have to determine first whether or not there was any agreement enforceable by law between the contracting parties, and, if so, was the contract one specifically enforceable by law as being one for which compensation in money would be no adequate relief. If the lower appellate Court found that the contract was one specifically enforceable, it would have to determine whether or not it was a contract entered into at the time it professes to have been made in good faith between the contracting parties, or, as alleged by the auction-purchaser, the transaction was **[557]** not made *bona fide* and was prepared in fraud of himself. If the lower Court found that there was a genuine contract of sale, the Court would then have to determine whether or not the auction-purchaser at the time of his purchase was aware of the original contract.

With this view of the case we annul the finding of the lower appellate Court, and remand the case, under S. 351 of Act VIII of 1859, with directions that it may be restored to its original number on the file, and be tried on its merits by the lower appellate Court. Costs will abide the result.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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JAN. 18.
APPEL-LATE CIVIL.
1 A. 557 = 2 Ind. Jur. 790.

FAZAL HAQ (*Plaintiff*) *v.* MAHA CHAND AND ANOTHER (*Defendants*).

[18th January 1878.]

1 A. 557 = 2 Ind. Jur. 790.

Powers of Municipal Committee—N. W. P. & Oudh Municipalities Act, Ss. 27, 32 and 38—Infringement of rights by the exercise of such rights—Relief.

By S. 38 of the N.W.P. and Oudh Municipalities Act, the property in all public highways is vested in the committee, and by S. 27, the committee can, with the sanction of the Local Government, sell any portion of land, referred to in that section, which is not required for the purposes of the Act, and shall keep roads in repair, and may do all acts and things necessary for purposes of general utility. But there is nothing in the Act which debars the Civil Courts from entertaining suits and giving relief in respect of any civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act.

[Ap., 9 M. 463 (465).**]**

Suit to establish a right of access to a certain public thoroughfare and to the use of a certain drain.

ORDER OF REMAND.

[558] As we understand the facts, it would appear that land which belonged to and formed part of the old public road and adjoined the plaintiff's premises has been sold by the Municipality to the defendant, but that a sufficient portion of land remains in use as the public road, and the defendant has appropriated to his own exclusive use that portion which

he has purchased and which lies between the plaintiff's premises and the present public road, and by so doing the plaintiff avers that defendant has interfered with his right of way and prevented approach as of old on his part from his premises to what now constitutes the public road. The plaintiff asks that a passage three yards wide be opened across the purchased land to the public road for his use; he also seeks to have a drain opened which defendant has closed. The Court of first instance decreed the opening of the drain, and dismissed the rest of the claim, and the lower appellate Court has affirmed this decision. The Subordinate Judge has found that the land purchased by the defendant was a public thoroughfare, but has held that plaintiff has no right to relief in respect of maintenance of his right of way, apparently on the ground that he could obtain access to the public road by making a detour, and that any inconvenience to him would be trifling compared with the loss to the defendant who has purchased the land at a high price. This judgment proceeds on erroneous grounds. If the land purchased from the Municipality was part of a public thoroughfare, and the defendant by his purchase obstructs its use, the plaintiff can sue for relief, if he can show that he has been individually injured by the defendant's act. In the present case there is no doubt that such injury has been shown, if the plaintiff's allegations are true that he has no longer the direct access to the present public road which he had before, and that the act of the defendant has [559] caused the closing of an established drain, and it would be no ground for denying him relief that he may by making a detour get access to the road, or that to give him relief will interfere with the benefit which defendant anticipated from his purchase.

The questions for decision are whether the land bought by defendant was part of a public thoroughfare; whether the title obtained by the defendant under the Municipality's right to sell was one which gave him the land free from any liability or responsibility to the plaintiff on account of previous user of it; and whether plaintiff has suffered the injuries alleged by the defendant's act so as to give him a right of action and a claim to the relief now sought.

It will be necessary that the Municipality be properly represented in the suit as defendant, and we remand the case under S. 354 of Act VIII of 1859 that this may be done and the above issues tried and decided; when the lower appellate Court will return the case with its finding to this Court, and seven days will be allowed for objections to be preferred to the finding.

On the return of the Subordinate Judge's finding, the Court delivered the following—

JUDGMENT.

[559] The lower Court's finding on the issues remitted is to the effect that the land in dispute formed part of a public thoroughfare, and that the defendant by his occupation of it since his purchase from the Municipal Committee has interfered with the plaintiff's right of drainage and way. On the latter point the Court's finding shows that plaintiff's premises adjoin this land, and while it formed part of the highway he and his tenants had immediate access to the highway, but by the exclusive occupation of this portion of the highway by defendant, their access to that portion which now forms the highway has been shut off, and no other adequate means of access has been provided.

Accepting this finding, it shows that plaintiff has suffered injuries and inconveniences by the closing of the highway by defendant, which

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1 A. 557 = 2 Ind. Jur. 790.

affect him beyond what affects the public at large, and he has in consequence a right of action against the defendant, Maha Chand, and there is nothing in the circumstance that defendant's title is derived by purchase of the land from the Municipality, as has been urged, which can affect the plaintiff's right to relief. No doubt [560] by S. 38 of the Municipalities Act the property in all public highways is vested in the Committee, and by S. 27 the Committee can, with the sanction of the Local Government, sell any portion of land referred to in that section which is not required for the purposes of the Act, and shall keep roads in repair and may do all acts and things necessary for purposes of general utility—S. 32. But there is nothing in the Act which debars the Civil Courts from entertaining suits and giving relief in respect of any civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act; on the contrary, provision is made for such suits. Here the plaintiff has made out a case. He has shown that the drainage from his premises has been stopped, and that he has been isolated and shut off from access to the present highway. The Municipality could not have thus dealt with the highway to the special injury of the plaintiff. In closing a portion of it they would have been bound to provide adequately for his drainage and his access to the highway which they had substituted; indeed, it is not clear that they had any intention of doing otherwise, and the defendant can do no less.

The relief which plaintiff now seeks is very reasonable. He does not ask to set aside the sale of the land, but that a cart-road nine feet wide should be reserved communicating with the highway, and that the existing course of drainage be not interfered with.

We decree the appeal, and modifying the decrees of the lower Courts, decree the claim with all costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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JAN. 21.
APPEL-LATE CIVIL.
1 A. 560.

RADHIA (*Defendant*) *v.* BENI AND OTHERS (*Plaintiffs*).

[21st January 1878.]

1 A. 560.

C.P.C. (1859), S. 2—Res judicata.

Where, in a former suit between the same parties, the whole question of the plaintiff's title to the plaint property as against the defendant was laid open by the pleadings and decided against him, *held*, in a subsequent suit for the same relief brought by the plaintiff in a different capacity, but a capacity that had already accrued at the time of the former suit, and was also inconsistent with his capacity in the first suit,—that the suit was *res judicata*.

JUDGMENT.

[561] OLDFIELD, J.—It appears that one Jai Ram had four sons, Basawan, Mata Din, Jhau, and Ram Bakhsh. They are all deceased, Jhau having died in 1868 and Ram Bakhsh some sixteen years ago, leaving a widow Dallo, who died in 1871, and a daughter, the defendant in this suit. The plaintiffs represent Mata Din. On the death of Dallo they sued in 1874 this defendant, the daughter of Ram Bakhsh, for the property now in suit, alleging that they were the heirs of her deceased father, Ram Bakhsh, and of Dallo; that suit was dismissed. They now sue her

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1 A. 560.

for the same property, alleging that Jhau and Ram Bakhsh lived and held the property as joint property, and that Jhau succeeded to Ram Bakhsh, and they are his heirs. The defendant pleaded that the claim was barred with reference to the decision in the former suit, and that it was also barred by limitation, owing to the long adverse possession of Dallo and the defendant. Both Courts have decreed the claim; the lower appellate Court has held that there is no estoppel under the Evidence Act to bar the suit, and that Ram Bakhsh and Jhau held the property jointly, and this being so, it must be concluded that, at Ram Bakhsh's death, Jhau succeeded to his share, and the possession of Dallo in a part of the premises was not adverse to him.

[562] It appears to us that this judgment of the lower appellate Court is inconsistent with the findings on facts made in the suit which the plaintiffs brought in 1874 against the defendant, and that the lower appellate Court has failed to properly consider the plea which was raised as to the effect of the judgment on this claim, and we consider that the suit cannot be maintained with reference to the former case. The plaintiffs brought the former suit on the ground that they were heirs of Ram Bakhsh and Dallo; that the property formed the estate left by Ram Bakhsh and Dallo; and they further alleged that Ram Bakhsh had lived separate in estate from all his brothers. When they brought that suit Jhau had been dead some years, and their present claim, that he succeeded to the estate at Ram Bakhsh's death as his heir, and that he held it jointly with Ram Bakhsh, was never urged in the former suit, and is wholly inconsistent with their allegations in that suit. But it further appears to us that the question of the nature of the estate, whether held separately by Ram Bakhsh from all his brothers, and the nature of Dallo's and the defendant's title and possession were questions which properly fell to be decided in that suit, and were in our opinion decided in favour of the defendant, and that the effect of that decision is to bar the claim both under S. 2 of Act VIII of 1859 and the Limitation Act. It was distinctly pleaded by defendant in that suit that after Ram Bakhsh's death Dallo had possession of the house in suit, and that defendant was entitled to the house by inheritance and the finding was as follows: "It is therefore satisfactorily established that for a long period Ram Bakhsh, and after his decease his widow, Dallo Kuar, had separate and adverse possession of the property in dispute, and under such circumstances the daughter, *i.e.*, the appellant, has according to Hindu law, the right of inheritance to the estate in suit left by Ram Bakhsh and his widow as against respondents. We cannot reconcile the above with the present finding that Dallo's possession was not adverse to Jhau. Anyhow, the judgment in that case appears to us to be final in respect of defendant's title as against the plaintiffs, whether they claimed in that suit as heirs of Ram Bakhsh or of Jhau, for at that time any title they had as heirs of Jhau had already accrued, and as we have remarked the entire character of Dallo's and defendant's title and possession as against **[563]** them was opened out by the pleadings, and properly fell to be decided in that case, and cannot be raised again.

We decree the appeal with all costs and reverse the decrees of the lower Courts and dismiss the suit.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1878
JAN. 21.

APPEL-LATE CIVIL.

CHADAMI LAL (*Plaintiff*) *v.* MUHAMMAD BAKHSH AND ANOTHER (*Defendants*). [21st January 1878.]

1 A. 563.

Pre-emption based on contract—Custom.

1 A. 563.

1. A plaintiff, who fails in a suit for pre-emption based on the administration papers of the current settlement, cannot, in appeal, fall back on any condition of pre-emption entered in the previous administration paper, and claim the same relief on the basis of custom.

2. An entry of the right of pre-emption in a former administration-paper would not necessarily establish, though it may be evidence towards, such a custom.

[2—Exp., 2 A. 876 (**F.B.**), 16 A. 40 (48).**]**

JUDGMENT.

[563] OLDFIELD, J.—This suit has been brought to recover certain shares in mauza Saran Top and Mahal Bagh, pargana Kanauj, by right of pre-emption based on the village administration-papers of the current settlement. It was urged in defence by the purchaser **[564]** that the village administration-papers are not binding on his vendor, who was no party to them, and that, as a matter of fact, the plaintiff refused the offer of the estates when made to him. The lower Court has dismissed the claim finding in favour of the answering defendant. The objections now taken in appeal by the plaintiff appear to us to fail. The *wajib-ul-arz* of Mahal Bagh was not signed by the vendor or any one he represents, and though in that of the zamindari mahal there is an endorsement to the effect that Gajabhar Lal attested it, there is nothing to show that, if he did so, he had any authority to do so. He was the lessee of the owner, Musammat Banno, but this position did not give him authority to act for her at the settlement. In his evidence he states that he cannot remember about the attestation of the *wajib-ul-arz*, and he never had any power of attorney to act as her agent.

We concur with the lower Court in considering that it is not satisfactorily proved that the vendor or any one he represents was a party to the execution of the village administration-papers, or knowingly accepted their conditions. Whether or not any similar condition of pre-emption was entered in the previous administration-paper cannot affect this claim, which is brought on the contract under the recent settlement-paper, and not on any well-established custom apart from the contract made under the administration-paper, nor would the entry of the right of pre-emption in a former administration-paper necessarily establish, though it might be evidence towards proving, such a custom.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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JAN. 22.

FULL BENCH.

DWARKA DAS AND ANOTHER (*Defendants*) *v.* HUSAIN BAKHSH (*Plaintiff*). [22nd January 1878.]

1 A. 564.

Pre-emption founded on Muhammadan law not claimable when vendor is a Hindu.

When the vendor is a Hindu, no suit will lie to enforce a right of pre-emption based on Mahomedan law. (H. C. R., N. W. P., 1874, p. 28, *overruled*; 10 B. L. R. 117, *F.*).

[D., 5 A. 110 (115); **R.**, 7 A. 755 (**F.B.**) = 5 A.W.N. 228, 32 C. 982 (986) = 9 C.W.N. 826.**]**

In a suit to enforce a right of pre-emption in respect of a dwelling house, the suit being founded on Muhammadan law, the plaintiff claiming such right as a neighbour of the vendors-defendants in the suit, who were Hindus, the plaintiff and the purchaser, also a defendant in the suit, being Muhammadans, the defence raised the question whether a suit to enforce a right of pre-emption founded upon Muhammadan law was maintainable where the vendor was a Hindu. The Court of first instance did not determine this question, but dismissed the suit. On appeal, the lower appellate Court, reversing the judgment of the Court of first instance, held, with reference to the case of *Chundo* v. *Alim-ud-din* (1) that a suit to enforce the right of pre-emption founded on Muhammadan law was maintainable where the vendor was a Hindu, and gave the plaintiff a decree.

The defendants appealed to the High Court, again contending that under S. 24 of Act VI of 1871, the vendors being Hindus, the Muhammadan law of pre-emption was not applicable.

REFERENCE TO THE FULL BENCH.

SPANKIE and OLDFIELD, JJ. referred to the Full Bench the question whether the Muhammadan law of pre-emption applied, with the following remarks:—

The question was decided in the affirmative by a majority of three out of four Judges comprising a Full Bench of this Court in *Chundo* v. *Alim-ud-din* (1). One of the Judges composing the Court however dissented, and the Chief Justice subscribed to the view taken, with hesitation. We have considerable doubts as to the correctness of the ruling, which is opposed to one by the High Court of Calcutta in *Poorno Singh* v. *Hurrychurn Surmah* (2), and thinking it desirable that the question be reconsidered, we refer it to the Full Bench of the Court.

JUDGMENT OF THE FULL BENCH.

[566] STUART, C. J.—I am reminded by the order of reference that in the case of *Chundo* v. *Alim-ud-din* (1) I gave my judgment with hesitation. I did so, no doubt, but chiefly, if not solely, in consequence of the deference I felt for the opinion of my colleague, Mr. Justice Spankie, in the case of *Shumshoolnissa* v. *Zohra Beebee* (3), who had most carefully and anxiously considered the question now referred in the long judgment he therein delivered. I cannot, however, say for myself that I had

(1) H.C.R., N.W.P., 1874, p. 28. (2) 10 B.L.R., 117.
(3) H.C.R., N.W.P., 1874, p. 2.

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FULL BENCH.
1 A. 564.

any doubt, that is, any argumentative doubt, on the question then before us, and I remain of the opinion I then expressed and subsequently in the Full Bench in the above case of *Chundo* v. *Alim-ud-din* (1), and this is my answer to the reference.

PEARSON, J.—For the reasons given in my judgment of the 1st December, 1873, in Full Bench, in the case of *Chundo* v. *Alim-ud-din* (1), I adhere to the opinion therein expressed.

TURNER, J.—I have never been able to accept the grounds on which it was contended that on the sale of the property by a Hindu a right of pre-emption arises. Our Courts are not strictly bound to enforce the law of pre-emption unless founded on custom or contract, though they have gone so far as to give effect to that law where the vendor is a Muhammadan. The circumstance that on a sale a right of pre-emption accrues greatly affects the value of the property, and it has always appeared to me most inequitable to allow such a claim to be asserted on the sale of the property by a Hindu, if it be not based on local custom or special agreement.

SPANKIE, J.—The point has been so exhaustively argued in the decision of this suit and in the Full Bench case cited in the order of reference that it is quite unnecessary to go over the ground again. I would say that, as the purchaser bought the property from a Hindu, there is no right of re-purchase from him under the Muhammadan law of pre-emption on the ground that the vendee and pre-emptor are both Muhammadans.

OLDFIELD, J.—The Muhammadan law recognises the right of pre-emption on the ground of avoiding the inconvenience to a neighbour which might arise by the sale of adjoining property to a stranger. The right can be claimed by all description of persons without reference to difference of religion. We find in the Hedaya **[567]** that "the privilege of Shaffa is established after sale, and the right of the Shaffee is not established until after demand be regularly made, &c." These and similar passages imply only that a complete title to claim the right of pre-emption accrues only on completion of sale, when the former owner's interest in the property has ceased, but the right itself would seem to spring out of a rule of Muhammadan law enacted in the interest of neighbours, and which would seem to be binding only on all those owners being vendors of property who are subject to Muhammadan law and who necessarily hold their property subject to this rule of law, which will affect them and the property wherever a sale takes place to bring the rule of law into operation.

I concur in the view taken in *Poorno Singh* v. *Hurry Churn Surmah* (2). I would reply that the Muhammadan law of pre-emption does not apply to the case referred.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

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APPELLATE CIVIL.
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MARATIB ALI (*Plaintiff*) *v.* ABDUL HAKIM AND OTHERS (*Defendants*). [23rd January 1878.]

1 A. 567.

Pre-emption based on agreement—Custom set up in special appeal.

1. Where a suit to enforce a right of pre-emption, on the basis of an entry in the administration-paper as a matter of agreement and not of custom, has been tried and investigated, parties cannot be allowed on special appeal to set up a custom.

(1) H.C.R., N.W.P., 1874, p. 28.
(2) 10 B. L. R., 117.

2. A claim based on the administration-paper does not exclude a claim under Muhammadan law.

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A suit to enforce a right of pre-emption in respect of a share in a certain village, the suit being founded on an agreement contained in the village administration-paper and on the Muhammadan law of pre-emption, was dismissed by the first Court on the ground that the administration paper was not signed by the vendor and the agreement was consequently not binding on him, and on the further ground that the plaintiff had not fulfilled the conditions of the Muhammadan law of pre-emption. On appeal, the lower appellate Court also held that the claim on the agreement was unmaintainable, as the vendor had not signed the administration-paper, and that the claim on the agreement excluded the claim based on Muhammadan law.

On appeal to the High Court, the plaintiff contended that the claim on the administration-paper did not exclude that based on the Muhammadan law; and that the mere fact that the vendor had not signed the administration-paper did not affect the claim thereon, the administration paper being only a record that the custom of pre-emption prevailed.

ORDER OF REMAND.

[568] The second plea is overruled because it was admitted that the existence of the right of pre-emption was entered in the record as a matter of agreement and not of custom. and on these averments the suit has been tried and the issues fully investigated; but the validity of the first plea must be admitted. The claim based on the *wajib-ul-arz* did not exclude a claim under Muhammadan law. The lower appellate Court must determine whether the appellant had, under the Muhammadan law, the right of pre-emption, and secondly, if he had the right, whether he duly performed the conditions which, under the Muhammadan law, are essential to the validity of the right, namely, the immediate expression of his intention to purchase and immediate demand.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

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JAISHANKAR AND ANOTHER (*Decree-holders*) *v.* TETLEY (*Judgment-debtor*). [23rd January 1878.]

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Limitation Act (1871), Sch. II, Arts. 166 and 167—Execution of decrees obtained on bond specially registered—Act XX of 1866, Ss. 52 and 53.

Applications for execution of decrees obtained on bonds specially registered under Act XX of 1866 are governed by Art. 167, and not 166, of Sch. II, Limitation Act.

[Diss., 5 B. 673 (676).]

On an application for the execution of a decree which had been obtained under the provisions of S. 53 of Act XX of 1866 upon a bond specially registered under the provisions of S. 52 of that Act, the Court of first instance held that the application was barred by limitation under Art. 166 and also under Art. 167, Sch. II, Act IX of 1871. The decree-holders appealed to the High Court.

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REFERENCE TO THE FULL BENCH.

The Court (STUART, C. J., and TURNER, J.) referred to the Full Bench the question whether the application was governed by Art. 166 or Art. 167, Sch. II of Act IX of 1871.

JUDGMENT OF THE FULL BENCH.

[587] STUART, C. J.—I agree with the other members of the Court that the appeal in this case must be allowed. Art. 167, Sch. II of Act IX of 1871 clearly applies and governs the case, and the application therefore is not barred.

PEARSON, J.—In my opinion the appeal lies. The law of limitation applicable to the case appears to be Art. 167. Sch. II of Act IX of 1871. Art. 166 is not applicable, for execution is not sought of a decision but of a decree. The application is clearly within three years of preceding applications to enforce or keep in force the decree, and is therefore not barred.

TURNER, J.—It is admitted at the bar that the application is not barred by limitation, if the application is governed by Art. 167, Sch. II of Act IX of 1871. There were clearly applications sufficient **[588]** to keep the decree alive made within three years before the present application was presented. That the application is governed by the provisions of that article I have held in Miscellaneous Special Appeal No. 10 of 1877 (1). The order of the Court below must be reversed, and the proceedings returned to that Court that the application may be disposed of on the merits. The costs of this appeal should abide and follow the result.

SPANKIE, J.—I concur in the view expressed by Mr. Justice Turner.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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1 A. 568.

MAKUNDI LAL (*Plaintiff*) *v.* KAUNSILA (*Defendant*).

[24th January 1878].

1 A. 568.

Sale in execution of decree—Right of auction-purchaser to recover purchase-money on sale being set aside—Fraud on the part of decree-holder—Fraud on the part of auction-purchaser—Minor—Claim for costs of suit.

In execution of a personal decree for money, a decree-holder fraudulently brought to sale the property of a minor. The minor brought a suit to set aside the sale and recovered possession of the property from the auction-purchaser. The latter sued the decree-holder for recovery of the purchase-money with interest, and the costs incurred by him in defending the suit brought by the minor. It was found that the auction-purchaser was neither a party to, nor aware of, the fraud on the part of the decree-holder; but it was also found that he was aware that he was purchasing the property of a minor, and that he did not ascertain whether the sale was warranted by the terms of the decree.

Held by a majority of the Full Bench, that this knowledge and this omission on his part did not disentitle him to recover the purchase-money from the decree-holder. (H. C. R., N. W. P., 1874—168, *Distd.*).

Held, also, that he could not recover the costs incurred in defending the suit brought by the minor, as he ought not to have defended it, at any rate without obtaining a guarantee from the decree-holder for the costs to be incurred.

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(1) *Wilayat-un-nissa* v. *Najib-un-nissa*, 1 A. 583.

Per Stuart, C. J. That under the circumstances, the auction-purchaser was guilty of fraud, at the least, of negligence in purchasing with notice that the property belonged to a minor, and in failing to ascertain whether the terms of the decree warranted its sale, and that therefore he could not recover.

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[D., 2 A. 780.]

FULL BENCH.

This was an appeal to the Full Court under S. 10 of the Letters Patent.

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JUDGMENT OF THE DIVISION BENCH.

[570] STUART, C. J.—I am of opinion that the judgment of the Judge is wrong and must be reversed, and that the decree of the Munsif should be restored. The facts are these: On the 20th September, 1867, plaintiff purchased at auction two pies four gandas share in mauza Ballipur Tatta, pargana Chail, in execution of a decree of Hira Singh, father of Beni Prasad, the present defendant, against Tikaitin. This decree had been obtained in a suit on a bond which had been executed by Tikaitin, and in which she hypothecated the property of Ganga Din, who was at the time a minor. She herself had no means or property of her own, and in fact lived on offerings received by her in charity, and the money borrowed, Rs. 100, was to meet her own personal wants, and not on account of any necessity relating to the interest or benefit of her minor son. Ganga Din had been made a defendant in the suit by Hira Singh, but the fact of his minority had been brought before or had come to the knowledge of the Court, for the decree given was against Tikaitin herself exclusively. The attempt, therefore, to execute the decree against the property of the minor could not but fail; and in a suit instituted by the minor, after he became of age, against the auction-purchaser, he obtained a decree, dated the 29th November, 1873, for possession of his property, and which of course had the effect of invalidating and setting aside the auction-sale itself.

Under these circumstances, the auction-purchaser now brings the present suit to recover back from the defendant, Beni Prasad, the son and heir of Hira Singh, the original decree-holder, and Tikaitin, the amount of the sale-price and the costs which he had to pay in the litigation with Ganga Din, together with interest on **[571]** both. Tikaitin makes no defence, and the other defendant, Beni Prasad, simply denies that there is any cause of action against him, and that he is not liable to the claim. The Munsif was of opinion that the doctrine of *caveat emptor* applied, and in support of this view of the law referred to the ruling of this Court in the case of *Kelly* v. *Gobind Das* (1); he therefore dismissed the claim with costs and interest. On appeal to the Judge the decision of the Munsif was reversed, he relying on another earlier ruling of this Court in the case of *Neelkunth Sahee* v. *Asmun Matho* (2).

In special appeal it is now contended that the plaintiff had purchased with notice of Ganga Din's minority, and that on the authority of the above ruling in *Kelly* v. *Gobind Das* (1) the doctrine of *caveat emptor* clearly applies. The bad faith of the decree-holder in attempting to sell the minor's rights under a decree which applied only to his mother I do not for one moment defend. In such a case as this, however, the decree-holder's conduct, however bad, is immaterial, unless the auction-purchaser is considered to have shown the opposite qualities, and to have acted honestly and in good faith, *i.e.*, that he became the purchaser of the minor's property in the honest belief that it could legally be sold in execution of the decree. The only ground for holding that he entertained such

(1) H.C.R., N.W.P., 1874, p. 168. (2) H.C.R., N.W.P., 1878, p. 67.

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an honest belief was what is stated to have been an official announcement or proceeding read at the time of the sale that the minor's rights would be included. It is stated to have been reported to the Civil Court that the name of Ganga Din's mother was not upon the revenue record, but only his (the minor's), and that, thereupon the Court made an order to put up the rights of both mother and son to sale. How the Court could have done this, in the face of its own decree, it is difficult, if not impossible, to understand, but of itself it appears to afford no sufficient excuse for the plaintiff's deliberately going on with his purchase; and it cuts both ways, for if it is good for the auction-purchaser it was equally good for the decree-holder, and the latter had as much right and reason to rely upon it as the former; and assuming that they both thus acted in good faith, *i.e.*, in honest reliance on the Court's announcement or order, what is the necessary consequence? Namely, that **[572]** the decree-holder has at once a good answer and can safely say *caveat emptor* to the plaintiff. After the first hearing of the case we ordered that Makundi Lal, the auction-purchaser, should attend and give his evidence before us as to his knowledge of the facts relating to the sale. He appeared and stated that he was a mahajan and had been such for upwards of twenty years; that he was in the habit of going to the Collector's Court, and it happened that he was there on the day of this sale, and bid. He did not at first know that it was the property of the minor that was to be sold, but a proceeding was read out to the effect that the rights and interest of Tikaitin and Ganga Din, the minor, were to be sold in execution of a decree held by Hira Singh. He then knew that it was the property of the minor that was to be sold, and he understood that the money was to be applied on account of expenses incurred in the maintenance of the minor. He does not say anything about the decree, or that he had seen it, or that he knew its terms, but he makes the singular statement that he believed the decree-holder was present at the sale, that is, in the same place with himself, *but he had no conversation with him, he was not acquainted with him.* Notwithstanding, he adds that, from what he had been told about the sale-proceeding and the proceeding from the Collector, he was satisfied that the property of the minor could be sold, and he offered Rs. 230. He added that it is not his habit to make inquiries except as regards the value of the property to be sold, and "I take into consideration whether the auction involves any dispute or does not, when the judgment-debtor is a minor. In such a case I do not bid at all. In the present case I thought from what took place that there would be no dispute, and I bid." This is surely a very extraordinary and far from satisfactory explanation by a mahajan of twenty years' experience. There appears to me to be bad faith on the face of his deposition, and that the real meaning and significance of the portion of it I have just quoted was that he determined to take the risk of the minor's subsequently disputing the sale. My belief is that both parties, the decree-holder and auction-purchaser, were in bad faith, and that in trying to overreach each other they have simply contributed to the well-known contention which results in honest men coming by their own. The plaintiff-auction-purchaser tells us distinctly that he made the purchase **[573]** with the full knowledge that the property belonged to the minor, and that the fact that it was the minor's property was publicly and distinctly announced at the sale. Yet, although the decree-holder was present, he makes the ridiculous excuse that he had no conversation with him, and that he was not acquainted with him, nor did he take any pains to ascertain the terms of the decree. And this from an acute and

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cautious mahajan of twenty years' experience! The very words of the decree are these,—"Having duly considered the arguments of both the parties, it is ordered that a decree be given in the plaintiff's favour for the amount claimed, with costs and interest, against the female defendant. She is to pay the amount of the decree in a year. Pleaders to get their fees." All this the auction-purchaser was bound to know, and if he was content with the sort of general inquiries he appears to have made, he must take the consequences. He had every opportunity and the means for ascertaining the real state of the case, and I cannot listen to him for one moment when he states that, although the decree-holder was present with him at the sale, nothing passed between them. Under all the circumstances, and having regard to his own evidence, the auction-purchaser must be taken to have had not only full notice of the minority of the person whose property he was seeking to purchase, but as having lent himself to a proceeding not only illegal and invalid in itself but grossly in fraud of the minor's rights. It was argued before us that the doctrine of *caveat emptor* does not apply to a public sale; but for this opinion there does not appear to be any authority, although in a case like the present it is unnecessary to consider the question. Such a view of the law probably arises out of a misapprehension of the rules of the common law of England as to sales in market *overt*, but which can have no possible application to the sale in execution of a decree in India of the rights and interests of a minor. And in such a case as this where, under cover of a sale of such rights and interests, the minor's property was attached and taken, it would be subversive of all justice if an auction-purchaser was not made to feel the risk he ran, and that, to say the least, he was fully, if not within the principle at least, liable to the penal consequences of the rule of law in question. The peril he undertook was in truth greater than that of a venturous buyer shutting his eyes to **[574]** his possible danger, for he clearly knew of Ganga Din's minority and all the circumstances when he appeared at the sale, and he therefore not only acted in bad faith, but involved himself in a risk as purchaser which was different from that against, only because it was much greater than that against, which the doctrine of *caveat emptor* is directed. I should add that I cannot accept the ruling of this Court in the case of *Neelkunth Sahee* v. *Asmun Matho* (1); but I fully adhere to my own ruling in the case of *Kelly* v. *Gobind Das* (2), in which the judgment was very carefully considered by Mr. Justice Spankie and myself. There was another case referred to by the respondent, that of *Doolhin Har Nath* v. *Baijoo Oojha* (3), where the auction-purchaser succeeded in recovering his money. The case, however, is not well reported. There was a speciality in respect to the property sold being *jagir*, and, therefore, not subject to sale; and it was stated, although it does not appear from the report to have been proved, that the auction-purchaser was aware of the property being *jagir*. If he was aware of the objection, he acted in bad faith, and I must dissent from the ruling. On the other hand, if he was not aware of the nature of the property and of its exemption from sale in execution, then he was simply deceived and misled by the decree-holder, and the judgment of this Court was clearly right. But in neither view of the case would the rule of *caveat emptor* have applied. That doctrine relates to defects, latent defects, which the seller, at the inception of the contract, does not or is not bound to know or to inquire into, the purchaser taking

(1) H.C.R., N.W.P., 1871, p. 67. (2) H.C.R., N.W.P., 1874, p. 168.
(3) H.C.R., N.W.P., 1867, p. 50.

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the risk of the *status quo*. The doctrine, in truth, if it does not contemplate absolute good faith on both sides, at least puts the burden of inquiry and investigation on the seller, but it has not the same application where there is anything in the nature of bad faith or fraud. The precise terms of the decree cannot be got over, and no announcement by the Court which issued it or by any officer could avail to the contrary; and if the plaintiff might contend that, at any rate, he was misled, it was a misleading which could give him no cause of action against the present defendant, for it was a misleading which he could only share with him, seeing that the defendant was as much entitled to rely on the Court's order (to put up the minor's rights to sale) as **[575]** the plaintiff. Yet such an order was the plaintiff's only ground for the claim he makes in this suit against the defendant. On the other hand, any difficulty he experienced, and he must, under the circumstances, have felt some, should have put him on his inquiry as to the ownership of, and title to, the property. But he chose to go on, and what he might have easily ascertained, if he did not already know, has come to pass to his loss. In short, the sum and substance of the case is this: the decree-holder attempted to sell the property, and the auction-purchaser took the risk on the chance of the sale not being successfully disputed by the minor and lost his money on the venture. I would decree the appeal, reverse the judgment of the Judge, restore the decree of the Munsif, and dismiss the suit with costs in all the Courts.

OLDFIELD, J.—Hira Singh, father of Beni Prasad, defendant, sued on the 17th January 1866, Tikaitin, the mother and guardian of Ganga Din, for the recovery of a sum of money lent on a bond executed in his favour by Tikaitin and her son Ganga Din, and obtained a decree against Tikaitin, dated the 27th January 1866: the decree was a mere money-decree and a personal decree against her and not in her representative capacity. In execution of this decree, however, the decree-holder caused the rights and interests of both the lady and of Ganga Din, then a minor, to be sold. It appears that it was reported to the Civil Court that the lady's name was not borne upon the revenue records, but only the minor's name was on the records, and the Court made an order to put up the rights and interests of both persons to sale, and the said rights and interests, representing a two-pie four-ganda share in Ballipur, were sold and purchased by the plaintiff on the 20th September 1867. Subsequently Ganga Din, on attaining his majority, brought a suit against the decree-holder and the plaintiff, the auction-purchaser, and Tikaitin, to invalidate and cancel the bond and the decree of the 27th January 1866, obtained on it, and to establish his right in the property sold. The decree-holder did not defend the suit, and Tikaitin pleaded that the loan under the bond was a personal loan to herself, and the Court made a decree, on the 29th November 1873, in favour of Ganga Din, and held that the money had not been lent for the use or to meet the necessities of the minor so as to render him or his property liable under Hindu law.

[576] The plaintiff, the auction-purchaser, now sues to recover from the defendant, the son and heir of the original decree-holder, and from Tikaitin, the amount of sale price and costs with interest incurred in the suit brought by Gunga Din against him. The Judge has reversed the decision of the Munsif, who held that plaintiff had no cause of action against defendant, and has remanded the case for trial on the merits. The defendant (heir of the decree-holder) now appeals against this judgment. The facts disclosed appear to me to show an amount of bad faith on the part of the decree-holder such as should entitle the plaintiff to

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recover from him. The decree he obtained was a mere money-decree against Tikaitin personally, notwithstanding which fact he obtained through the Court in execution of his decree the sale of the rights and interests of the minor whom the decree did not affect. The decree-holder was best acquainted with the nature of the decree he had obtained and cannot be exonerated from the imputation of having deliberately permitted rights and interests of a person not touched by the decree to be sold and bought by the plaintiff. Indeed, he by his pleader appears to have pressed on the Court to order the sale of the minor's interests on the ground that the money had been lent for the maintenance of the minor, a fact disallowed in the suit brought by the minor, where it was held that the money was not lent for the minor's benefit. The decree-holder's bad faith is not confined to the sale-proceedings but attaches to his conduct throughout. The bond which hypothecated the minor's property, and on which the decree-holder obtained his decree, has been held to have represented a loan to Tikaitin for her own use and not for the benefit of the minor, and notwithstanding that Ganga Din was a minor when the bond was executed, yet the decree-holder did not scruple to take a bond in which he the said minor is represented as one of the contracting parties contracting in his own person. I can, on the other hand, discover no grounds for attributing bad faith to the auction-purchaser. No doubt he knew he was purchasing a minor's rights and interests, but this knowledge does not necessarily imply connivance in any fraud on the minor, nor have the lower Courts found fraud on his part, nor is it implied that he knowingly bought what he knew was a risky purchase. He seems to have honestly believed that the minor's rights and interests were **[577]** properly saleable under the decree, and when, in course of execution-proceedings taken by the decree-holder under the decree, the Court ordered the sale of the minor's interests, he was justified in believing that those interests were properly saleable under the decree. He might, perhaps, have been somewhat more careful in looking into the decree, but at most was guilty of some carelessness, and not of the bad faith or sharp practice to which the conduct of the decree-holder appears to me to amount, and I therefore consider his position to be a better one than that of the decree-holder. The cases referred to by the Judge appear to me much in point, while the facts in the case of *Kelly* v. *Gobind Das* (1) appear somewhat different. In that case Kelly, the auction-purchaser, bought at auction-sale property which he had already privately purchased and then conveyed to his wife, and he must have known the insecure nature of his auction-purchase, which was afterwards set aside at his wife's suit, and he may well have been held to have bought accepting the risk, and so not entitled to recover back his purchase-money from the decree-holder. I would affirm the decree of the lower appellate Court and remand the suit to the Court of first instance, that the amount due to the plaintiff might be ascertained, and a decree to that amount should be given against the heir of the decree-holder as his representative, and I would dismiss this appeal with costs.

The plaintiff appealed to the Full Court against the judgment of Stuart, C.J., under Cl. 10 of the Letters Patent.

JUDGMENT OF THE FULL BENCH.

[578] STUART, C. J.—I adhere to my first judgment, having heard nothing from the bar when the case came before the Full Bench, or from

(1) H.C.R., N.W.P., 1874, p. 168.

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the other members of the Court, to induce me to change my opinion in any respect.

PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ. concurring.—The purchaser has appealed to the Full Court, and it is contended on his behalf that there is no evidence of any fraud on his part nor of any such laches as disentitle him to recover, and that as a *bona fide* purchaser he is entitled to the return of his purchase-money now that the sale of the minor's share has in effect been set aside. Firstly, then, as to the question of fraud, it is to be noticed that no allegation was made in the written statement filed by the decree-holder imputing fraud to the purchaser. It was indeed stated that he was acquainted with the circumstances set out in the proceeding ordering the sale; that he knew he was purchasing the property of a minor brought to sale for the satisfaction of a debt stated to have been contracted on the minor's behalf; but it was not alleged that he was aware the debt had not been so contracted, nor that he was aware the order for sale was not warranted by the terms of the decree. The Munsif having dismissed the suit without trial, the only evidence as to the present appellant's knowledge of the circumstances of the sale is that which is to be derived from the examination of the present appellant in the High Court. That evidence is insufficient to justify the inference that he was in any way a party to or had cognizance of the fraud of the decree-holder.

It is, however, argued that the purchaser ought not to recover his purchase-money because he was aware he was purchasing the property of a minor, and therefore incurring risk, and that in the next place he did not take the pains to see that the order was warranted by the decree. To hold that the purchaser, if the sale of a minor's property is set aside, is not entitled to recover back the consideration from a third party who has brought about the sale and obtained the consideration, would very greatly depreciate the **[579]** selling value of the property of minors, and no authority has been cited to support the contention. It is not apparent why in purchasing the property of minors the purchaser should be deprived of an equity which cannot injure the minor, and to which a purchaser would be entitled if the property purchased had belonged to a person of full age.

If the doctrine of *caveat emptor* applies where the sale has been practically set aside, then it may be proper to hold that the omission to see that the order of sale was warranted by the decree amounted to such a want of reasonable care as to deprive the purchaser of his right to relief. But should not the question of what amounts to reasonable care be considered in reference to the circumstances of the place? In England purchases of real estates are rarely made without the intervention of a solicitor and a scrutiny of title. In these provinces such precautions are almost entirely unknown. However this may be, it would be going too far to hold that the mere omission to see that the order for sale was warranted by the decree ought to deprive the purchaser of relief under the circumstances at present known to the Court, if on other grounds he is entitled to it. Assuming then that the purchaser was innocent of fraud and purchased in the *bona fide* belief that the minor's property was properly saleable, there seems no reason why he should not recover back his purchase-money from the decree-holder through whose misfeasance the order for sale was obtained. This case is clearly distinguishable from *Kelly's* case (1) which have been cited at the hearing. Here the sale has

(1) H.C.R., N.W.P., 1874, p. 168.

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been virtually set aside so far as regards the rights and interests of the minor, the owner of the share. In *Kelly's* case the sale was not set aside. Kelly, knowing that his wife had already purchased the judgment-debtor's interests in the property offered for sale, purchased what was offered for sale, that is to say, whatever right, title, or interest remained to the judgment-debtor in the property. On similar grounds it has been held in other cases that a purchaser at auction in execution of decree is not entitled to recover back his purchase-money or compensation, although it may be subsequently discovered that the judgment-debtor has a less interest in the property offered for sale than was suggested by the **[580]** advertisement or even no interest at all. But in these cases also the sale has not been set aside.

But while the present appellant is entitled to recover from the decree-holder his purchase-money and reasonable interest, it cannot be held that he can recover the costs of a suit which he should not have defended. On receiving information of the minor's claim he might have investigated it, and by surrendering the property have escaped the costs of suit. Had he wished to protect himself from those costs he might have informed the decree-holder that he declined to defend the suit unless he obtained a guarantee for the costs. In the absence of such a guarantee he cannot recover anything on this account as against the decree-holder. The decree of the Division Bench, so far as it dismisses the claim to the purchase-money and interest, is reversed, and the order of the Judge affirmed with proportionate costs.

Tikaitin did not appear in the Court of first instance nor in the Judge's Court, nor did she appeal the Judge's order to the Court, but in carrying out the order the Munsif should see that some cause of action is established against this defendant; at present no cause of action is disclosed.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

1878
JAN. 29.
FULL BENCH.
1 A. 580.

FAKIR MUHAMMAD *(Decree-holder)* v. GHULAM HUSAIN AND ANOTHER *(Judgment-debtors)*. [29th January 1878.]

1 A. 580.

"Date of applying"—Meaning of expression in Limitation Act (1871), Sch. II, Art. 167.

1. By the F.B. "The date of applying to the Court" means the particular date on which the application is actually presented, and not the last day or any other day on which the application was pending.

2. (By the Divn. Bench). An application by the decree-holder for the stay of execution proceedings is not an application to enforce or keep in force a decree. (13 M.I.A. 479, *R.*).

[1—F., 30 C. 761 (770); **R.**, 22 B. 722 (726), 1 C.W.N. 260 (263), 8 C.W.N. 251 (255); 10 C.L.J. 479; **2—F.**, 3 A. 757.**]**

REFERENCE TO THE FULL BENCH.

The Court (STUART, C. J., and TURNER, J.), referred to the Full Bench, the question as to the construction to be placed on the term "the date of applying" used in Art. 167, Sch. ii of Act IX of 1871.

1878

JAN. 29.

FULL BENCH.

1 A. 580.

ORDER OF REFERENCE.

This case turns on the construction to be placed on the term "the date of applying to the Court." Does that term mean the date on which an application is made, or can it be interpreted to mean any or the last day on which the application previously made was pending before the Court? The former construction may in many cases work great hardship, and is opposed to the construction placed by the Judicial Committee of the Privy Council on the language of the former Act (1). But grave as the injustice may be, we are constrained to give effect to the law if its terms are free from ambiguity. The point, however, is of such importance that we consider it should be determined by the Full Bench, and refer it accordingly.

JUDGMENT OF THE FULL BENCH.

[582] STUART, C. J.—It appears to me that the judgment of the Privy Council (1) referred to has no application to the present case. That was a judgment under a totally different limitation law from that which we have now to consider. S. 20 of Act XIV of 1859 provided that "no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution." But the provisions of Act IX of 1871 are much more precise, for under No. 167 of the second schedule the time when the period of limitation begins to run is "the *date of applying* to the Court to enforce or keep in force the decree or order." I can quite understand that this may operate harshly in many cases, but the meaning is too plain, and it is that "the date of the applying to the Court" is the particular day on which the application is actually presented, and not the last or any other day on which the application was pending.

PEARSON, J.—The date of applying must in my opinion be held to be the date of making application. But an application to enforce or keep in force may not be exclusively an application of the nature described in S. 212 of Act VIII of 1859.

TURNER, J.—However inconvenient may be the construction, I feel bound by the plain terms of the Act to hold that the date of applying means not any day on which an application may be pending but a certain day, the day of its presentation; but the Court may not feel constrained to hold that by the term applying we are to understand only an application to execute the decree. Any application made to a Court during the pendency of proceedings in execution to enforce or keep in force the decree might be held to give a date from which limitation might be calculated, and I am confirmed in this view by the more explicit language of the Act recently passed.

[583] SPANKIE, J.—I concur.

JUDGMENT OF THE DIVISION BENCH.

The case having been returned to the Division Court, the Court delivered the following judgment:—

The period of three years must be computed from the date on which the last application to enforce the decree was filed. It cannot be said

(1) *Mahtab Chund* v. *Bulram Singh*, 13 M.I.A. 479.

that the application of the 28th August 1872, (1) was an application to enforce the decree. It was on the contrary an application for the suspension of the proceedings. Under the circumstances the Court below was right in holding the present application barred by limitation. The appeal is dismissed with costs.

1878
JAN. 29.
FULL BENCH.
1 A. 580.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1878
FEB. 4.
APPELLATE CIVIL.
1 A. 588.

ALI SHAH (*Plaintiff*) *v.* HUSAIN BAKHSH AND ANOTHER (*Defendants*).

[4th February 1878.]

1 A. 588.

Sale in execution of decree—Auction-purchaser—'Lis pendens'—'Res judicata'—C.P.C. (1859), S. 2.

Quære. Does the doctrine of *lis pendens* apply to a purchase in execution of decree? (*Vide* 7 M.H.C.R. 104.)

Where an auction-purchaser in Court-sale purchased certain property with notice of a suit for such property pending in a Munsiff's Court which, however, had no jurisdiction (the value of the property being over Rs. 1,000), *held* that he was not bound to intervene or to contest it by appeal, and that his omission to do these things did not preclude him from suing the successful party in the previous suit for possession of the property purchased by him at the auction-sale.

[F., 10 B. 400 (405); **R.**, 28 B. 378 (381).**]**

Ali Shah, the plaintiff in the present suit and the auction-purchaser of certain immoveable property at a sale in execution of a decree obtained by Behari Lal against Raj Bibi (the widow of Khoda Bakhsh—the brother of Ghulam Husain—to whom his rights and interests in the property in question was conveyed in lieu of dower), purchased with notice that a suit by Husain Bakhsh and Muhammad Ali, the sons of a daughter of Ghulam Husain, against the judgment-debtors (the legal representatives of Raj Bibi) and the decree-holder (Behari Lal) for a share in such property was pending, but did not intervene in such suit. After Ali Shah's purchase but before the sale was confirmed, Husain Bakhsh and Muhammad Ali obtained a decree against Behari Lal and the legal representatives of Raj Bibi for a moiety of their claim, which decree was eventually affirmed by the High Court. Ali Shah took no steps to get such decree set aside. He now sued to establish his right to such moiety in virtue of his auction-purchase. Both the Courts below held that the doctrine of *lis pendens* was applicable to the suit, and the plaintiff was bound by the judgment in the suit brought by Husain Bakhsh and Muhammad Ali and dismissed the suit. The plaintiff preferred a special appeal to the High Court.

JUDGMENT.

[590] PEARSON, J.—It seems to us very doubtful whether the doctrine of *lis pendens* applies in this case. The decree passed by the Munsif in the suit brought by the heirs of Gulam Husain against the heirs of Raj Bibi and her decree-holder, Behary Lal, was passed before the

(1) In this application, the decree-holder represented to the Court executing the decree that partial execution thereof had been obtained, and that the parties would probably come to some arrangement respecting the other relief granted by the decree and to enable this arrangement to be made, he prayed that the proceedings in execution might be stayed for fifteen days.

1878
FEB. 4.
APPELLATE CIVIL.
1 A. 588.

present plaintiff had acquired a title to the rights and interests of Raj Bibi aforesaid as auction-purchaser by the confirmation of the auction-sale Moreover, that doctrine appears to be applicable to cases in which the alienation is of a voluntary nature, and not to an alienee who has bought a property sold in execution of a decree. Doubtless also there is irresistible weight and force in the last ground of appeal. The rights and interests purchased by the plaintiff at auction-sale, which may be assumed to represent an eight-biswas share, fetched a price of Rs. 15,000. The one and a half biswa claimed in the present suit is valued at Rs. 2,784-6-0. It cannot then be doubted that the value of the three biswas claimed in the suit of Gulam Husain's heirs exceeded Rs. 1,000, and that the suit was not cognizable by the Munsif. It would be unreasonable to hold that the present plaintiff was bound to intervene in that suit, and to dispute the claim preferred in a Court which had not jurisdiction to dispose of the matter. We must add that he cannot be bound by a decree which is patently invalid, and for that reason could not bind even the parties to the suit in which it was passed. The question which was tried and determined in that suit is not a *res judicata*, because the Court which determined it was not a Court of competent jurisdiction, and is therefore open to be adjudicated in the present suit. The decree passed in that suit being invalid for want of jurisdiction and nullity, we cannot say that the present plaintiff, as successor in title to Raj Bibi, was bound to take steps to get it set aside by means of appeal, or that, because he omitted to [591] do so, it has become binding upon him, and that he is precluded from bringing this suit. Accordingly we set aside the decrees passed by the lower Courts in this suit, and remand it to the Court of first instance under Ss. 562 and 587 of Act X of 1877 for disposal on the merits, with a direction that the costs of the parties in all the Courts shall follow the result.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

1878
FEB. 6.
APPELLATE CIVIL.
1 A. 591.

DURGA PRASAD AND ANOTHER (*Plaintiffs*) *v.* NAWAZISH ALI AND ANOTHER (*Defendants.*) [6th February 1878.]

1 A. 591.

Suit for pre-emption—Amendment of plaint as to price at last stage—Court may refuse.

In a suit for pre-emption, in which the plaintiff claimed the right on payment of a sum less than that mentioned in the sale-deed, on the ground that that was the actual price, and did not, in his plaint, say that he was ready and willing to pay whatever price the Court might find to be the actual price, *held* that the Court was not bound, as a matter of law, to allow him to supply this defect by amending the plaint at the very last stage, when the suit was about to be disposed of, and to bring in the very much larger price which he should have offered to pay when he brought the suit.

[D., 3 A. 753 (755).]

In a suit instituted to enforce their right of pre-emption in respect of a share in a certain village, the plaintiffs alleged that the actual price of the property, was not the price entered in the sale-deed but a smaller amount, and claimed the property on payment of such smaller amount, without mentioning in the plaint that they were ready and willing to pay any price which the Court might find to be the actual price. But on the date on which the Court of first instance finally disposed of the suit,

they presented an application stating that they were ready to pay whatever sum the Court might adjudge to be the actual price. The Court, refusing to entertain that application and finding that the actual price of the property was the amount entered in the deed of sale, dismissed the suit. On the lower appellate Court affirming that decision, the plaintiffs preferred a special appeal to the High Court.

1878
FEB. 6.
APPELLATE CIVIL.
1 A. 591.

JUDGMENT.

[592] TURNER, J.—We cannot hold as a matter of law that the Court of first instance was bound to allow the plaintiff to amend his plaint, and to bring in the very much larger sum which he should have offered to pay when he brought his suit. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

1878
FEB. 11.
APPELLATE CIVIL.
1 A. 592.

BIJAI RAM (*Defendant*) *v.* KALLU (*Plaintiff*).

[11th February 1878.]

1 A. 592.

Suit for pre-emption—Limitation—Act IX of 1871, Sch. II, Art. 10.

The period of limitation for a suit for pre-emption begins, not necessarily from the time when the defendant-vendor takes physical and tangible possession of the property, but from the date when the subject of sale is completely conveyed to, and vested in, the purchaser, and he has acquired such possession as, before the sale, was enjoyed by the seller.

Where, therefore, the holder of a deed of conditional sale executed in 1861, foreclosed the conditional sale, and obtained a decree for possession of the property in 1874, obtained mutation of names in respect of such property in 1875, in which year he also got the property released from an attachment, made in 1865 in execution of a decree, by making arrangements for its satisfaction, and finally, in December 1875, acknowledged having received possession of the property in execution of his decree for possession; *held*, in a suit for pre-emption against him, brought in November 1876, that the suit was barred, as it was brought more than one year from the date when he obtained such possession of the status of the owner as enabled him to procure mutation of names and exercise the rights of an owner. (1 A. 311, *F.*)

On the 10th September, 1871, the defendant-appellant purchased conditionally certain immoveable property. This was attached in execution of a decree on the 29th March, 1865. On the 4th July, 1874, the conditional sale having been foreclosed, the defendant obtained a decree for possession of the property. In February 1875, he obtained mutation of names in respect of such property. Arrangements having been made by him in November 1875 to satisfy the decree in execution of which the property had been attached, the attachment was removed. On the 17th December, 1875, he acknowledged that he had received possession of property in execution of his decree of the 4th July, 1874. The plaintiff on 16th November, 1876, sued to enforce his right of pre-emption in respect of such property. The first Court referring to 1 A. 311, held that the suit was within time, as the property did not vest in the defendant till the 17th December, 1875, and gave the plaintiff a decree. The lower appellate Court affirmed the same. The defendant preferred a second appeal to the High Court.

1878
FEB. 11.
APPELLATE CIVIL.
1 A. 592.

JUDGMENT.

[594] TURNER, J.—The principle laid down in the Full Bench judgment of the Court (1) governs this case. The appellant was not bound to discharge the debts in respect of which the property was attached immediately he had obtained his decree confirming the sale. He took such possession as he then could obtain. The appellant having established his title, carried his decree to the revenue office, and got his name entered in substitution for that of the former owner, and having obtained such possession as the nature of the property admitted, he then set himself to discharge the incumbrances for which it was under attachment. Limitation in such a case runs from the date when he obtained possession of the status of the owner sufficient to enable him to procure mutation and to exercise the rights of an owner. The appeal is decreed, the decrees of the Courts below reversed, and the suit dismissed with costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

1878
FEB. 13.
FULL BENCH.
1 A. 583 = 2 Ind. Jur. 792.

WILAYAT-UN-NISSA (*Decree-holder*) *v.* NAJIB-UN-NISSA (*Judgment-debtor*). [13th February 1878.]

1 A. 583 = 2 Ind. Jur. 792.

Bond specially registered—Execution of decree obtained thereon—Appeal against order in execution.

Orders, passed in the execution of decrees, obtained under S. 53 of Act XX of 1866 on bonds specially registered under S. 52 of the Act, are appealable. 1 A. 377, *overruled*. (7 W.R. 130 and 18 W.R. 512, *Dis.*).

Per Stuart, C.J., contra.

[F., 1 A. 586 (588), 5 B. 673 (676) (F.B.).]

REFERENCE TO THE FULL BENCH.

The Court (TURNER and OLDFIELD, JJ.) referred to the Full Bench the question whether an appeal would lie from an order made in the execution of a decree obtained under the provisions of S. 53 of Act XX of 1866 upon a bond specially registered under the provisions of S. 52 of that Act.

JUDGMENT OF THE FULL BENCH.

[584] STUART, C. J.—The question submitted to the Court in this reference was raised almost under identical circumstances in a case before and decided by Mr. Justice Oldfield and myself—*Ramanand* v. *The Bank of Bengal* (2)—and to our ruling in that case I advisedly and deliberately adhere. Indeed, the reasoning that arrives at a different conclusion is, to my mind, after an experience of thirty years in the practice of the law, absolutely unintelligible.

The provision in S. 53 of Act XX of 1866 enacts that "such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure," and this lets in the Code *so far as the enforcement of decrees* made under this portion of Act XX of 1866 is concerned, but it does not follow, and it is not the law, that

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(1) 1 A. 311.

(2) 1 A. 377.

this S. 53 lets in and enforces the *whole* provisions of the Code of Civil Procedure, Act VIII of 1859, relating to the execution of decrees. To hold otherwise would be, in effect, to render nugatory S. 55 of Act XX of 1866 which provides that "there shall be *no appeal* against any decree or order made *under Ss. 53, 54, or this section.*" *To that extent* therefore this section forbids the application of the Code of Civil Procedure, that is, so far as *appeals* are concerned, and only imports the Code **[585]** "for the *enforcement* of decrees." The ruling of the Calcutta High Court therefore in 7 W.R. 130 and 18 W.R. 512 is clearly right.

It is suggested that the prohibition against appeals in S. 55 is intended only to apply to *orders* passed under that and the two previous sections, and not to decrees in course of execution under the Civil Procedure Code. But no such distinction is admissible in this case. The Civil Procedure Code, so far as it relates to the enforcement of decrees, is, by the sections in question, 53, 54, and the first part of S. 55, made part of Act XX of 1866, only limited by the proviso of the first part of S. 55, which takes away all appeals. In all other respects the Code of Procedure for the enforcement of decrees applies, and this is the meaning of Act XX of 1866 in regard to all decrees and *orders whatsoever* passed "in any proceeding under this part of the Act," as S. 54 provides. The proceeding which is the subject of the reference before us is an order passed on an application for the execution of a decree under S. 53 of the Act, and the order of the Subordinate Judge was that the decree was barred by lapse of time, and this is clearly an order within the meaning of S. 55, which take away all right of appeal whatever.

PEARSON, J.—I am of opinion that the orders in execution of the decree given under S. 53 of Act XX of 1866 are not passed under that section, but under the Civil Procedure Code, which that section makes applicable to them, and are appealable under the Code.

TURNER, J.—With every respect for the opinions of those learned Judges who have entertained a different view, I am of opinion that the words "there shall be no appeal against any decree or order made under Ss. 53, 54, or this section," are to be construed as confined to decrees or orders passed under the express provisions of the sections of the Act, and that they do not prohibit appeals from orders passed when the decree is in course of execution under the provisions of the Procedure Code. It was evidently intended that in certain cases of special registration a bond-holder should be enabled to go to the Court and obtain an *ex parte* and final decree without having recourse to a suit. To carry out this intention the Legislature provided that the decree so passed should not be open to appeal. But to guard against hardship and injustice the law gave the Court which passed the decree powers to set aside its decree or stay execution, and declared those powers also should not be open to appeal.

[586] Where a person has executed a bond consenting at the time of registration that it should be registered in such a manner that the bond-holder may at once obtain a decree, it is intelligible that the law should declare the decree final unless the alleged executant of the bond could show cause why the decree should be stayed. But the reasons which induced the Legislature to declare such decrees and orders final do not extend to orders passed under the provisions of the Civil Procedure Code for the execution of such decrees. Construing the terms of S. 55 strictly, they do not deprive the parties to the decree of such rights of appeal as the Code of Civil Procedure declares to attach to orders in execution passed under the provisions of that Code.

1878
FEB. 13.
FULL BENCH.
A. 583 = 2 Ind. Jur. 792.

It is a more difficult question whether the execution of the decrees obtained under the Registration Act, 1866, is governed by Cl. 166 or Cl. 167, Sch. ii of the Limitation Act, 1871. They are not mere decisions of a Civil Court, but on the other hand they are not decrees or orders passed in a regular suit. They are decrees passed without the formalities prescribed for regular suits. They resemble decrees passed on awards filed under the provisions of the Procedure Code. It has, I believe, never been doubted that the execution of decrees passed on awards is governed by Cl. 167 and not Cl. 166, and I consider that Cl. 167 is equally applicable to decrees obtained under the special provisions of the Registration Act of 1866.

SPANKIE, J.—I concur in the views expressed by Mr. Justice Turner on the point expressly referred.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

1878
FEB. 13.
APPELLATE CIVIL.
1 A. 594 = 2 Ind. Jur. 722.

RUKA BAI (*Plaintiff*) *v.* GANDA BAI (*Defendant*).

[13th February 1878.]

Hindu Law—Decree for maintenance—Suit for reduction of rate.

A suit will lie for reduction of the maintenance decreed in favour of a person on the ground of diminution of income.

[Ap., 22 M. 175 (177), 24 B. 386 (392); R., 26 B. 707 (709).]

The defendant in this suit, a Hindu lady, obtained a decree awarding her maintenance at a certain rate and charging the assets of a certain firm with the payment of such maintenance. There was no provision in the decree that such rate was subject to any modification which future circumstances might render necessary. The assets of such firm diminished. The proprietor of the same brought a suit for the reduction of such rate of maintenance. The first Court gave a decree in favour of the plaintiff. The lower appellate Court dismissed the suit as unmaintainable for want of cause of action. The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[596] PEARSON, J.—The appeal must prevail. The diminution of the income of the estate on which the defendant's income is chargeable, since her allowance was fixed, is obviously a sufficient cause for the present action of which the object is the reduction of the allowance formerly fixed. It would be unreasonable to hold that, even if the income of the estate should come to an end altogether, that allowance should still continue; and therefore it must be liable to be reduced in proportion to the existing income. We set aside the lower appellate Court's decree and remand the case to it for fresh disposal on the merits, with a direction that the costs of this appeal shall follow the result.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Spankie.

1878

FEB. 15.

GULZARI LAL AND OTHERS (*Defendants*) *v.* THE COLLECTOR OF BAREILLY (*Plaintiff*). [15th February 1878.]

APPELLATE CIVIL.

1 A. 596 = 2 Ind. Jur. 722.

Sale-proceeds realized in execution against pauper plaintiff—Preferential right of Collector to amount of Court-fee.

In an application for execution by the defendant against an unsuccessful pauper plaintiff, his property was attached, and subsequently, on the application of the Collector, the Court executing the decree ordered that the property should be sold in satisfaction of the Collector's claim for Court-fees and of the demand of the defendant for costs, and that the Collector should be first paid out of the sale-proceeds. The sale-proceeds being insufficient to meet both these demands, the Court passed another order, under which the Collector and the defendant were to be paid out of the sale-proceeds rateably. *Held*, in a suit by the Collector to contest the order and to recover from the defendant, in the pauper suit, the amount paid to him out of the sale-proceeds, that he was entitled to recover, as the Crown was entitled to be paid first, out of the proceeds of such sale, the amount of the Court-fee the plaintiff in the pauper suit would have had to pay if he had not been allowed to sue asa pauper. (1 B. 7, *F.*)

1 A. 596 = 2 Ind. Jur. 722.

[R., 33 C. 1040 (1046) = 10 C.W.N. 857.]

N was allowed to bring a suit as a pauper against G and others. His suit being dismissed by the first Court with costs, he appealed and his appeal was dismissed with costs. G and others applied to recover the costs incurred by them in defending the suit, and certain houses belonging to N were accordingly attached. Subsequent to this, on the application of the Collector, the Court executing the decree ordered that the property should be sold in satisfaction of the amount which N would have had to pay as Court-fees had he not been allowed to sue and appeal as a pauper as well as in satisfaction of the demand of G and others, stating at the same time that the Collector should have the preference. The sale-proceeds were paid to the Collector and G and others rateably. In a suit by the Collector to contest this order, the first Court dismissed it. The plaintiff preferred an appeal to the lower appellate Court which held that the principle laid down in 1 B. 7 applied and gave the plaintiff a decree. The defendants appealed to the High Court.

JUDGMENT.

[598] PEARSON, J.—The principle of the ruling of the Bombay Court (1), on which the lower appellate Court has relied, appears to us to be reasonable and we decline to interfere.

(1) 1 B. 7.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

1878
FEB. 15.
APPELLATE CIVIL.

ABASI (*Plaintiff*) *v.* DUNNE (*Defendant*). [15th February 1878.]

1 A. 593.

Mahomedan Law—Guardianship of minor—Prostitution a disqualification to custody.

Though a sister is, under Mahomedan law, *prima facie* entitled to the custody and guardianship of her minor sister, yet the circumstance that she leads a life of prostitution may disentitle her to claim the same.

1 A. 598. [R., 26 A. 594.]

JUDGMENT.

[599] PEARSON, J.—The claim in this suit was simply for the recovery of the minor, Chittan, from the custody of the Government; and the fact that the plaintiff is a prostitute, and therefore an unfit person to have the charge of the girl, seems to be a sufficient reason for dismissing the claim in the interest of the minor. It may be admitted that the plaintiff would, under the Muhammadan law, be *prima facie* entitled to the guardianship of her younger sister were her fitness for the charge established; but her own bad character and manner of life must be held to disqualify her; and we must affirm the decree of the lower Courts dismissing her suit. It is stated in the plaint that the tenets of Christianity are being imparted to the minor at the Orphanage at which she has been placed by the Magistrate, and that "in bringing her claim, the plaintiff prays that the Court, after satisfying itself that the plaintiff would not bring up the minor in her own trade of prostitution, and that she would marry her according to Muhammadan law, may order the minor to be given to her." But it is difficult to see how the minor, if made over to her, could be secured from the evil effects of her example, influence, and association. The appeal is dismissed with costs.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

1878
FEB. 15.
CRIMINAL JURISDICTION.
1 A. 599 = 2 Ind. Jur. 723.

EMPRESS OF INDIA *v.* MULUA. [15th February 1878.]

1 A. 599 = 2 Ind. Jur. 723.

Act XVII of 1862, Ss. 1, 2, 4—General Clauses Act (I of 1868)—Penal Code—Offence committed prior to 1st January, 1862.

A person could not be convicted of an offence committed prior to the 1st January, 1862, under Act XVII of 1862, because that Act was a repealing Act and not an Act providing for the punishment of such offences. But it is another question whether persons who have committed offences prior to 1st January, 1862, are not amenable to punishment under the Regulations. To the several repealing Acts, passed since the General Clauses Act came into operation, the provisions of S. 6 of the General Clauses Act apply, and the repeal of a Regulation subsequently to the passing of the Act does not relieve offenders from the penalties to which they were liable under the Regulations.

It is a more difficult question whether the right of reference given by S. 3 of Reg. IV of 1797 remains after the repeal of Act XVII of 1862, if that right had not accrued before the Act was repealed, and the conviction had not taken place till after the repeal of the Act.

1878

FEB. 15.

CRIMINAL JURISDICTION.

1 A. 599 = 2 Ind. Jur. 723.

JUDGMENT.

[600] TURNER, J.—The prisoner was charged with the offence of murder committed in the year 1855. On that charge he was tried by the Judge of Fatehgarh and convicted and sentenced, under the Regulation in force before the 1st January, 1862, to transportation for life. The Judge has submitted the sentence for confirmation, and at the same time has called the attention of the Court to a Full Bench ruling of the High Court of Calcutta (1), in which it has apparently been held that a person who has committed an offence prior to the 1st January, 1862, could not now be legally convicted and sentenced. We say apparently it was so held, because such was the opinion expressed by the learned Judges before whom the case was originally heard, and although the judgment of the Full Bench proceeds on grounds which do not necessarily involve that conclusion, the conviction was pronounced illegal and set aside.

Up to the 1st January, 1862, the law under which persons were liable to trial and punishment for the offence of which the prisoner has been convicted was declared in the Regulations. On the 1st January, 1862, the Indian Penal Code came into operation, for although in the Code itself the date on which it should **[601]** take effect was declared to be the 1st May, 1861, that date was altered by the subsequent Act VI of 1861. By Act XVII of 1862, Ss. 1 and 2, the Regulations and Acts prescribing punishments for offences were repealed from the 1st January, 1862, "*except as to any offence committed before the 1st January*, 1862." In respect of those parts of India in which the Code of Criminal Procedure came into operation on the 1st January, 1862, the Acts and Regulations theretofore regulating procedure in the trial of offences were by S. 4 of the same Act, XVII of 1862, repealed: and it was declared that thereafter the Criminal Courts should be guided by the Code of Criminal Procedure and exercise the powers and jurisdiction vested in them under the said Code, provided that no person convicted of an offence committed before the 1st January, 1862, should be liable to any other punishment in respect of such offence than that to which he would have been liable had he been convicted of such offence before the said first day of January, 1862, and that no person who should claim the same should be deprived of any right of appeal or reference to a Sudder Court which he would have enjoyed under any of the Regulations or Acts thereby repealed.

The effect then of Act XVII of 1862 was this; it left the Regulations and Acts under which offences were theretofore punishable unrepealed in respect of an offence committed before the 1st January, 1862; and while it declared that the Criminal Courts should in the investigation and trial of offences be thereafter guided by the provisions of the Code of Criminal Procedure, and enjoy the powers and jurisdiction conferred on them by that Act, it saved offenders guilty of offences committed before the 1st January, 1862, from liability to any other punishment in respect of such offences than that to which they would have been amenable under the repealed Regulations and Acts, and secured to them the same rights of reference and appeal to a Sudder Court which they would have enjoyed if they have been tried under the Regulations and Acts thereby repealed.

By the General Clauses Act, I of 1868, S. 3, it is provided that in all Acts made by the Governor-General in Council for the purpose of reviving either wholly or partially a Statute, Act, or **[602]** Regulation repealed, it shall be necessary expressly to state such purpose, and by S. 6 of the same Act it is enacted that the repeal of any Statute, Act, or Regulation shall not

(1) *Empress* v. *Diljour Misser*, 2 C. 225.

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1 A. 599 = 2 Ind. Jur. 723.

affect any thing done, or any offence committed, or any fine or penalty incurred before the repealing Act shall have come into operation. By the repealing Act VIII of 1868 the 1st, 2nd, and 7th sections of Act XVII of 1862 were repealed, and by Act X of 1872 the sections of the Act then unrepealed were also repealed. There being no express words to that effect, the repeal of Act XVII of 1862 of course did not revive the Regulations in so far as they had been repealed by the Act, but neither did it operate to repeal those Regulations in so far as they were not repealed by the Act. Thus in respect of offences committed prior to the 1st January, 1862, the penalties prescribed by the regulations were not affected by the repeal of Act XVII of 1862, nor, so far as we can discover, were any of the Regulations prescribing punishments for offences, which were in force before the passing of Act XVII of 1862, repealed in respect of offences committed before the 1st January, 1862, prior to the passing of the General Clauses Act, I of 1868.

We agree with the High Court of Calcutta that a person could not be convicted of an offence committed prior to the 1st January, 1862, under Act XVII of 1862, and for this reason, that that Act was a repealing Act and not an Act providing for the punishment of such offences. But it is another question whether persons who have committed offences prior to the 1st January, 1862 are not amenable to punishment under the Regulations. To the several repealing Acts passed since the General Clauses Act came into operation, the provisions of S. 6 of the General Clauses Act apply, and the repeal of a Regulation subsequently to the passing of the Act does not relieve offenders from the penalties to which they were liable under the Regulations.

It is a more difficult question whether the right of reference remains after the repeal of Act XVII of 1862. That right had not accrued before the Act was repealed, for it accrued on conviction, and the conviction did not take place till after the repeal of Act XVII of 1862; but to avoid any illegality by the omission of confirmation if it be still required, we have considered the case on the **[603]** merits and hold the conviction justified by the evidence and the sentence not improper. We therefore confirm it.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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APPELLATE CIVIL.

1 A. 603 = 2 Ind. Jur. 725.

BALDEO PANDAY *(Plaintiff)* v. GOKAL RAI *(Defendant)*.

[19th February 1878.]

1 A. 603 = 2 Ind. Jur. 725.

1. *Bond—Post diem interest.*

When, in a bond for repayment of money within a fixed time, with interest at a certain rate, there was a clause that in case of default, the holder of the bond was at liberty to recover the principal and interest. *held* there was an express contract for the payment of interest after the due date at the same rate.

Semble, where there is no such express agreement as to the rate of interest to be paid after the due date, an agreement to pay at the rate stipulated for payment during the term of the bond cannot be implied. In such a case, interest should be awarded on the footing of damages, and when the interest stipulated in the bond is not excessive, it would be a fair measure of such damages.

2. *Rate of interest in India.*

In India, the ordinary rate of interest is 12 per cent. per annum, and Re. 1-8-0 or Re. 1-12-0 per mensem cannot be considered excessive. (2 C. 41=25 W.R. 189, *not F.*).

[1—Ap., 2 A. 639 (640); **F.**, 3 A.W.N. 35, 7 A. 333=5 A.W.N. 27; **R.**, 2 A. 617, 11 A. 416 (419)=9 A.W.N. 165.]

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APPELLATE CIVIL.

Suit instituted on 11th May 1877, for money charged on immoveable property by a bond dated 8th January 1872.

JUDGMENT.

1 A. 603 = 2 Ind. Jur. 725.

[603] STUART, C. J.—In this case I think the appeal must be allowed. I am not sure that I quite follow the Subordinate Judge in the rea-**[604]**sons he assigns for his judgment, but his order is clearly right and ought to be restored. The Judge, on the other hand, is as clearly wrong in allowing interest at the rate of six per cent. per annum "from the date when the bond fell due," evidently thinking that that was at the end of two years. He is also of opinion that the rate of interest stipulated in the bond, *viz.*, twenty-one per cent., is excessive. I differ from him on both points. The bond is in the following terms: "I, Gopal Rai, son of Bhandhan Rai, do declare that, whereas Rs. 434 is due by me to Baldeo Panday on account of previous dealings, and whereas I have borrowed from the said Baldeo Panday a further sum of Rs. 566 for the payment of revenue and to meet other household expenses, the whole sum amounting to Rs. 1,000, I therefore execute this bond in respect of the sum borrowed at present and that formerly due by me, and agree and covenant that, having paid the entire aforesaid sum within two years with interest at Re. 1-12-0 per cent. per mensem, I shall take back the bond from the said mahajan; that in case of default the creditor shall be at liberty to recover the whole amount including principal and interest, by instituting a suit, or in any way he pleases, from my person and property, both moveable and immoveable; that until payment of the whole debt including principal and interest, I hypothecate my four-anna share in mauza Kharkapur, which I have neither directly or indirectly transferred, nor shall I do so; that I shall get whatever payments I make endorsed on the bond, and that I shall not plead any payment without getting the same endorsed, and that if I do so or set up any receipt or discharge the same shall be invalid. Hence this bond." Now what was the contract here made? The contract I mean as to interest, for that was the whole question in the case before us. Clearly to my mind the contract so recorded was of this nature; "you the debtor shall not be troubled about the debt for two years, at the end of which time, if payment is made by you with interest at Re. 1-12-0 per cent. per mensem, there shall be an end to the transaction, and the bond will be returned to you; but if it be otherwise and you then make default, the creditor shall be at liberty," *not*, observe, "shall then be *bound*," "to recover the whole debt including principal and interest, and until payment of such principal and interest the property mentioned in the bond is hypothecated, all the other conditions of **[605]** the bond meanwhile remaining in force." Such I take to be the true meaning of the contract in the present case, the rate of interest remaining the same in all the events contemplated. The only peculiarity that might suggest any doubt on this point might be supposed to arise from the fact that, although default appears to have been made at the end of the two years, the plaintiff, Baldeo Panday, did not institute his suit till the 11th May, 1877, upwards of three years after default. Now if the interest was excessive, this delay might possibly be justly attributed to the plaintiff's laches and fairly

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considered to have the effect of modifying his claim. But I do not think that in the present case such a consideration should prevent us from reading and construing the bond as a contract to be applied according to its terms, and according to these, as I view them, the creditor was not bound to proceed to recover immediately upon default, but might do so at any time within the limitation period, which, in such a case as the present, I should say would be twelve years from the time when the money became due.

1 A. 603 = 2 Ind. Jur. 725.

Nor do I think the rate of interest stipulated for excessive. A Calcutta case was referred to (1) where Kemp, J., in delivering the judgment of the Court. appears to have considered that 18 per cent. per annum or Re. 1-8-0 per month was an excessive rate, but he appears to have formed that opinion from his reading of the judgment of Lord Selborne in the case of *Cook* v. *Fowler* (2) decided by the House of Lords, where the principle laid down is that "the rate of interest to which the parties have agreed during the term of their contract may well be adopted." The rate of interest, however, claimed in that case was £5 per cent. per month, or £60 per annum, and that was justly disallowed, the ordinary rate of interest in England not being more than 5 per cent. But when it is remembered that in India the ordinary rate of interest is one per cent. per month or 12 per cent. per annum, a rate of Re. 1-8-0, or even Re. 1-12-0, ought not in my opinion to be considered excessive, but may fairly and legally be stipulated for by contract. The corresponding rate in England would be not £60 per cent. but [606] seven and a half or seven and three-quarter per cent. per annum, and would not, I am satisfied. were the facts the same as in the present case, be considered excessive by any English Court. For these reasons the plaintiff is entitled to our judgment reversing the decree of the Judge and restoring that of the Subordinate Judge, with costs in all the Courts.

SPANKIE, J.—The lower appellate Court holds that there is no provision in the bond as to the rate of interest to be charged after the date of payment has passed, and therefore interest must be allowed on the principle, not of implied contract, but of damages for breach of contract. Applying the case of *Deen Doyal Lall* v. *Het Narain Singh* (1) to the record before him, the Judge holds that the interest here demanded after the date of payment is excessive, and allows six per cent. only from the date when the bond fell due. It is contended that the terms of the contract have been misunderstood by the Judge, and that the appellant was, under the provisions of Act XXVIII of 1855, entitled to the interest agreed upon between the parties.

In my opinion the interest referred to in the bond as payable to the plaintiff alike during the term of the contract and until date of payment is Re. 1-12-0 per mensem. The bond recites that the obligor shall pay the amount of it with interest at Re. 1-12-0 per mensem within two years. This is the first condition. The second condition is that in case of default the obligee will be at liberty to recover the amount of debt including the principal and interest, by instituting a suit, or in any other way he pleases, both from the person of the obligor and from his moveable and immoveable property. The third condition is that, until payment of the entire amount including the principal and interest, the obligor hypothecates his four anna share in a particular village, and engages not to transfer it directly or indirectly.

(1) *Deen Doyal Lall* v. *Het Narain Singh*, 2 C. 41=25 W.R. 189.

(2) L.R. 7 H. L., 27.

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1 A. 603 = 2 Ind. Jur. 725.

Now it appears to me that, with respect to the interest "*post diem*," there is here clearly a contract to pay the interest agreed between the parties when the principal was lent. Not only was it to **[607]** be paid during the continuance of the contract, but by the conditions of the bond the particular four-anna share mentioned therein was charged as security for the payment of the debt, both principal and interest. The principal and the interest are the sum for which the bond was executed, and the interest is the 21 per cent. agreed upon. I regard this case as being one free from doubt, and hold that there is no question here of an implied contract to pay the same rate of interest "*post diem*" that was agreed upon "*ante diem*." If I could not construe the contract in this light, I should admit that the Judge was right in applying the precedent cited, that, in the absence of any defined rate of interest to be paid after the period of the bond had expired, the suggestion of an implied contract to pay at the same rate that the obligor was to pay during the term of the bond could not be allowed. The question then would be what would be a reasonable rate of interest to be allowed. In coming to a conclusion on this point, I should be unable to accept the Judge's finding that 6 per cent. was sufficient. The ordinary rule would appear to be that the creditor is entitled to the interest payable during the term of the bond, this amount being regarded as a fair measure of the rate to be allowed as a penalty for breach of contract, provided of course that the original interest claimed is not excessive. In this particular case the bond was executed on account of a former debt, and of a fresh advance of Rs. 566 to pay Government revenue, and it must not be forgotten that the defendant was allowed time. He had only paid Rs. 210 on account of the bond, and it is probable that it was at his own request that the plaintiff allowed the debt to stand over. He himself (defendant) states that he wanted to pay the debt due to plaintiff by borrowing the money from another banker, that he had asked the plaintiff to charge interest at Re. 1-12-0 per mensem up to the date of the term of the bond, and after that date to charge 1 per cent., *i.e.*, 12 per cent. per annum, but the plaintiff did not agree to this nor would he take his money. It is to be observed that defendant's story is not reliable, and is inconsistent with the fact that plaintiff took payment of Rs. 210 on the 20th January, 1874. If defendant was in a condition to borrow the money elsewhere why did he not do so? He assigns no reason why the rate demanded is excessive, and his own defence suggests that he was **[608]** quite aware that the interest to the date of payment was 21 per cent. and he desired to alter the terms after the date expired. The Subordinate Judge allowed 21 per cent. to date of institution of the suit and 6 per cent. afterwards. This was an equitable judgment, and I would affirm it on that ground did I not also hold that, under the terms of the contract, the plaintiff was entitled to charge 21 per cent. after the date of payment of the bond had expired. I would decree the appeal, and modify the judgment of the lower appellate Court so as to restore the decree of the Subordinate Judge with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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BAIJNATH (*Defendant*) *v.* MAHABIR AND ANOTHER (*Plaintiffs*).

[19th February 1878.]

APPEL-LATE CIVIL.

1 A. 608.

Hindu Law—Inheritance—Rights of daughters and daughter's sons.

A daughter's son is not entitled, by Hindu law, to succeed as heir to his maternal grand-father's estate, so long as any daughter not disqualified, or in whom a right of inheritance has once vested, survives. (2 I.A. 113=15 B.L.R. 10=28 W.R. 214, *F.*)

1 A. 608. [D., 8 A. 365=6 A.W.N. 129.]

Ram Jiawan died leaving two daughters Batasi Kuar and Phulra Kuar and the latter died shortly after her father, leaving two sons. While Batasi Kuar was alive, her sons and the sons of Phulra Kuar sued, as the heirs of Ram Jiawan, to set aside a mortgage of his real estate made by Batasi Kuar as the guardian of her minor sons, and the father of Phulra Kuar's sons as their father and guardian. Both the Courts below dismissed the suit in so far as the sons of Batasi Kuar were concerned. on the ground that they had no right in the estate of their maternal grand-father while their mother was alive, but gave the sons of Phulra Kuar a decree in respect of a moiety of the property. The defendant preferred a second appeal to the High Court contending that the whole suit ought to be dismissed, as under the Hindu Law, the sons of Phulra Kuar had no right in their maternal grand-father's estate while their mother's sister Batasi Kuar was alive.

JUDGMENT.

[609] The decision of the lower appellate Court appears to be open to the objection taken by the special appellant. It has been held by the Judicial Committee of the Privy Council in the case of *Amirtolal Bose* v. *Rajoneekant Mitter* (1) that a daughter's son is not entitled by Hindu law to succeed as heir to his maternal grandfather's estate, so long as any daughter not disqualified, or in whom a right of inheritance has once vested, survives. This precedent applies to the present case in which Batasi Kuar, on the death of her sister, became the sole owner of their father's property. Batasi Kuar still survives; therefore neither the Munsif nor the Subordinate Judge should have decreed the claim of the plaintiffs with respect to the share of Phulra Kuar, the second daughter. The Court below should have dismissed the claim of the plaintiffs *in toto*, and should not have decreed it with respect to Phulra Kuar's share. We accordingly decree the appeal and modify the decision of the Court below so as to dismiss this portion of the claim.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

APPEL-LATE CIVIL.

MUL CHAND (*Defendant*) *v.* BALGOBIND (*Plaintiff*). [22nd Feb. 1878.]

1 A. 610.

1 A. 610. A case similar to 1 A. 126 in all respects, for particulars of which see p. 98, *supra*.

(1) 2 I.A. 113=15 B.L.R. 10=23 W.R. 214.

CRIMINAL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice.

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CRIMINAL JURISDICTION.

1 A. 630.

EMPRESS OF INDIA *v.* SEYMOUR. [25th February 1878.]

1 A. 630.

Excise Act, X of 1871, Ch. VI, Ss. 57, 52—Illicit sale of liquor.

Where the lapsing of a first license for the sale of spirituous and fermented liquors, was not noticed by the authorities, and was only brought to their knowledge by the accused going to the Collector's office ten days after, and they simply renewed the license, and accepted the whole fee, for the new period, *held*, that the accused was not guilty, as he had given no notice of his intention not to renew the license, nor had the Collector recalled it.

[R., 1 A. 638 (639); D., 1 A. 635.]

JUDGMENT.

[631] STUART, C. J.—This is an application for revision of the conviction, under S. 62 of the Excise Act X of 1871, of Charles Seymour, an assistant employed in Newton's Hotel at Allahabad, and of the sentence passed on him to pay a fine of Rs. 100, or one month's imprisonment in the Civil Jail, although Mrs. Newton is the real party concerned.

I must, in the first place, remark that, even if the conviction could be supported, the prosecution of the defendant was in my opinion an extremely harsh and uncalled for proceeding, and I regret to say that the Assistant Magistrate appears to have acted with reprehensible precipitancy, and without considerate and thoughtful attention to the facts of the case, and the provisions of the Excise law, as embodied in Act X of 1871, and I have further to remark here that the sentence passed was out of all proportion to the very venial character of the offence, if offence there was, a nominal fine of say one rupee being quite sufficient.

But in my judgment the legality of the conviction is, to say the least, so doubtful that it ought not to be allowed to stand. On the 30th October, 1877, the Collector of Allahabad granted a license to Walter Newton, Mrs. Newton's husband (at present I understand in England), for the sale of spirituous and fermented liquors in the hotel, and this license bears that it was to have effect from the 30th October to the 31st December, 1877. The expiry of the license on the latter date does not appear to have been noticed by the authorities themselves, and Mrs. Newton went on conducting the hotel, including of course the selling of spirituous and fermented liquors, unmindful of the license until the 11th January, when it suddenly occurred to her to obtain a renewal of it. For that purpose she applied at the Collector's office and obtained a renewal of the license up to the 31st March, 1878. Nothing was said to her at the time about her having incurred any of the penalties of the Act, and this perhaps is not to be wondered at, for the neglect to renew the first license, when it expired on the 31st December, was not ascertained by the **[632]** authorities by means of any enquiries or watchfulness on the part of themselves or their officers, but was simply brought to the knowledge of the Collector by Mrs. Newton herself, and the license was handed back to her with this simple endorsement: "This license is extended up to the 31st March, 1878." It is further to be noticed that one of the conditions of the license was that a monthly fee of Rs. 8-5-4 should be paid to Government in advance for every month of the term for which the license was granted, and that all claim in respect of this condition had been fully

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1 A. 630.

satisfied, and, indeed, more than satisfied by Mrs. Newton, the whole aggregate fee amounting to Rs. 25 for the three months from the 30th October to the 31st December, 1877, having been paid up in advance, and a similar aggregate fee of Rs. 25 for the term from the 1st January till the 31st March, 1878, having been paid and accepted by the Government on the 11th January, when the renewal of the license was, without any objection or demur, granted. Now such being the state of the case, I really think that the Assistant Magistrate might have paused and considered whether it was necessary to prosecute Mrs. Newton for the slight illegality she had ostensibly been guilty of in selling spirituous and fermented liquors in her hotel for about ten days without formally renewing her license; and, if he had so paused and considered, he might perhaps have seen that the renewal endorsement on the license without any objection stated, and the payment and acceptance in advance of the whole fee due under the license, were strong circumstances of condonement on the part of the Government of any little neglect Mrs. Newton may have been guilty of. and that they showed the possession by Mrs. Newton of a license with all the conditions fulfilled, and more than fulfilled, entitling her to sell spirits and liquors from the 30th October, 1877 to the 31st March, 1878, uninterruptedly. Most reasonably therefore might she have believed that she had, although somewhat irregularly yet sufficiently, discharged her duty in the matter, and that she might go on conducting her hotel in peace. But it will scarcely be believed that three days afterwards her assistant, Seymour, was brought up before Mr. Thomson, the Assistant Magistrate, tried and convicted under S. 62 of Act X of 1871, and punished with a fine of Rs. 100 or one month's imprisonment in the Civil Jail, a sentence the **[633]** severity of which would seem to imply that, in the opinion of the Assistant Magistrate, Mrs. Newton had been guilty of a wilful attempt to defraud the revenue, a view of her conduct, however, which is simply ridiculous, for she and her assistant, Seymour, had merely and unintentionally overlooked for a few days the necessity of renewing the license at the proper time, under the venial and excusable circumstances I have explained. And so far from defrauding the revenue, the Government had not only lost nothing at the *hands* of Mrs. Newton, but had in fact accepted from her more than they were entitled to under their own conditions.

Such being the true state of the case, is this conviction sustainable? I think not. S. 62 of the Excise Act X of 1871 provides, among other things, that "every person other than a licensed vendor who sells any spirituous or fermented liquors shall for every such offence be punished with fine not exceeding Rs. 500." Now would it be reasonable to hold, on the facts and on a sound reading of the law, that Mrs. Newton was not a licensed vendor, that is, a vendor altogether unlicensed? At least, after the explanation I have given of the conduct of the authorities, it does not lie in their mouth to contend that between the 1st and 11th January Mrs. Newton was acting without any authority or license from them, and that she had no reason to believe that in their opinion she had violated the law and laid herself open to its penalties. But a careful examination of the Act will show that in no view of the case could Mrs. Newton be regarded as other than a licensed vendor for the whole period up to the 31st March, during which the license was in operation. The portion of the Act dealing with the subject of licenses is Ch. vi, including Ss. 31 to 35. Ss. 31 and 32 deal with licenses for a year. It may be remarked, however, in passing. that S. 32 supplies a strong argument by analogy against the conviction in the present case. By that section it is provided

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1 A. 630.

that, where there is an intention not to renew the license, notice of such intention shall be given to the Collector at least fifteen days *before the year expires, and if such notice be not given, and the license be not recalled by the Collector, the license held and engagement entered into by every such person shall remain in force as if the same license and engagement had been formally renewed.* There seems no reason why this should not hold good in the case of a license for less than a year, as, indeed, **[634]** as I shall presently show, it rather seems to do. and there is not a word in the Act, from beginning to end, showing it to be the intention of the Legislature that it shall be otherwise in the case of short licenses—a view of their position in this respect which is only too abundantly supported by the conduct of the parties in the present case, and especially on the part of the Government. S. 33 provides that the Chief Revenue Authority may regulate the form and condition of all licenses under the Act, and rules for these purposes appear to have been issued, but I do not observe among them any rule relating to the lapsing or renewal of a license for three months. I observe, however, that one of the rules provides that any party shall be at liberty to cancel such a license at the close of any quarter of the year, a provision which previously derives considerable force from that contained in S. 32 to which I have directed attention, and which therefore tells rather against than in favour of his conviction. S. 34 empowers the Collector to recall or cancel any license if the tax or duty therein specified be not paid, or in case of a violation of any other condition thereof, or of the holder being guilty of a breach of the peace or any other criminal offence ; and the same section proceeds to provide for the case where the Collector desires to recall a license, and S. 35 relates to the surrender of a license by the holder. Now, even if things were entire and there were none of the peculiarities relating to the conduct of the Excise authorities to which I have adverted, I think it would be quite allowable to hold that the term "licensed vendor" in S. 62 must be taken to mean a vendor licensed or unlicensed within the meaning of the section of the Act I have pointed out on licenses generally, and constituting Ch. vi, and a person not being in position, as Mrs. Newton plainly is not, cannot be said to have incurred the penalty of S. 62. The only section of the Act which appears to me to have the remotest bearing on such a case as the present is S. 57, which provides for the refusal to produce a license on the demand of an excise officer, and also for a breach of any of the conditions of the license granted, neither of which circumstances apply to the case of Mrs. Newton, for she was never asked by any excise officer to produce her license, nor has she committed any breach of any of its conditions. The present case therefore appears to me to be wholly unprovided for by the Excise Act X of 1871, and I must add that it is very properly unprovided for, for I do not **[635]** believe it to have been the intention of the Legislature to punish an innocent person like Mrs. Newton, who was guilty of nothing but a very intelligible, and in my judgment, excusable, little neglect or delay, which showed no intention on her part to cause any of the mischief against which the Excise Act is directed.

For these reasons I set aside the conviction and sentence in this case, and direct the fine of Rs. 100, if it had been paid, to be returned to the applicant.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Pearson.

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CRIMINAL JURISDICTION.

1 A. 610.

IN THE MATTER OF THE PETITION OF NARAIN DAS.

[27th February 1878.]

1 A. 610.

Crim. Pro. Code, 1872, Ss. 283, 300—Omission to take the opinion of the assessors.

The omission to take the opinion of the assessors, in a sessions case tried with their aid, is, although a serious irregularity, not a ground for the revisional interference of the High Court, if it has not affected the conduct of the prosecution or prejudiced the prisoner in his defence.

[R., 10 A. 414 (417), 24 M. 523 (535) = 2 Weir 346; **Expl.**, 4 A. 518.]

Application to the High Court for the exercise of its powers of revision under S. 297, Act XVIII of 1872. The Sessions Judge, who tried a case with the aid of Assessors, without asking the opinion of the Assessors, acquitted an accused person, after his defence had been heard. Objection was taken to the procedure adopted by the Sessions Judge.

JUDGMENT.

[611] PEARSON, J.—The opinion of the Assessors does not appear to have been taken as it is not found on the record. The omission to take it was a serious irregularity and must be pointed out to the Judge, and he must be cautioned to avoid a similar irregularity in future. At the same time I cannot hold that it affected the conduct of the prosecution or prejudiced the prisoner in his defence, and it is not, therefore, with reference to the provisions of Ss. 283 and 300 of Act X of 1872, a ground for revisional interference.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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APPELLATE CIVIL.

1 A. 611.

GANGA PRASAD *(Defendant)* *v.* KUSYARI DIN *(Plaintiff)*.

[27th February 1878.]

1 A. 611.

1. *Bond charging profits of immoveable property—Construction.*

Where a bond charged the profits of immoveable property with the re-payment of the loan, and stipulated that the obligee should take the management of the property and render accounts to the obligor, that if the loan was not paid when due, the latter should remain in possession till the loan was discharged, and also that the obligor should have no power to sell, mortgage or alienate the property till the discharge of the debt; *held* that the bond created a mortgage of the profits only and not of the property itself and that, therefore, the obligee cannot sue for the sale of the property.

2. *Effect of condition not to alienate—Simple mortgage.*

If there is a condition, in a bond for payment of money, not to alienate certain lands, it would constitute it a simple mortgage.

Suit to bring to sale a certain mauza for the satisfaction of the debts due under two deeds dated 17th April, 1860 and 6th February, 1863.

JUDGMENT.

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1 A. 611.

[612] TURNER, J.—In our judgment, on the proper construction of the two deeds on which the respondent relies, by neither of them was such a security created as would entitle the mortgagee to call for a sale of the mauza.

By the first deed, executed on the 17th April, 1860, in consideration of a loan of Rs. 710, the mortgagor gave the mortgagee one half of the profits of the mauza up to the end of the then current settlement, and he charged the remaining one half share of the profits with the payment of the mortgage-debt and interest. It was also stipulated that the mortgagee should take the management of the mauza, rendering accounts to the mortgagor, and that, if the mortgagor should fail to pay the debt therein mentioned, or should take another loan and fail to pay it within the term therein mentioned, the mortgagee should remain in possession of the entire mauza until payment of all that might be due. This deed clearly created no hypothecation of the mauza itself. It assigned one half of the profits to the mortgagee for the period of the then current settlement, and charged the residue of the profits with the mortgage.

The original mortgagor having died, his heir executed a second deed on the 6th February, 1873, in which he admitted the creation of the original charge and the existence of a further debt of Rs. 1,000. The further debt of Rs. 1,000 he undertook to discharge [613] by payment of Rs. 500 in Chait, 1920 Sambat, and he agreed that the balance should be realised by the mortgagee from half the profits of the mauza in his possession *according to the terms of the bond for Rs.* 710, dated the 17th April, 1860, and that, until the realisation of the amounts entered in both bonds as well as of any amount borrowed in future, the mauza should continue in the possession of the mortgagee, and that the mortgagor should have no power to sell, mortgage, nor alienate it. Had this last condition stood alone, it may be conceded that it would have been sufficient to constitute a simple mortgage of the estate, and the respondent would have been entitled to an order for sale, but the clause must be read with what preceded it, and so read it is to our minds clear that the parties intended to mortgage the profits and not the mauza itself nor any share in it. This construction is favoured by the direction which immediately follows the agreement not to alienate, and which is to the effect that an arrear of revenue which had been defrayed by the mortgagee should be realised from the profits. We must therefore hold that the respondent is not entitled to the relief he seeks in this suit, and reversing so much of the decree of the Court below as decreed the claim in part we must dismiss the suit with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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APPELLATE CIVIL.
1 A. 613.

SUNDAR AND OTHERS (*Plaintiffs*) *v.* KHUMAN SINGH (*Defendant*).

[4th March 1878.]

1 A. 613.

Record-of-rights—Jurisdiction—Civil and Revenue Courts—Act XIX of 1873 (N.W.P. Land Revenue), Ss. 62, 91, 94 and 241.

Under S. 241 of the Act, it is provided that no Civil Court shall exercise jurisdiction in "the matter of the formation of the record-of-right;" but the matter

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1 A. 613.

of the formation of a record is clearly not the same thing as the question of the rights which its entries record. The Civil Court may not alter or amend the record, or give directions in respect of it, because these matters are, under Ss. 62 and 94 of the Act, peculiarly within the jurisdiction of the Revenue Court. It will thus be seen that Civil Courts are not debarred from entertaining and deciding questions of rights between parties, merely because those questions may have been made the subject of entries in the record, and because the decision of the Civil Court may show that they are wrong and need correction.

Held, therefore, that a suit will lie for a declaration of plaintiff's right to make collections of rent and to defray and therefrom certain village and other expenses, though, with reference to these matters, there was, in the record-of-rights, an entry adverse to the plaintiff.

[Ap., 9 A. 429 (431).]

JUDGMENT.

[614] OLDFIELD, J.—The plaintiffs brought this suit originally for the cancelment of the orders of the Deputy Collector and Settlement Officer relating to the formation of the record-of-rights, over which the Civil Court has no jurisdiction, at the same time asking that they might disburse the village-expenses as before. The Court of first instance rejected the plaint, and the lower appellate Court reversed this order and remanded the case for trial, with an intimation that the plaintiff was at liberty to amend the plaint, and in special appeal this Court did not interfere with this order. The plaint was not amended till the 24th July, and on the same day the Court of first instance decided the case, after directing that the amended plaint should be filed with the record, and after the defendant had filed an answer to the amended plaint, and after evidence had been taken, which, however, was taken before amendment of the plaint. The Court of first instance held that, notwithstanding the amendment of plaint, the suit was not cognizable by the Civil Court. The plaint as amended is for establishment of the plaintiff's right as hitherto to make collections of rent from certain cultivators, and to defray the village-expenses themselves on their share of the estate; this right having it appears been interfered with by the Settlement Officer's order, by which the defendant's right was recognised to collect these rents and to take them for defraying village-expenses. The lower appellate Court also held the suit on the amended plaint not to be cognizable. Both Courts seem to consider that in substance there is no difference **[615]** in the two plaints in the relief sought, that the object of the amended plaint is substantially to cancel an order of the Settlement Officer affecting the record-of-rights, although not stated in so many words, and that such a suit cannot be entertained under S. 241 of Act XIX of 1873; and the Judge seems further to consider that, inasmuch as the plaintiffs appealed from the Deputy Collector's orders to the Settlement Officer and failed, they are debarred from bringing this suit.

The view which the lower Courts have taken is erroneous. In the order of this Court in special appeal the Court pointed out the distinction which exists between that portion of the plaintiffs' claim in which they ask for the Court's interference with the formation of the record-of-rights, and that portion in which they ask to have declared their right to make certain collections of rent and defray village-expenses themselves.

The law enacts (S. 241) that no Civil Court shall exercise jurisdiction in "the matter" of the "formation of the record-of-rights;" but the matter of the formation of a record is clearly not the same thing as the question of the rights which its entries record. The Civil Court may not alter or amend the record or give directions in respect of it, because the formation and maintenance of the record and correction of errors in it has

been made by Ss. 62 and 94 of Act XIX of 1873, a matter peculiarly within the province of the Revenue Court. That was the object with which that part of S. 241 above cited was enacted, but it was not intended to debar Civil Courts from entertaining and deciding questions of rights between parties merely because those questions may have been made the subject of entries in the record, and because the decision of the Civil Court may show that they are wrong and need correction. .S. 62 and following sections detail what the contents of the record-of-rights shall be, and the principle on which it is to be prepared, and the powers which the Settlement Officer shall exercise in its preparation; and S. 91 goes no further than to declare that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." To so much weight the entries are entitled by a Civil Court, and S. 241 has been misinterpreted by the lower appellate Court, and was not intended to bar the jurisdiction of the Civil Courts in respect of the determination **[616]** of questions of right merely by reason of the record-of-rights treating of them. How far the question raised in this suit has been determined in the Settlement Department, and how far any such determination may be binding, we are not in a position to say, as the case has not been tried at all by the Court of first instance. We reverse the decrees of both Courts and remand the suit to the Court of first instance for retrial. Costs to abide the result.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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APPEL-LATE CIVIL.

ZAIB-UN-NISSA (*Plaintiff*) *v.* JAIRAM GIR (*Defendant*).

[4th March 1878.]

1 A. 616.

Attachment in execution—Effect thereon of order striking execution-proceeding off the file.

Whether an attachment in execution proceedings subsists or is removed by an order striking the execution proceedings off the file, must be decided with reference to what appears to have been the object and intention of the order.

When, therefore, certain properties were attached in execution of a decree, and the proceedings struck off the file, and afterwards an application was made again to attach the property, and granted, *held* that the first attachment was not subsisting and that a private sale of the property before the second attachment was not void. (H.C.R., N.W.P., 1869, p. 51, *F.*).

1 A. 616.

[R., 5 A.W.N. 57.]

Certain immoveable property having been attached on 2—5—1871 in execution of a money-decree held by the defendant in this suit against a third party, the execution case was struck off the file on 22—7—1871, and the defendant in this case again applied for the execution of the decree on 28—8—1873 by attachment and sale of the property. Notice was directed to be issued on 12—9—1873. The plaintiff in this suit, who purchased the property from the judgment-debtors on 17—9—1873 preferred a claim in virtue of her purchase, on hearing that the property was ordered to be attached on 28—11—1873; but her claim being disallowed, on 23—1—1875, she brought the present suit to establish her right to the property. Both the Courts below decided against the plaintiff, who appealed to the High Court contending that, as the attachment on the property had been virtually removed in July 1871, the property was not

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1 A. 616.

under attachment at the time of the sale and the sale was consequently not void; and that, as the sale was supported by consideration, the lower appellate Court had erred in holding that the sale was made in bad faith.

JUDGMENT.

The judgment of the Court, so far as it related to this contention, was as follows:

[618] OLDFIELD, J.—Nor are we of opinion that plaintiff's purchase is void by reason of there being subsisting an attachment of the property at the time of his purchase. There had been an attachment in May 1871, but it appears to us to have been removed when the proceedings in execution came to an end in the following July, for we find the defendant in 1873 applying again to have the property attached, which he would not have done if it was then under attachment; and in the reports made on his application no mention is made that there was an attachment subsisting, but on the contrary we find that the Court, on the 28th November, 1873, issued orders for attachment. We must give effect to what appears to have been the object and intention of the orders in the former proceedings, and this is the principle laid down in the Full Bench ruling of this Court—*Ahmud Hossein Khan* v. *Mahomed Azeem Khan* (1).

The Judge's finding that the plaintiff purchased in bad faith, which is based on the error that he knew at the time that there was a subsisting attachment, necessarily falls to the ground, for there is no reason to suppose that it was not a *bona fide* purchase for valuable consideration. We decree the appeal and reverse the decrees of the lower Courts, and decree the claim with costs in all Courts.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

1878
MARCH 5.

LAKHMI CHAND (*Plaintiff*) *v.* TORI LAL AND OTHERS (*Defendants*).

[5th March 1878.]

APPELLATE CIVIL.

1 A. 618.

1 A. 618.

Agreement—Consideration.

Where, by an agreement duly registered, the settlor agrees that, in consideration of the recognition by his brothers of his rights in certain property, he will not sell, transfer, or hypothecate such property, and that, should he desire to dispose of it, he would convey it to them for a certain price, *held* that the agreement was binding and enforceable.

JUDGMENT.

[620] TURNER, J.—In our judgment the agreement is binding. It is registered, and the settlor thereby agrees that, in consideration of the recognition by the brothers of his rights in the property to which the deed relates, he will not sell, transfer, or hypothecate his share, and that should he desire to dispose of it he would convey it to them for Rs. 800. There is no reason why such an agreement should not be enforced. If it was made out of natural affection it has been expressed in writing and duly registered. If the consideration was, as it purports to have been, the recognition of the settlor's right to share, there was a consideration. There is nothing to show that the agreement was made in fraud of the appellant. The appeal fails and is dismissed with costs.

(1) H.C.R. N.W.P., 1869, p. 51.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Spankie.

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APPEL-LATE CIVIL.

1 A. 620.

KALIAN DAS AND OTHERS (*Plaintiffs*) *v.* NAWAL SINGH AND OTHERS (*Defendants*). [7th March 1878.]

1 A. 620.

1. *Order returning plaint after it was admitted and posted for evidence—Appeal.*

An order returning a plaint for presentation to the proper Court, on the ground that the property in suit was beyond the pecuniary jurisdiction of the Court in which it was presented, is appealable under the C.P.C. (1859), and the appellate Court's order thereon is also appealable to the High Court under the C.P.C. (1877).

2. *Suit for redemption—Jurisdiction.*

Where the subject-matter of the suit is, not only whether the property has been redeemed by payment out of the usufruct, but also whether the property and the right to redeem belongs to the plaintiff, the question of jurisdiction depends on the value of the property and not on the amount of the mortgage.

[2—R., 11 B. 591 (594)].

Suit instituted on 17th April, 1877 in the Munsif's Court for "complete" possession of certain land by redemption of a usufructuary mortgage and ejectment of the defendants, valued at Rs. 150, the principal money secured by the mortgage. The Munsif made an order on the plaint fixing the 8th May, 1877, for the hearing of the suit, and directing that the defendants should be summoned to appear on that day in person or by pleader, and that the pleaders for the plaintiffs should be ready to produce their evidence. On the defendants appearing and denying the mortgage and setting up a proprietary title to the land, the Munsif, on 26th June, 1877, ordered the plaint in the suit to be returned to the plaintiffs for presentation in the proper Court. This was affirmed by the lower appellate Court. The plaintiffs appealed to the High Court.

JUDGMENT.

[622] PEARSON, J.—A doubt was expressed at the hearing as to the admissibility of this appeal. We do not share that doubt. A case of exactly the same nature was entertained and disposed of on the 18th January last. The Munsif's order for the return of the plaint was passed after the suit had been admitted on the file and parties had been called on to produce evidence. His order finally disposed of the suit, and was the legitimate subject of a regular appeal under Act VIII of 1859. The present appeal from the appellate decree of the lower appellate Court has presumably been brought and admitted under S. 584 of Act X of 1877.

The lower appellate Court's decision is, in our opinion, right. The question is not one of institution-fee but of jurisdiction : and it appears that the subject-matter of dispute in this case is not only whether the property has been redeemed by payment of the debt out of the usufruct, but whether the property and the right to redeem belongs to the plaintiffs. As the value of the property is found to exceed Rs. 1,000, it has been rightly held that the suit was not cognizable by the Munsif. The plaint was returned to the plaintiffs for presentation in the proper Court. Instead of presenting it there, they elected to appeal from the Munsif's order, and the lower appellate Court has properly disposed of their appeal. We dismiss this appeal with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

1878

MARCH 8.

SHIB LAL AND OTHERS (*Plaintiffs*) *v.* HIRA LAL AND ANOTHER (*Defendants*). [8th March 1878.]

APPEL-LATE CIVIL.

1 A. 622.

Legally invalid document—Suit for declaration that it is not genuine—Reasonable apprehension of injury.

Where a document is not legally valid or admissible for the purposes for which it is apprehended that it may be used, a suit will not lie for a declaration that it is not genuine, as there cannot be said to be a reasonable apprehension of injury from the document.

1 A. 622.

[R., 9 A.W.N. 147 ; **Not F.**, U.B.R., Civil (1892—1896), 529 (534).]

Suit for a declaration that a certain receipt, purporting to be an acknowledgment by a son of the mortgagee of the receipt from the mortgagors of a certain amount in part payment of the debt due under a bond, was not a genuine document, as the same has been fabricated with the object of reviving the suit on the bond which had become barred by limitation. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court held that the suit was not maintainable, on the ground that the question as to the nature of the receipt could only be raised and determined when the receipt was used by the defendants as a genuine document. The plaintiffs appealed to the High Court.

JUDGMENT.

[623] TURNER, J.—The receipt cannot be used for the purpose which the appellants apprehend. To support a plea that a new period of limitation has accrued from part payment of principal, the fact of payment must appear in the handwriting of the person **[624]** making the same on the instrument on which the debt arises, or in his own books, or in the books of the creditor. The appellants cannot then be held to have reasonable ground to apprehend injury from the document. The appeal is dismissed with costs.

CRIMINAL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice.

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MARCH 22.

EMPRESS OF INDIA *v.* DHARAM DAS. [22nd March 1878.]

CRIMINAL JURISDICTION.

1 A. 635.

Excise Act, X of 1871, Ss. 12, 57, and 62—Illicit sale of liquor.

Where a license for the sale of spirituous and fermented liquors by retail, expired on a certain date, and the accused did not attempt to renew it, till after he had been convicted before the Magistrate for selling spirituous liquors, *held*, that the case was distinguishable from 1 A. 630, and that he was properly convicted as he violated S. 12 of the Act.

1 A. 635.

[R., 1 A. 638 (639).]

JUDGMENT.

[635] STUART, C.J.—The facts in this case are different from those in the case of *Charles Seymour* (*Mrs. Newton*) (1), for there are none of

(1) 1 A. 630.

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1 A. 635.

the circumstances of condonement and estoppel which characterise [636] the latter, and the license had clearly and simply expired. In *Seymour's* case the lapsing of the first license was not noticed by the authorities, and was only brought to their knowledge by *Mrs. Newton* herself going to the Collector's office, they simply renewing the license and accepting the whole fee for the new period by anticipation; nor was there in that case anything to show any action on the part of the Collector as to the recalling the license or otherwise within the meaning and scope of Ch. vi of Act X of 1871, or of the rules respecting the license for three months drawn up and issued by the Chief Revenue Authority, that is, in these Provinces, the Board of Revenue. I therefore held there that the defendant was not a person other than a licensed vendor within the meaning of S. 62 of the Excise Act.

The present case is quite different, for here we have the license simply expiring and no attempt whatever on the part of the defendant to renew it, nor does he apply for renewal till after he had been convicted before the Magistrate for selling spirituous liquors without a license. He therefore violated S. 12 of the Excise Act, which provides that "spirituous liquors passed from distilleries according to the English method, fermented liquors manufactured at a licensed brewery, and spirituous and fermented liquors imported either by land or by sea, shall not be sold except under license from the Collector," and laid himself open to the penalty enacted by S. 62. His conviction must therefore stand. But as to the sentence, I do not think that the case is a flagrant or serious one and calling for a severe penalty. Nor can I help remarking on the peculiar nature of the evidence on which the conviction is based. It is not the evidence obtained simply by the testimony of ordinary customers from among the public frequenting the defendant's shop, but by that of a constable sent direct from the Collector's office for the express purpose of detecting or rather involving the defendant in a violation of the excise law, and such evidence is, from its very nature, open to remark and even suspicion, although I do not mean to say that the constable who acted in this employment did otherwise than perform his duty fairly. The circumstance, however, in my view takes from the conviction the severe illegality which it otherwise might have shown, and renders a penalty of a fine of Rs. 100, or of one month's imprisonment [637] in the Civil Jail, excessive punishment, and I set that sentence aside, and in lieu of it I consider that one-fourth of the fine imposed by the Assistant Magistrate would be sufficient, and therefore, while affirming the conviction, I sentence the defendant to pay a fine of Rs. 25 without the alternative of imprisonment; the fine, if necessary, to be recovered by distress in due course of law. But if the Rs. 100 has been paid by the defendant, the difference between that sum and the Rs. 25 must be returned to him.

APPELLATE CIVIL.

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APPELLATE CIVIL.
1 A. 624.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

GOPAL (*Plaintiff*) *v.* NANKU AND ANOTHER (*Defendants*).

[26th March 1878.]

1 A. 624.

Decree of Small Cause Court—Execution against immoveable property.

The Judge of a Small Cause Court, when duly invested with the powers of a Subordinate Judge, has, in the exercise of such powers, general jurisdiction.

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He is, therefore, competent to order the sale of immoveable property within his jurisdiction, in execution of a decree passed by him on the Small Cause side.

[Ex., 8 M. 8 (9).]

APPELLATE CIVIL.

1 A. 624.

In a suit by the plaintiff, as auction-purchaser, to establish a right to certain immoveable property,—sold in execution of a decree of a Court of Small Causes, under the orders of the Judge of the said Court duly invested with the powers of a Subordinate Judge under the provisions of S. 51, Act XI of 1865,—and for possession of the same, the lower Courts concurred in holding that the plaintiff's title to the property was invalid, as the Judge of the Small Cause Court was not competent to enforce the decree under S. 20 of Act XI of 1865. The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[625] TURNER, J.—The Judge of a Small Cause Court, when duly invested with the powers of a Subordinate Judge (1), has, in the exercise of such powers, general jurisdiction. He was therefore competent to order a sale of immoveable property within his jurisdiction (2). The decree of the lower appellate Court must be set aside, and the case remanded for trial on the merits. The costs of the appeal will follow and abide the result.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Turner.

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APRIL 2.

EMPRESS OF INDIA *v.* MEGHA. [2nd April 1878.]

APPELLATE CRIMINAL.

1 A. 637.

1 A. 637.

1 A. 637.

Penal Code, S. 75—Enhanced punishment.

Where it was proved that the appellant had, a few days before the trial of an offence of theft, been convicted, but it was not shown that he had been convicted of one of the offences mentioned in S. 75, nor that he had been convicted of any offence before the commission of the offence for which he had received the enhanced sentence, *held* that the enhanced sentence was not proper in the circumstances of the case.

[F., L.B.R. (1893-1900), 479 (480).]

On a certain day a person was convicted under Ss. 109, 328, I.P.C. A week later he was convicted under S. 328, and also under S. 379, I.P.C. He was sentenced, under S. 328, I.P.C., to rigorous imprisonment for 10 years, and, with reference to his previous conviction, under Ss. 75 and 379, I.P.C., to transportation for life. The accused appealed to the High Court against the second conviction.

JUDGMENT.

[638] TURNER, J.—I am unable to support the enhanced sentence passed by the Judge under S. 75. That section declares that if any person, *having been convicted* of any offence punishable under certain parts of the Indian Penal Code, *shall be* guilty of any offence punishable under those parts of the Code, he shall for every such *subsequent* offence be liable to the penalties therein declared. The section then prescribes enhanced punishment for particular offences committed after conviction of any one of such offences and not merely on a second conviction. In the

(1) under S. 51, Act XI of 1865. (2) in enforcing a decree under Act XI of 1865.

present case it is shown that the appellant had, a few days before the trial of the present offence, been convicted, but it is not shown that he had been convicted of one of the offences mentioned in S. 75, nor that he had been convicted of any offence before the commission of the offence for which he has received an enhanced sentence under S. 75 of the Indian Penal Code. I must quash the sentence passed under Ss. 379 and 75 of the Code, and as the appellant has received the full punishment that could be awarded for an offence falling at the same time under Ss. 328 and 379 of the Indian Penal Code, it is unnecessary to pass a sentence under S. 379 of the Indian Penal Code. The conviction and sentence under S. 328 are affirmed and the appeal dismissed.

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APRIL 2.
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1 A. 637.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Turner.

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APRIL 4.
CRIMINAL JURISDICTION.
1 A. 638.

EMPRESS OF INDIA *v.* MAHINDRA LAL AND ANOTHER.

[4th April 1878.]

1 A. 638.

Excise Act, X of 1871, Ss. 32, 57, 82—Illicit sale of liquor.

Where a license for the sale of spirituous and fermented liquors by retail expired and the license-holder gave no notice of his intention not to renew the license, nor had the license been recalled by the Collector, but liquor having been sold for a week without the renewal of the license, the license-holder's servants were prosecuted, *held*, that they could not be convicted under the provisions of S. 22, but only under S. 57, for not paying the monthly license fee in advance.

Reference by the Sessions Judge of Allahabad, under S. 296 of Act X of 1872, for the orders of the High Court.

JUDGMENT.

[639] TURNER, J.—It appears that licenses for the sale of spirituous and fermented liquors by retail may be granted in the North-Western Provinces for any term not less than three calendar months and not exceeding one calendar year, and that in Allahabad they are usually granted for a period of three months. The fee leviable on such licenses in Allahabad is Rs. 8 per mensem, and it is a condition of the license that the fee should be paid in advance. The petitioners' mistress held a license for the sale of fermented liquors by retail for the period of three months terminating on the 31st December 1877. The holder of the license did not give to the Collector any notice of her intention not to renew the license, nor had the license been recalled by the Collector prior to the 8th January 1878. From the 1st to the 7th January 1878, inclusive, the petitioners admit they sold by retail spirituous or fermented liquors. On these facts the Magistrate convicted them for that, not being licensed vendors, they sold spirituous or fermented liquors on divers dates from the 1st January to the 7th January 1878, inclusive, and, under S. 62 of the Excise Act, sentenced them to pay a fine of Rs. 100 or to undergo imprisonment for one month in the Civil Jail.

[640] It is contended that the conviction is wrong in that the petitioners were not unlicensed vendors, but sold under a license subsisting under the provisions of S. 32 of the Act, seeing that their mistress had given no notice of her intention not to renew it and it had not been recalled by the Collector.

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CRIMINAL JURISDICTION.

1 A. 638.

The pleader for the petitioners relies on *Empress* v. *Seymour* (1) decided by the learned Chief Justice of this Court on the 25th February last. The facts of that case are much the same as those of the present. The defendant was the servant of a person named *Newton* who held a license for a term of three months expiring on the 31st December 1877. The license was not formally renewed until the 11th January 1877, when the proper fee was paid. Sales had nevertheless been made between January 1st and January 11th, and on account of these sales the defendant *Seymour* was prosecuted and convicted. The learned Chief Justice considered that any breach of the Act committed by the defendant had been condoned by the action of the Collector in receiving the fee and renewing the license, but he doubted whether, in advertence to the terms of S. 32 of the Excise Act, the master of *Seymour* could be held to be unlicensed, and therefore whether any offence had been committed. His Honour called attention to the absence from the Act and the rules of any direction as to the period within which the license was to be renewed. In the result he quashed the conviction. On the other hand the Government Pleader relies on a subsequent ruling by the same learned Judge. In *Empress* v. *Dharam Das* (2) the facts differ from those of *Seymour's* case only to this extent, that it was not shown the license had been renewed and the fee paid subsequently to the sales which led to the conviction. It, however, appears that on the 11th January, the same day on which the fee was accepted in *Seymour's* case, the defendant brought the fee into Court and tendered payment of it. In this case the learned Chief Justice supported the conviction. He distinguished it from *Seymour's* case on the ground that in the latter there were circumstances of condonement in the acceptance of the fee and renewal of the license, while in the case of *Dharam Das* these circumstances were absent. Although in his petition *Dharam Das* urged that, in reference to the provisions of S. 32 of the Excise Act, he **[641]** could not be held to be an unlicensed vendor, it would seem that this argument was not pressed at the hearing for it is unnoticed in the judgment. The Government Pleader urges that, inasmuch as the Collector had not accepted the fee in the case before me, the decision must follow the ruling in *Dharam Das's* (2) and not the ruling in *Seymour's* case (1), but I am constrained to say that I cannot regard the acceptance by the Excise authorities of an excise fee in ignorance of a contravention of the law as a condonation of the offence if the offence had been committed. The acceptance of the fee would not warrant the quashing of a conviction for sales made prior to the acceptance of the fee, if those sales were in fact illegal; and if the sales on which the prosecution was founded were illegal in *Dharam Das's* case, I should have held them equally illegal in *Seymour's* case. Even assuming the excise fee had been received with a full knowledge of the circumstances, I should hold that this might be ground for inflicting a light penalty and not for quashing the conviction. But I entirely agree with the reasoning of the learned Chief Justice in that part of the judgment in *Seymour's* case (1) in which he gives expression to his doubts as to the legality of the conviction in reference to the terms of S. 32 of the Excise Act. That section declares that, unless otherwise specially authorised by the Chief Revenue Authority, licenses for retail sales shall be granted for one year, and if continued to the holders thereof shall be formally renewed from year to year, but that every person holding such a license who may intend not to renew it shall give notice of his intention

(1) 1 A. 630.

(2) 1 A. 635.

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1 A. 638.

to the Collector, at least fifteen days before the year expires, and that if such notice be not given and the license be not recalled by the Collector, the license held and engagement entered into by every such person shall *remain* in force as if the said license had been formally renewed. By the rules made by the Chief Revenue Authority in these Provinces licenses may and in practice are granted for periods of three months. To these licenses the provisions of S. 32 are clearly applicable. Notice must be given of the intention not to renew the license, and if no such notice is given and the license is not recalled, the license granted to, and the engagement taken from, the holder of the license remain in force as if they had been formally renewed. The Government Pleader has argued that this is to be read as implying that the holder of the license is to be held to his engagements, that he is responsible for the fee and for the performance of the conditions of the license, but that the authority conferred **[642]** by the license no longer subsists. I cannot accede to a construction which is at variance with the clear language of the Act,—"the license held shall remain in force as if the said license had been formally renewed." If it had been formally renewed it could not be doubted the holder would be a licensed vendor, and enjoy the privilege conferred by the license. Inasmuch as no notice has been given of an intention not to renew it and it has not been recalled, the holder still enjoys the privilege of selling in virtue of the authority conferred by it, while on the other hand he is liable to the payment of the fee and the performance of the other conditions imposed on him. On the facts found or allowed in this case, the petitioners cannot be convicted as unlicensed vendors. The sales admitted by them were made in virtue of the license which under the terms of S. 32 was still subsisting. The convictions must then be quashed and the fines remitted.

It would certainly be well that the Chief Revenue Authority should prescribe some period within which licenses should be brought for renewal, but as the law and rules now stand there is a remedy for any negligence on the part of the holder of the license. He is bound by a condition of his license to pay the monthly fee in advance. If he omits to do so he can be prosecuted for the breach under S. 57 of the Excise Act, and is liable to a fine of Rs. 50. In quashing the convictions under S. 62, I am urged to convict the petitioners under S. 57, but the petitioners are not the holders of the license, they are the servants of the holder.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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APPELLATE CIVIL.
1 A. 661=3 Ind. Jur. 33.

PHUKAR SINGH AND OTHERS (*Plaintiffs*) *v.* RANJIT SINGH AND OTHERS (*Defendants*). [9th April 1878.]

1 A. 661=3 Ind. Jur. 33.

1. *Stridhan.*

In order to constitute property held by a woman "stridhan" devolving on her own heirs, it must be held by her unconditionally, and subject to no restrictions. "That alone is her peculiar property, which she has power to give, sell, or use—independently of her husband's control" (Dayabhaga).

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APPELLATE CIVIL.

1 A. 661 = 3 Ind. Jur. 33.

2. *Property inherited by paternal grandmother from grandson.*

Immoveable property inherited by the paternal grandmother from her grandson is not stridhan so as to devolve on her death on her heirs; it devolves on the heirs of the grandson. (11 M.I.A. 139, 5 I.A. 1, 1 S.D.A. 164, 11 M.I.A. 487, *R.*)

[1 & 2—R., 3 O.C. 129 (135), 22 A. 353 (357).**]**

JUDGMENT.

[662] OLDFIELD, J.—The property in suit belonged to Sardar Singh, and at his death he was succeeded in 1861 by his paternal grandmother, Muna Kuar, in the absence of nearer heirs. She died in 1873, leaving a daughter, Phul Kuar, still living. Some of the defendants are her sons, and the defendant, Ranjit Singh, is a son of a sister of Sardar Singh also living. The plaintiffs are grandsons of the full brother of Mohabbat Singh, great-grandfather of Sardar Singh, and they claim the estate as heirs of Sardar Singh. Another plaintiff, Ganjan Singh, has purchased part of their rights and interests. The Judge has dismissed the suit and reversed the decree of the first Court. The plaintiffs have preferred a special appeal. It is clear that Muna Kuar succeeded Sardar Singh in the ordinary course of succession, and her possession has not been adverse to the plaintiffs, to whom the succession only opened out at her death. There is therefore no bar by limitation, as the Judge appears to think; but it has been contended before us that the Judge's decree should be maintained on the ground that Muna Kuar succeeded to the property as *stridhan*, and that the plaintiffs would not be her heirs, but her daughter, Phul Kuar, for whom the defendants hold.

The question we have to determine is whether property inherited by the paternal grandmother from the grandson will rank as *stridhan* and devolve as such; and, to support the affirmative, Mitakshara, Ch. ii, S. xi, v. 2, is referred to, where property which a woman has acquired by inheritance is included in the category of "woman's property;" and Sir T. Strange has included this sort of property in the several kinds of *stridhan* —Strange's Hindu Law, 4th ed., p. 28. But on this subject Sir W. Macnaghten observes: "In the Mitakshara, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure or finding, is denominated woman's property, but it does not constitute her *peculium*." —Macnaghten's Hindu Law, 3rd ed., p. 38; and this distinction between woman's property generally and *stridhan* proper, which alone de-**[663]** volves on her relations, was noticed by the Privy Council in *Thakoor Deyhee* v. *Baluk Ram* (1), at the time that they decided that one class of inherited property, *viz.*, that inherited by a widow from her husband, does not rank as *stridhan* devolving on her heirs. The enumeration in Manu of woman's property has been held not to be exhaustive, and it is unnecessary for us in this suit to give an opinion as to what extent property acquired by inheritance will be *stridhan*. The question was discussed by the Privy Council in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2) and left undetermined, but we are disposed to hold that property inherited by the paternal grandmother from her grandson is not *stridhan*. It may be gathered from the text-books on the Hindu Law that property must be held unconditionally, and subject to no restrictions, to constitute *stridhan* devolving on a woman's heirs. "That alone is her peculiar property which she has power to give, will, or use independently of her husband's control"—Dayabhaga, Ch. iv, S. i, V. 18. The property inherited by the grandmother from the grandson will not bear

(1) 11 M.I.A. 139.

(2) 5 I.A. 1.

this test, since it is like property inherited by the mother from the son, subject to the same restrictions as to its disposal as that inherited by the wife from her husband. It has been held that the rules concerning property devolving on the widow equally affect property devolving on a mother from her son—note to *Bijya Dibeh* v. *Unpoorna Dibeh* (1)—and it has already been decided by the Privy Council—*Thakoor Deyhee* v. *Baluk Ram* (2) and *Bhugwandeen Doobey* v. *Myna Baee* (3)—that property inherited from the husband by the widow will not rank as *stridhan*, and the ground on which that decision rests appears to us to apply equally to the case before us. This is the view of the law of succession taken by Sir T. Strange and Sir W. Macnaghten.—"Had the property been the mother's in the Hindu sense of 'woman's property,' it would descend on her death to her daughters, but having been inherited by her from her son, it passes according to the law as practised in Bengal, not to her heirs, but to his,"—Strange's Hindu Law, 4th ed., p. 144. "On her death (*i.e.*, mother's) the property devolves on the heirs of the son, and not on her heirs,"—Macnaghten's Hindu Law, 3rd ed., p. 26; and the rulings of the **[664]** Courts accord with this view, though there appears some conflict of decisions in the Bombay High Court. We decree the appeal with costs, and reverse the decree of the lower appellate Court, and restore that of the Court of first instance.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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APPELLATE CIVIL.
1 A. 642.

RAHMANI BIBI AND OTHERS (*Defendants*) *v.* HULASA KUAR AND ANOTHER (*Plaintiffs*). [12th April 1878.]

1 A. 642.

Limitation Act (1871), Sch. II, Art. 148—Insufficiency of acknowledgment by agent.

An acknowledgment of the title of the mortgagor or of his right of redemption, signed by the mortgagee's agent, is not sufficient, under Art. 148, Sch. II of Act IX of 1871, to create a new period of limitation. (13 B.L.R. 177, *F.*)

[F., 1 A.L.J., 355; R., 17 B. 173.]

In a suit for recovery of possession of a certain share in a village alleged to have been mortgaged by the plaintiffs' ancestor to the defendants' ancestor 42 years prior to suit, the defendants alleged that the property had been mortgaged 70 years before the suit. The administration-paper dated 29—6—1840, had been signed for the mortgagee by his agent. The first Court without determining the date of the mortgage decreed in plaintiffs' favour, holding that the administration-paper contained an acknowledgment of the title of the mortgagor, creating, under Art. 148, Sch. II, Act IX of 1871, a new period of limitation. On this being affirmed in appeal, the defendants preferred an appeal to the High Court.

ORDER OF REMAND.

[643] It having been ruled by the Privy Council (4) that signature by an agent is not sufficient to satisfy the analogous terms of Act XIV of 1859, we must hold that the acknowledgment in this case is insufficient. Of

(1) 1 S.D.A., 164.
(2) 11 M.I.A. 139.
(3) 11 M.I.A. 487.
(4) 13 B.L.R. 177.

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course we are now considering the acknowledgment required under Act IX of 1871 and not under the present law, of which the terms are more equitable.

The lower appellate Court must determine whether this suit has been instituted within 60 years from the date on which the mortgage was made. It will try this issue and remit its finding to this Court, when ten days will be allowed for objections.

APPELLATE CIVIL.

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1 A. 642.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.

SHEO SINGH RAI (*Defendant*) *v.* DAKHO AND MURARI LAL (*Plaintiffs.*) [13th April 1878.]

1 A. 688=2 C.L.R. 193=5 I.A. 87=3 Suth. P.C.J. 529=3 Saraswati's P.C.J. 807.

1 A. 688=2 C.L.R. 193=5 I.A. 87=3 Suth. P.C.J. 529=3 Saraswati's P.C.J. 807.

1. *Privy Council—Special leave to appeal on questions of great general importance—Technical objections urged at a late stage—Permissibility.*

The defendant in a suit applied for and obtained leave to appeal to the Privy Council, which leave, however, became abortive owing to his failure to make the deposit for costs in due time. He then applied to the Privy Council for special leave to appeal on the ground that the suit was one concerning properties of large value, and involving questions of great importance to the sect to which he belonged. Special leave having been granted on the ground, the appellant urged, at the hearing before the Privy Council, certain preliminary objections to the maintainability of the suit, objections to which no reference had been made either in his application to the High Court for leave to appeal, or to the Privy Council for special leave. *Held* that, though it was not, by any means, intended to lay down, as a rule, that no questions can be raised at the hearing, which are not indicated in the petition for special leave to appeal, yet in the present cases considering the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, objections which altogether excluded the consideration and discussion of those very important questions, the appellant ought not, at that stage, to be allowed to insist that, by reason of these objections, the suit ought to be dismissed.

2. *Declaratory decree—When to be given.*

A declaratory decree ought not to be given unless there is a right to some consequential relief, which, if asked for, might have been given by the Court, or unless, in certain cases, a declaration of right is required as a step to relief in some other Court. (15 B.L.R. 83=2 I.A. 169, *Appr.*)

3. *Nuncupative will—Suit for declaration of its nullity, when lies.*

In cases where property may legally pass by an oral will, a suit may lie to have it declared null and void; for a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. A right to have a document or act which obstructs the title or enjoyment of property; cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

4. *Usage of Jains—Estate of sonless widow—Rights of such widow.*

According to the custom obtaining among the Saraogi Agarwala Jains, a sonless widow takes a very much larger dominion over the estate of her husband than is conceded by Hindu law to widows among orthodox Hindus; she takes an absolute interest at least in the self-acquired property of her husband; she

enjoys the right of adoption without the permission of her husband or the consent of his heirs; a daughter's son may be adopted, and, on adoption, takes the place of a son begotten.

With regard to the Jains, the Hindu law must be applied generally to their cases, in the absence of custom varying that law.

5. *Declaratory decree—Alternative declaration.*

In a suit by a Jain widow for the maintenance of her possession by the establishment of her exclusive right of inheritance to her husband's estate, and to have the adoption by her of a son, upheld, the adopted son was subsequently added as a plaintiff. The Court of first instance, granting all the reliefs asked for, declared that the widow was entitled to be maintained in possession as *proprietor*. The High Court, on appeal, modified this by declaring that she was entitled to be maintained in possession, either as proprietor or as manager of the estate on behalf of the adopted son. *Held*, that, though the declaration, being in the alternative, was in one sense uncertain, yet, it was independent of the other declarations, which decided the rights of the parties as between the plaintiffs on the one side, and the defendant on the other, and repelled the defendant's pretensions. There being no conflict between the rights of the plaintiffs *inter se*, the decree was rightly framed in a form which avoided prejudice to those rights.

[1—**F.**, 8 A. 365=6 A.W.N. 120; **3—R.**, U.B.R. Civil (1892—1896) 623 (625), U.B.R. Civil (1892—1896) 529 (534), 7 O.C. 187 (190) **4—F.**, 8 A. 319 (322)=6 A.W.N. 118; **R.**, 3 A. 55, 16 M. 182 (185), 16 A. 379 (381)=15 A.W.N. 123, 27 C. 379 (386), 30 A. 197 (223)=A W.N. (1908) 79=5 A.L.J. 200, 4 C. 744 (752) (**P.C.**), 19 B. 428 (459), 31 C. 11 (30) (**P.C.**)=7 C.W.N. 895 (901), 84 P.R. 1903=135 P.L.R. 1903, 29 A. 495 (511)=A.W.N. (1907) 121=4 A.L.J. 407, 11 Bom. L.R. 797 (805).]

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JUDGMENT.

[697] SIR MONTAGUE E. SMITH.—This is an appeal from a judgment of the High Court of the North-West Provinces, which substantially affirmed a decree of the Subordinate Judge of Meerut. The suit was originally brought by the respondent Dakho, the sonless widow of Ishq Lal, in her own name; Murari Lal, her daughter's son, whom she had adopted, being afterwards added as co-plaintiff. The defendant (the appellant) was a younger brother of Ishq Lal. The family were Saraogi Agarwalas, one of the divisions of the sect of Jains, whose laws and customs with regard to a widow's estate and her power of adoption differ, as the respondents allege, from the ordinary law by which Hindus are governed. This difference gives rise to the principal questions to be decided in the present suit. Ishq Lal died in 1867. He left considerable property, including Government notes, to the value of upwards of five lakhs of rupees. The widow took out the certificate of administration of his estate, and obtained possession of it. It is admitted that the adoption by the Musammat of her grand-son was made without any authority expressly derived from her deceased husband, and without the consent of his kindred—an adoption, therefore, which on that ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindu law. The immediate occasion of the suit arose in the following manner: Ishq Lal, who had been an army contractor, received from the Government as a reward for services rendered during the mutiny a grant for his life of the zamindari of mauza Nabali, in pargana Bagpat, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the mauza to his widow, and she purchased it at the price of Rs. 6,206. It has been assumed that the purchase-money was paid out of the proceeds of her deceased husband's estate. It appears that, whilst making up the *wajibularz* (a document called by the Subordinate Judge "the village administration-paper"), the settlement officer called upon the widow to name her successor to the mauza, with a view to enter the name in this paper, and that in answer to this requisition she requested that the name

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of Murari Lal should be recorded as her adopted son and successor. The appellant objected [698] to this being done, and the settlement officer thereupon ordered the following special entry to be made in the *wajibularz* :

"Para. ix.—Regarding special tribes and customs of adoption, second marriage, or succession.

"Musammat Dakho desired that Murari Lal, her daughter's son, whom she adopted, should succeed her after her death. But Sheo Singh Rai, the younger brother of her husband, on hearing this, objected that it is illegal that an adoption should take place without the permission of the husband's near relations. 'The settlement officer therefore passed the following order on the 15th July 1871. 'The parties may get this point decided by the Civil Court, and all points of this paragraph shall be decided by order of the Civil Court.'"

Both the Courts in India have stated that the settlement officer, in calling upon the Musammat to name her successor, acted in excess of his powers. It has not been shown what is the precise object of the *wajibularz*, nor what are the regulations or orders under which it is made. The reference to "Paragraph ix.—Regarding special tribes and customs of adoptions, second marriage, or succession," seems to indicate that, when these special customs are found to exist, it is desired that they should be recorded for the information of the settlement authorities. The settlement officer directed that the order he had made for the above entry should be communicated to the Musammat by the tahsildar, and that she should be advised to have the question of adoption settled by the Civil Court. The present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it.

The plaint (the widow being sole plaintiff) asserts in a general and somewhat informal manner her claim to be maintained in possession, "by establishment of plaintiff's exclusive right of inheritance to the estate of her husband, composed of the mouza above described, and to uphold the adoption of Murari Lal, plaintiff's daughter's son, as well as his right permanently to succeed her after her death, by voiding the defendant's pretensions, under the usages and customs of the Saraogi religion." It then alleges that the defendant, during the progress of the late settlement, raised the objection that the widow cannot, unless with the consent [699] of the relations of the family, make an adoption, and that the plaintiff was referred to the Court by the settlement department.

The defendant, in his written statement, after objecting to the suit on the grounds that the adopted son was not made a party to it, that the entry in the *wajibularz* did not give a cause of action, and that the suit was unnecessary and premature, stated in his defence on the merits as follows:

"(iii) The law of inheritance applicable to the Jains is nothing different from the Shastras. They are all subject to the common Hindu Law. Therefore, both according to law and custom, the adoption of a daughter's son is invalid: moreover, the custom of adoption is not universally recognised among the people of this sect.

"(iv) Among the Jains, a widow is not competent herself to adopt a son unless with the permission of her husband or the consent of the near heirs.

"(v) The plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The defendant, the brother of the deceased, is, under the Shastras as well as a verbal declaration of Ishq Lal, the owner and possessor of the whole of his estate. The plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the defendant will be entitled to it as reversioner."

Evidence having been taken respecting the customs and tenets of the Saraogi Agarwala Jains, the Subordinate Judge, without specially deciding

upon these customs, dismissed the suit on the ground that the plaintiff, by adopting a son who, upon adoption, would become, if his adoption were valid, heir to his father, "had raised a barrier" to her own claim of absolute right. Upon appeal to the High Court, the Judges were of opinion that the Subordinate Judge had not sufficiently inquired into and ascertained the special customs of the Jains, and that he was wrong in dismissing the suit. The Court, therefore, remanded the suit under section 351 of the Civil Procedure Code, and directed that an opportunity should be given for making the adopted son a party to the suit.

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The following passage of the judgment contains the view of the Court with regard to the nature and scope of the inquiry to be made by the Subordinate Judge :—

"We are invited by the pleaders of the parties in this Court to give directions to the Court below on the questions of Jain law which are raised in this suit.

[700] "The Jains have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them ; and for the ascertainment of those customs we think the Court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community in the places in which they are said to be numerous and respectable, *viz.*, Delhi, Muttra, and Benares. The questions to be addressed to these gentlemen would be the following :

"'What interest does the widow take under Jain law in the moveable and immoveable property of her deceased husband, and does her interest differ in respect of the self-acquired property and the ancestral property of her husband? Is a widow under Jain law entitled to adopt a son without having received authority from her husband, and without the consent of her husband's brother? May a widow adopt the son of her daughter? By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband? Has the adoption of a son by a widow any effect, and (if any) what effect in limiting the interest which she takes in her husband's estate? And if the Subordinate Judge considers that the verbal gift which the respondent alleges is established by proof, he might further inquire whether such a gift is valid as against the widow?'"

Upon the suit being thus remanded, Murari Lal, the adopted son, was made a co-plaintiff, the Musammat being appointed his guardian.

Commissioners to take evidence as to the customs of the Saraogi Agarwala Jains were then issued to Delhi, Jeypore, Muttra, and Benares, and several leading members of that division of the Jain community were examined under them at each of these places. The Subordinate Judge has thus summarised their evidence.

"With the exception of one from Delhi, the others unanimously declare that, in the absence of any son, a Jain widow succeeds to the estate of her husband moveable and immoveable, in the absolute right. (ii) That she can deal with it at pleasure and without restriction. (iii) That she can adopt her daughter's son, without requiring any consent or authority from her deceased husband or relative, of such deceased ; and that such adopted son would succeed to her deceased husband's estate in the same manner as her own begotten son would have done, with a slight restriction. (iv) That a nuncupative will by her husband would not be valid as against her ; but this last point does not at all bear on the case, seeing that there is no evidence as to any such will having been pronounced."

[701] The Subordinate Judge then made a decree in favour of the plaintiff in the following terms :

"That the plaintiff is entitled to a decree to be maintained in possession of the zamindari property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted grandson by her daughter, there being nothing to prevent his succession to the estate."

The defendant again appealed to the High Court, one of his grounds of appeal being that the witnesses, except at Jeypore, had not been

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examined on oath. Another ground was, "That the finding of the Subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the plaintiff in favour of the appellant was incorrect."

On this appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been irregularly taken, and being of opinion that it would not be proper to decide the important questions of Jain Law involved in the case upon the evidence of the Jeypore witnesses alone, they determined, before finally disposing of the appeal, to issue fresh commissions from their own Court to Delhi, Muttra, and Benares. These commissions were accordingly issued, and under them the original and new witnesses were examined, whose testimony was given at greater length than that on the first occasion. Upon the return of these commissions, the cause was finally heard by the High Court, and the judgment now under appeal pronounced. It contains the following general account of the history and religious tenets of the Jains:

"The parties are Saraogi Agarwalas, one of the numerous sub-divisions of the sect of Jains. What little is known of the history of that sect is to be found collected in the learned judgment of the Chief Justice of Bombay in *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. 241. For upwards of eleven or twelve centuries they have seceded from the creed of the Vedas, and their religious tenets have more affinity with the precepts of the Buddhists than with those of the Brahmins. They recognise the caste system of the Brahminical Hindus, and in such ceremonies as they retain generally avail themselves of the assistance of a Brahmin.

"They differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is a merely temporal arrangement and has no spiritual object."

[702] The Judges then proceed to an elaborate review of the decisions in India in which the laws and customs of the Jains have been considered. It appears to have been contended before them, to use the words of the Court, "that the applicability to Jains of the laws of the Brahminical Hindus, or what is generally termed Hindu law, had been established by so many rulings that the Court was bound to apply it to this case;" and, further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that, in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that, where these were satisfactorily proved, effect ought to be given to them. The learned counsel for the appellant who argued the case at their Lordships' Bar felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable, if it had appeared that in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindu or Muhammadan, the Courts had denied to the large and wealthy communities existing among the Jains, the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise.

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It no doubt appears from the judgment of the High Court of Bombay delivered by Westropp, Chief Justice, in *Bhagvandas Tejmal* v. *Rajmal*(1) that the Judges of that Court were not satisfied that in the Presidency of Bombay usages had been established to exist among the Jains at variance with ordinary Hindu law. "Hitherto," they say, "so far as we can discover, none but or-[703]dinary Hindu law has been ever administered either in this island or in this Presidency, to persons of the Jaina sect." This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. They also remark upon the impolicy of introducing departures from the general law. Their Lordships, however, do not understand the Judges to say that customs having such an effect may not lawfully be given effect to, if established by sufficient evidence. On the contrary, their judgment contains this passage :

"But when amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

Reference was also made to the observations of this Board respecting the proof required to establish customs in the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2).

The facts in the case before the High Court of Bombay were that, after the death of both husband and wife, the brothers of the deceased husband, with the consent of the "*Panch*" (3), chose a nephew of the husband to be his son by adoption. The evidence given in support of such a custom of adoption was slight, and the Court held that it was not sufficiently proved. It is said in the judgment, "not a single *yati*, or *pandit*, or priest, or other expert, either in the lore of the Jainas or of the Brahmans, has been called to prove the alleged custom." Undoubtedly such a custom being, as the Judges point out, opposed to the spirit of the Hindu law of adoption, would require strong evidence for its support, and such evidence appears to have been wholly wanting in that case.

In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit. This evidence, particularly that taken at Delhi, is entitled to great weight, having regard both to the status of the witnesses and to the consistent manner in which they describe the custom. It is stated in the judgment below that "Delhi is the chief seat of the Jains in the [704] north-west of India, and is the adjoining district to that in which the property is situate." The manner in which the witnesses were called together to be examined, and their position in the Jain community, are thus described in the judgment :

"The Commissioner reports that, on receipt of the Court's commission, he called upon the Deputy Commissioner to furnish him with a list of the names of the principal members of the Jain community residing in Delhi; that out of 125 persons whose names were so furnished, he selected 26 persons, whom he summoned to attend his Court, and that out of the 26, he examined six, of whom two, Zora Mul and Ghyan Chand, were elders of the council of the sect at Delhi appointed to determine all questions of religious and social importance arising in the sect, while the other four persons selected were all of a rank that entitled them to admission to the Lieutenant-Governor's Durbar. Of these also, one Baldeo Singh, deposed he was a member of the council before-mentioned. Furthermore, the Commissioner, at the instance of the appellant, took the evidence of two others out of the 26 persons summoned. As all the witnesses so selected by the Commissioner must be presumed to have been impartial, and as either party was at liberty by the terms of the commission to produce any witnesses he desired should be examined, and the appellant availed himself of this privilege only

(1) 10 B.H.C.R. 241. (2) 14 M.I.A. 570, see at p. 585.
(3) '*Panch*,' the senior members of the community acting as arbitrators.

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so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the Delhi commission."

Their Lordships are relieved from an examination of this evidence in detail, since the learned counsel for the appellant felt constrained to admit that the conclusions drawn from it by the Court were in the main correct. These findings are thus stated in the judgment, and their Lordships entirely concur in them:

"Contrasting this evidence with that given by the independent witnesses examined under the several commissions and having regard to the position which several of the Delhi witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the respondents. It appears to us that, so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a Saraogi Agarwala takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus; that she takes an absolute interest at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs; that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the more reliable **[705]** evidence that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family."

The Court adds:

"We do not, however, desire to be understood as ruling this point in this suit for the widow, and the adopted son has not been separately represented at the bar, and we have not had the benefit of such assistance from the bar on this point as on the other issues, there being at present no contest between the widow and her adopted son as to their respective rights. We shall affirm the decree of the Subordinate Judge declaring the validity of the adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the decree of the Subordinate Judge so far as it declares the widow entitled to be maintained in possession as proprietor, by inserting the alternative, or as manager on behalf of her adopted son."

Their Lordships will advert hereafter to the form of the decree. They will now proceed to consider the objections raised to the suit on the ground that it is merely declaratory, and can lead to no relief. It is scarcely necessary to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board, that S. 15 of the Indian Act VIII of 1859, relating to declaratory decrees, ought to receive the same construction as S. 50 of the English Act, 15 and 16 Vic., c. 86, which is similarly worded, has received from the English Courts. In the last of these decisions the English and Indian cases on the subject were reviewed, and it was laid down that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court.—*Kattama Natchiar* v. *Dorasinga Tevar* (1).

The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to observe that a right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree.

[706] It was contended on behalf of the respondents that the intervention of the appellant in the proceedings of the settlement officer, and his objection to the entry in the *wajibularz* of the name of Murari

(1) 15 B.L.R. 83 = 2 I.A. 169.

Lal as the adopted son of the Musumat on the ground that the adoption was illegal, was an act of obstruction against which they were entitled to relief; and if it had been shown that the entry thus objected to had been necessary to the settlement of the mauza, or the completion of the title, or the right to present possession, the contention might have been well founded. But this has not been shown. It would seem that the mauza had been already granted by the Government to the Musumat, and she had been recorded as proprietor. The object of the paper appears to be, as already stated, to record peculiar customs and rights for the information of the settlement officer; and although the Deputy Collector asked for information as to the Musumat's successor, and upon the appellant's objection to the entry of the adoption, placed his objection upon the *wajibularz* and referred the parties to a Civil Court, their Lordships would have felt great difficulty, to say the least, if it had been necessary to give a decision upon this point, in coming to the conclusion that these proceedings were such an obstruction to the title or right of possession as would sustain the decree.

Another ground on which it was alleged the plaintiffs were entitled to relief was that the appellant had put forward a nuncupative will of his deceased brother, by which he was made the proprietor of the estate, and that the plaintiffs were entitled, if they had asked for it, to a decree annulling that will. It would not probably be disputed that, if a fictitious will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled, and their Lordships are not prepared to say that, in cases where property may legally pass by an oral will, an analogous right to have it declared null may not exist. A claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. The reasons, too, for giving such relief in the case of written wills would seem to apply to nuncupative wills, and one of them, the probable deaths of witnesses, with even greater force to the latter than the former. It was, however, contended on behalf of the appellant that **[707]** relief against this will was not one of the objects of the original suit, which was confined to the intervention of the appellant in the settlement proceedings. Undoubtedly the plaint refers only to this intervention, and the assertion of this will appears for the first time in the defendant's answer. But it will be found, on reference to the proceedings, that the claim was persisted in after Murari Lal had been added as a co-plaintiff, and, indeed, to the end of the suit. One issue framed at the first hearing of the cause was whether the verbal will had been in fact made, and one of the questions put to the witnesses examined upon the customs of the Jains was whether a verbal gift is valid against the widow. The commissions in which this question appeared were issued after the first remand to the Subordinate Judge, and after Murari Lal had been made a co-plaintiff. In his judgment given after the return of these commissions, the Subordinate Judge expressly finds on this issue that a nuncupative will by the deceased husband would not be valid as against the widow; and although he adds that there was no evidence that such will had been "pronounced," the defendant, in one of his grounds of appeal to the High Court, complains that this finding is not correct, and the High Court deals with the question of this will in its final judgment. The contention then on the part of the appellant that his putting forward of this will ought not to be regarded, is reduced to the objection that it was not introduced into the original plaint. It is, however, questionable whether, when Murari Lal was made a plaintiff, the suit ought not to be considered for this purpose as a new suit, and

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whether the appellant, having before that time put forward the claim in question and persisted in it to the end, relief might not, if asked for, have been granted against it. It would not be necessary that the suit should have been in fact remodelled when Murari Lal became plaintiff so as to ask for this relief, it is sufficient if it might have been so remodelled, and relief obtained.

Their Lordships, however, do not think it necessary to give a definite judgment on this question, because they are of opinion that, under the circumstances in which this appeal to Her Majesty comes on to be heard, the appellant ought to be precluded from insisting on his objection to the decree on the ground of its being declaratory only.

[708] In his petition to the High Court for leave to appeal to Her Majesty, the appellant made no reference in the grounds of appeal to this objection to the decree. The leave granted by the High Court having become abortive, in consequence of the deposit for costs not having been made in due time, application to this Board for special leave to appeal was made. In the petition for this leave again no reference was made to this objection, but the application was based on the ground that important questions affecting a large community were involved in the decision sought to be appealed from. This petition, after fully stating the conclusions of the High Court upon the evidence relating to Jain customs, contains the following passage: "The petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance to the sect of the Jain community, to which the petitioner belongs." Their Lordships having, on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the appeal comes on to be heard, not to examine or consider the important questions thus indicated, but to reverse the judgment on a ground which altogether excludes their discussion. Their Lordships do not by any means intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the whole course of the proceedings in the Court below, to which they have fully adverted, the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, they think the appellant ought not, at this stage, to be allowed to insist that, by reason of these objections, the decree appealed from should be reversed.

Exception has been taken to that part of the decree of the High Court which varied the decree of the Subordinate Judge declaring that the widow was entitled to be maintained in possession as proprietor, by substituting the declaration that the widow is entitled to retain possession of the estate, either as proprietor, or as manager thereof on behalf of her adopted son, Murari Lal. The substituted declaration, being in the alternative, is no doubt, in one sense uncertain, but it is independent of the other declarations which decide the right of the parties as between the plaintiffs on the one [709] side, and the defendant on the other, and repel the defendant's pretensions. The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being plaintiffs. It is no doubt on this account that the decree, whilst it declares the rights of the widow to present possession as against the defendant, is framed in a form which avoids prejudice to the rights of the plaintiffs *inter se*.

In the result their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

JAWAHIR LAL AND OTHERS (*Defendants*) *v.* NARAIN DAS AND OTHERS (*Plaintiffs*). [24th April 1878.]

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1 A. 644.

Application for leave to appeal to the Privy Council—Limitation Act XV of 1877, Ss. 4, 12, and Sch. II, Art. 177.

Held, (per Stuart, C.J., Spankie, J. dissenting) that, in computing the period of limitation prescribed by Art. 177, Sch. II of the Limitation Act (1877), for an application for leave to appeal to the Privy Council, the time required for obtaining a copy of the judgment on which is based the decree sought to be appealed against, cannot be excluded under S. 12 of the Limitation Act, 1877.

[F., 15 M. 169, 28 A. 391 (393) = 3 A.L.J. 165 = A.W.N (1906), 55; R., 6 A. 250 (F.B.).]

Application to the High Court for leave to appeal to Her Majesty in Council from a decree of the High Court dated the 20th August 1877.

JUDGMENT.

[644] STUART, C. J.—An application for leave to appeal to Her Majesty in Council having been filed, the question we have to consider is whether the application is within the time (six months) provided by the Procedure Code, Act X of 1877, and by the Limitation Act, XV of 1877, Sch. ii, No. 177, or whether it is beyond time. The limitation in such cases was previously that provided by S. 599 of the Procedure Code, but that section is repealed by the present Limitation Act XV of 1877, and without any substitute for it other than **[645]** that contained in No. 177 of Sch. ii. The date of the decree was the 20th August 1877, and if nothing could be shown to have interrupted the running of the limitation period, the six months expired on the 20th February 1878. But the present application for leave to appeal to Her Majesty in Council was not filed till the 27th February, that is, as reported by the Office, it was seven days beyond time. It was not explained why this application had been delayed till the last moment, till, indeed, after the expiry of the six months, but Mr. Colvin stated that the defendant was now anxious to appeal to the Privy Council, and he argued that he is entitled to seven days beyond the 20th February under S. 12 of the Limitation Act XV of 1877, inasmuch as he is entitled to have reckoned the time requisite for obtaining a copy of the judgment appealed against, as provided by that section. It appears that the defendant applied for a copy of the judgment on the 22nd September, and that it was ready for him on the 28th, although it was stated that he did not actually receive it till the 29th, but in either case, whether the 28th or 29th, he would be entitled to add seven additional days to the period, and his application would be within time. In fact, the seven days would bring him to the 27th February, the very day on which the application for leave to appeal to Her Majesty's Privy Council was made. Mr. Colvin enforced his argument by referring to S. 4 of the Limitation Act, which is in these terms: "Subject to the provisions contained in Ss. 5 to 25 (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence;" S. 12 is thus included among those sections. The portion of S. 12 of the Limitation Act relied,

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on is as follows: "Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded." What is the meaning here of the expression "where a decree is appealed against?" In the sections of the Code of Procedure relating to appeals to the Privy Council, there is a clear distinction between applications or petitions to appeal and appeals themselves, *i.e.*, admitted appeals, and if this portion of S. 12 of the Limitation Act be taken literally, it applies to an appeal alone and not an application. But if that be **[646]** so, where is the necessity for a copy of a judgment? That document can only be required for the preparation of the reasons of appeal which are only appropriate to an application and are evidently not wanted in the case of an admitted appeal. The rather unfortunate and ambiguous expression, therefore, "where a decree is appealed against," must, I think, be understood to mean a proceeding in the way of appeal for which a copy of the judgment is required. It plainly is not required for an admitted appeal, while it is as plainly necessary to an application to appeal. Notwithstanding therefore the obscure and doubtful expression in this part of S. 12 of the Limitation Act, "where a decree is appealed against," I think we must understand by it an application, or proceeding in the nature of an application, to appeal, and therefore if this part of S. 12 applies to appeals to the Privy Council, Mr. Colvin's contention is right, and his application within time.

But I am of opinion that this provision of S. 12 of the Limitation Act does not apply to Privy Council appeals. As for S. 4, even if relevant to some extent to the present case, it does not follow that it compels us to apply to the present case the *whole* provisions of S. 12, but only such one or more of them as are appropriate to an application to appeal to the Privy Council. S. 4 does not say subject to *all* the provisions, but simply to the "provisions," by which I think may fairly be argued is meant such provisions as are applicable and pertinent to the suit, appeal, or application, as it may be. For instance, the first part of S. 12, providing that the day from which the period of limitation is to be reckoned shall be excluded, may of course be applied to the present case. In this view of S. 4, the nature and legal character and conditions of the application or other proceeding must not be forgotten. And if in laying down this principle I am right, then we need not apply the provisions of S. 12 of the Limitation Act to such a case as the present, unless it can be shown that a copy of the judgment is essential to the necessary purpose of an application to appeal to the Privy Council. Now I think it must be conceded that a copy of the judgment is not needed for any such purpose. The procedure and all questions relating to Privy Council appeals ought to be determined solely with reference to the provisions contained in the sections of the Code of Civil Procedure which regulate such appeals. These sections are **[647]** twenty-three in number and form Ch. xlv of the Code headed "Of Appeals to the Queen in Council," and it is quite distinct in itself, comprising within its provisions the whole particulars of procedure necessary in such cases. If a copy of the judgment appealed against had, in the mind of the Legislature, been considered essential, the Code no doubt would have been made so to provide, but neither in the Code itself nor in the Limitation Act is there any express provision of the kind, and it could not, I think, be urged that a copy of the judgment appealed is a requirement suitable to and called for in such an application as this. In an ordinary application to admit an appeal the record is not here, but in the district where the original suit was instituted, and a copy of the

judgment is necessary to enable an appellant here to prepare his reasons. But for the purpose of an application to appeal from a judgment of a High Court to the Privy Council a copy of the judgment is plainly not wanted either by the parties or by the Court, for the record itself is here in the High Court, containing not merely a copy, but the judgment and order actually delivered, together with the whole proceedings in the original District and also in the High Court, and this record is therefore necessarily at hand for use by the parties or by the Judges, and the authentic instruction thus to be obtained must obviously be of greater service than a mere copy of the judgment. When, after admission by the High Court in India, the appeal gets to the Privy Council, it is subjected there to a different ordeal altogether, the cases for the appellant and the respondent, with their reasons respectively, being prepared by their counsel in London. Neither therefore on the true constructions of Ss. 4 and 12 of the Limitation Act XV of 1877, nor by any provision of the Procedure Code, nor for any necessary purpose, does that section apply to Privy Council appeals.

I have observed that the limitation applicable to appeals of this nature was previously that provided by S. 599 of the new Procedure Code, but that section has been repealed by the present Limitation Act, and the limitation now substituted for it by No. 177, Sch. ii, is distinct and imperative and cannot, in my opinion, be enlarged or in any way qualified by S. 12 of the same Act. The intention evidently was to allow the six months and no more, and that that **[648]** long period was considered to be, as it assuredly is, sufficient for all purposes, and not, I am persuaded, that it was intended to add to the six months by the few days that might be occupied in obtaining a copy of the judgment appealed against.

I am therefore of opinion that the seven days, which it is contended ought to be deducted from the time that has run from the date of the decree till the date of this application, cannot be allowed; and the only question is whether the six months provided by the Limitation Act XV of 1877, Sch. ii, No. 177, had expired when this application was presented. It clearly had expired. The date of the decree proposed to be appealed to the Privy Council is the 20th August 1877, and the six months had therefore run out on the 20th of the following February. For these reasons I consider that the report of the Officer is right, and that this application must be refused, but under the circumstances without costs.

SPANKIE, J.—S. 599 of Act X of 1877 provided for the limitation of appeals to Her Majesty in Council, but the section was repealed by Act XV of 1877. The limitation now provided is that to be found at Art. 177, Sch. ii, third division, applications, of Act XV of 1877, and the application is thus described: "For the admission of an appeal to Her Majesty in Council, six months" and the "time from which the period of limitation begins to run" is "from the date of the decree appealed against." Act XV of 1877 amends the law relating to the limitation of (i) suits, (ii) appeals, and (iii) certain applications to Courts. By S. 4, subject, however, to the provisions contained in Ss. 5 to 25 inclusive, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule of the Act *shall* be dismissed. Every application made for which limitation is prescribed in the schedule is apparently brought under S. 4, and is subject to the provisions contained in Ss. 5 to 25 inclusive. If we can find a place for the application before us in any one of these sections, its limitation is saved thereby, and it should be admitted,

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though after time. The second schedule, "appeals," provides the limitation in cases of appeals from the decrees and orders of the *local* Courts to appellate Courts *within this country*. An appeal subject to such rules as may from time to time be made by Her Majesty **[649]** in Council regarding appeals from Courts in British India and to the provisions contained in Ch. xlv of Act X of 1877 *shall* lie to Her Majesty in Council (S. 595 of Act X of 1877). Under the provisions of the Limitation Act application for leave to appeal to Her Majesty in Council, required by S. 598 of Act X of 1877, must be made within six months from the date of the decree appealed against. Therefore the application for leave to appeal is the first step in the appeal itself allowed by right, but subject to conditions. Its object is to appeal the decree, and limitation runs from the date of decree appealed against. The application for leave to appeal to Her Majesty in Council is the *petition* referred to in S. 598 of Act X of 1877 in the following words: "Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of." The petition then is the expression of the desire of the petitioner to appeal to the Queen. It is not an appeal to the Court whose decree is complained of, but it is the mode by which the appeal to Her Majesty in Council must be presented with a view of its being transmitted to England with the record, provided the petitioner fulfils the prescribed conditions. It is then, under S. 603, formally admitted as an appeal; no further petition is required; the original petition is the appeal to Her Majesty. By S. 600 the petition must state the grounds of appeal from the decree, for the appeal allowed is from the decree (*vide* S. 595). The grounds of appeal from the decree must be looked for in the judgment, and by S. 594 of Act X of 1877, in the chapter relating to appeals to the Queen in Council, unless there be something repugnant in the subject or context, the expression "decree" includes the judgment and order. Thus the petition really is the appeal to the Queen in Council, and therefore the time requisite for obtaining a copy of the judgment on which it is founded must also be excluded. This appears from the third paragraph of S. 12 of the Limitation Act, and it is unaffected by paragraph 1 and paragraph 2 of the section, which deal with appeals generally and particular applications, whereas paragraph 3 is exclusively confined to *decrees* appealed against or sought to be reversed. I am therefore of opinion that Mr. Colvin is right in his contention and the petition is within time.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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1 A. 709.

DEBI SINGH (*Defendant*) *v.* BHUP SINGH AND OTHERS (*Plaintiffs*).

[24th April 1878].

1 A. 709.

Suit for pre-emption—Pleader's fee—Principle of assessment.

In a suit for pre-emption, when it is found that the actual price paid for the land is less than that entered in the sale-deed, the pleader's fee to be charged on the opposite party must be calculated, not on the amount entered in the sale-deed, which is found to be false, nor on the amount on which the Court-fee on the plaint was paid, but on the actual value found by the Court to have been paid for the property.

In a suit for pre-emption, valued for Court-fees at Rs. 1,370-5-0 and for jurisdiction at Rs. 6,000 (the amount entered in the deed of sale as the price), the first Court found the actual price to be Rs. 2,300 and decreed for plaintiffs with costs. On appeal to the High Court, it was contended that the fees of the plaintiffs' pleader ought not to be calculated on the amount entered in the sale-deed.

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JUDGMENTS.

[710] PEARSON, J. * * * * * * *

The pleader's fee clearly should not be reckoned upon a valuation of the properties which is found to be false. Whether it should be calculated on Rs. 2,300, the real value as found in the decision, or Rs. 1,370-5-0, the amount on which the Court-fee on the plaint was paid, may be a question. The latest opinion seems to be in favour of the former mode of calculation, which should therefore be adopted in substitution for that which has been adopted in the Court below. With this slight modification, I would affirm the lower Court's decree and dismiss the appeal with costs.

1 A. 709

STUART, C. J.—I entirely approve of the view taken of this case by my colleague, Mr. Justice Pearson, and I quite agree with him as to the principle on which the pleader's fee should be calculated. The appeal is dismissed with costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

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A. L. SEALE (*Defendant*) *v.* BROWN (*Plaintiff*). [24th April 1878.]

1 A. 710=3 Ind. Jur. 72.

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Will—Power of executor under will—Indian Succession Act (X of 1865), S. 269—Mortgage—Power of sale.

Executors under a will have, under S. 269 of the Indian Succession Act, 1865, which makes no difference between moveable and immoveable property, power to dispose of the property of the testator, either wholly or in part, in such manner as they think fit.

After the Indian Succession Act came into operation, an Englishman domiciled in India made a will charging his lands with the payment of his debts. After his death, the executors under the will borrowed moneys from a Bank for the purpose of discharging the debts incurred by them in the administration of the testator's estate, and gave to the Bank a bond for the repayment of such moneys. On the same date, the executors conveyed to the Manager of the Bank, as security for the debt created by their bond, all their right, title and interest in certain estates of the testator, giving him at the same time a power of sale. On the same date, again, the executors executed another instrument, whereby they constituted the Manager of the Bank for the time being, their true and lawful attorney for them and in their names, to sell the estates and do all acts necessary for effecting the same. Default having been made in the payment of moneys due by the executors, the manager of the Bank, in the exercise of the power given to him by the executors, and as their attorney, sold the estates to a certain person. The purchaser, being resisted in trying to get possession by a legatee of the testator, sued the legatee and the executors for the declaration of his right to, and for the possession of, the estates purchased by him. The legatee contended that the executors had no power to confer a power of sale. Held (STUART, J., *dissenting*,) that the executors have, under S. 269 of the Indian Succession Act, authority to confer a power of sale, and that the sale made by the Manager of the Bank in virtue of such power conferred a valid title and operated to convey the property to the purchaser.

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Colonel Robert Henry Seale, an Englishman domiciled in India, who by his will dated the 24th March 1869, charged his real and personal estate with the payment of all his just debts, and appointed his wife, Sarah Emma Seale, and three of his children, Mary Victoria Read, R. E. Seale, and W. F. Seale, his executors, died on the 1st April 1869, and probate of his will was granted to all the persons appointed by him as executors. On the application of Mrs. Seale in December 1869 to the Delhi and London Bank for a loan to discharge debts incurred in the administration of the testator's estate, offering to mortgage a portion of the estate as security for the loan, the loan was granted, a bond to secure the amount being executed by Mrs. Seale, R. E. Seale, and W. F. Seale, as executors, and a mortgage-deed of a portion of the estate being executed by Mrs. Seale as executrix. The debt thus created not having been discharged. on the 21st August 1872, another bond for the amount due was executed by the said three persons, as executors of Colonel Seale, and by the same persons in the same character a portion of the testator's estate was mortgaged to secure the amount due on this bond. Default having been made in payment of this bond-debt. the Delhi and London Bank instituted a suit for its recovery, and for an order directing the sale of the mortgaged property for the satisfaction of the debt.

On the 15th July 1874, the cause came on for trial, but before its decision it was withdrawn, terms having been arranged between the parties, and embodied in the deeds next mentioned. By a bond (20th July 1874) Mrs. Seale, R. E. Seale, and W. F. Seale, describing themselves as executors of the will of Colonel Seale, bound themselves to pay to the Bank Rs. 34,250 and interest. By a second instrument, duly registered and bearing the same date as the bond, the same persons, under the same description, conveyed to the Manager of the Bank, as security for the debt created by their bond, all their right, title, and interest in the estates of the testator known as Rockville and Fairy Land; and, in the event of default being made in payment of the sum secured by the bond, they authorised and empowered the Manager of the Bank, his successors or assigns, absolutely to sell the properties mortgaged either by private sale or public auction for the realisation of the amount due on the bond: to sign a conveyance or conveyances, and a receipt or receipts for the consideration money: and declared that such conveyance or conveyances, receipt or receipts, should be as valid as if signed by them. By a third instrument also registered and bearing the same date, the same persons, under the same description, constituted the Manager of the Bank for the time being their true and lawful attorney for them and in their names, and as their act and deed, to sell the estates of Rockville and Fairy Land, and to do all acts necessary for effecting the premises. Default being again made in payment of the bond-debt, the Bank caused the property to be advertised for sale and eventually found a purchaser. By deed dated the 19th October 1875, which recited that at the date of the original loan Mary Victoria Read was resident in England, and had declined to continue acting as executrix, and which recited the several instruments to which reference has been made, Charles Edward Beresford, described as Manager of the Bank, in exercise of the power of sale, and for the purpose of reimbursing to the Bank the moneys advanced by and due to it, in consideration of Rs. 35,000 granted and conveyed to Isabella Blackburn Brown, the plaintiff in this suit, the estate called Rockville with its appurtenances, and all the estate and interest therein of Mrs. Seale, R. E. Seale, and W. F. Seale, as executrix and executors of the testator, freed from all claims of the mortgage (20th July 1874) and the said Charles Edward Beresford, for the executrix and executors named

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therein, executed the usual covenants for title and for further assurance. In her attempt to obtain possession of Rockville, the plaintiff was resisted by Alfred Leonard Seale, a son of the testator and a legatee under his will.

She accordingly brought the present suit, in which the plaint stated that the plaintiff claimed to obtain a declaration of right to, and recover possession of, the estate called Rockville, or Jabberkhet, situated in the district of Dehra Dun, adjoining the cantonment of Landaur, by virtue of a deed of sale dated the 19th October 1875, and executed under a written power of sale dated the 20th July 1874, from the defendants Sarah Emma Seale, Robert Edward Seale, and William Frederick Seale, acting as executrix and executors of the will of the late Colonel Robert Henry Seale, deceased, the owner of the said estate, the said deed of sale being executed by the defendants the Delhi and London Bank in favour of the plaintiff in consideration of Rs. 35,000; and that the cause of action arose on the 16th December 1875, when the defendant Alfred Leonard Seale refused to deliver possession of the said estate to the plaintiff, and denied the plaintiff's title thereto, as well as the validity of the said deed of sale. On the defendant setting up as defence, amongst other matters, that the deed of sale was invalid, the defendants Sarah Emma Seale, Robert Edward Seale, and William Frederick Seale, having no power under the said will to delegate to the defendant Bank their powers as executrix and executors to sell, the Court of first instance, upholding the deed of sale, decreed in favour of the plaintiff. The defendant thereupon appealed to the High Court.

REFERENCE TO THE FULL BENCH.

[714] STUART, C. J., and SPANKIE, J. referred to the Full Bench the question whether the deed of sale dated the 19th October 1875, being a deed of sale not under the hands of the executors themselves, but by and in the names of the persons to whom they delegated their authority under the power of attorney dated the 20th July 1874, was valid, and was a good and binding conveyance of the property it purported to sell.

JUDGMENTS OF THE FULL BENCH.

STUART, C. J.—I am of opinion that, by the power-of-attorney given by the executors to Mr. Beresford, the Manager of the Delhi and London Bank, they delegated their authority to sell to that gentleman, but that the sale to the plaintiff was and is invalid. I would therefore allow this appeal for the seventh reason assigned, and reverse the judgment of the Court below with costs. I have arrived at this conclusion after anxious consideration of the case, and of the legal principles on which its determination depends. If I have not found any decision or dictum exactly in points, there appears to be in the books the recognition and application of principles and analogies all going to show that the sale by Mr. Beresford to Mrs. Brown was not valid as against the defendant, and that therefore the judgment of the Court below ought to have been for the defendant. Viewed, indeed, in any light, the question thus before us for decision is, in principle, a most serious one, for if what was here done was validly done, then undoubtedly executors and trustees have much larger powers than is generally understood by lawyers, while if these executors have exceeded the limits of their authority, we should be told so by the Court in the last resort. I therefore trust that this case may go further, and that the Judges of the Privy Council may have an opportunity of instructing us on **[715]** the subject. The case is one of pure technical law, having nothing whatever to do with the legal customs and usages of India, nor does even

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the Indian Succession Act, in my opinion, affect it in the slightest degree. The three documents which are material to the case are fully set out in the order of reference by Mr. Justice Spankie and myself; and just let us see how the case stands on these. First, there is the testator's will, in which, with the exception of charging his estate, real and personal, with the payment of all his just and lawful debts, there is no express provision for, or, indeed, any special recognition of the necessity of, such a sale as we have to consider; on the contrary, there is only one special trust to sell, and that for a totally different purpose than for the payment of debts, and appearing to show, too, that in the testator's mind at least there would be no necessity for such a sale as this so-called sale to the plaintiff, *viz.*, one for the personal benefit of one of his sons in consequence of his infirmity and inability to earn a competency, and otherwise for the benefit of the rest of his children. It is also to be considered that the debts for the payment of which the sale to Mrs. Brown was made were not debts incurred by the testator himself and left by him to be paid out of his estates, but debts incurred by the executors themselves in the course of their administration. Then we have the second document mentioned in the reference, *viz.*, the power-of-attorney by which the executors "constitute and appoint the Manager for the time being of the Delhi and London Bank, Mussoorie, our true and lawful attorney for us and in our names, and as our act and deed, to sell and negotiate the sale of the houses and property situate in Landaur, etc., and to perfect all or other act or matter or thing whatsoever which shall or may be necessary or requisite for effecting the premises, we, &c., hereby ratifying and confirming whatsoever the Manager for the time being of the said Delhi and London Bank, Limited, shall lawfully do or cause to be done for us or on our behalf in or about the aforesaid premises by virtue of these presents." Here it will be observed there is no recital of the will or the discretion in it to pay the testator's debts, nor of the fact that there were any such debts existing, and of the necessity of paying those debts by means of a sale of a portion of the estate, and that such estate should be the particular property mentioned, but the Manager of the Bank is simply, and without any [716] reason assigned, directed to sell and negotiate the sale of the houses and property. There is no direction simply to make a subsidiary contract, or to receive offers, which offers are to be communicated to, and considered by, the executors, but a power to negotiate and conclude a sale, and to sell, in the largest and most unqualified sense of the term: and as if this was not enough, the instrument goes on to empower the Manager "to do and to perfect all or any other act or matter or thing whatsoever which shall or may be necessary or requisite for effecting the premises;" that is to say, the Manager is to effect the sale on any terms he pleases, and in effect, to deal with the property directed to be sold as if he himself was an executor or trustee of the will. If this is not a delegation of their office, and, *pro tanto*, of their estate by the executors, I cannot imagine what delegation can possibly mean. One thing is certain, that Mr. Beresford, the Manager, evidently considered it was complete so far as he was concerned, and that he had, by means of it, acquired absolute control over the property which it had been determined to sell, for he proceeds himself, of his own authority, to sell the property, and he executes a conveyance to Mrs. Brown as if the transaction were a matter exclusively personal to him and her. This conveyance or deed of sale, no doubt, contains recitals which go to justify the arrangements to some extent as between the executors and him, but from beginning to end there is not the slightest recognition in this deed of the rights and interests

under the will of the *cestui que trust* and legatees as parties and beneficiaries who are in any wise to be accounted to. The operative part of this deed of sale is remarkable as showing the merely personal character of both seller and purchaser. It is preceded by the following singular recital: "And whereas I (the Manager) being desirous of effecting a sale, &c., under the power hereinbefore recited" (by which he means the general direction in the will to pay the testator's debts), "have for a great length of time advertised the sale in the public newspapers, and have at last received an offer, &c., of Rs. 35,000 to be paid on the execution, registration and delivery of these presents" (and of certain other instruments, none of which contained any recognition whatever of the executors, &c.), "and having communicated the offer to the said executors" (it is not stated that the executors gave any answer about the offer, or **[717]** in any way gave their assent to its acceptance directly or indirectly), "and being satisfied" (that is, the manager being satisfied) "that it is unlikely any higher offer for the said estate will be made, etc., etc., have *decided* upon accepting the said offer and have *duly communicated my acceptance of it*" (to the purchaser, Mrs. Brown), "Now therefore know ye that I the said Charles Edward Beresford, in exercise of the said power of sale" (that is, the power of sale given by the will to the executors), "and for the purpose of re-imbursing to the said Delhi and London Bank, Limited, the moneys advanced by and due to it" (that is, the Manager's own Bank), "and in consideration of the sum of Rs. 35,000 to be paid by the said Mrs. Brown" (it is not said to whom, to the executors or to Mr. Beresford himself), "do by these presents grant unto the said Mrs. Brown, her heirs and assigns all those lands, forests, and houses, and hereditaments." It is unnecessary to go further with this deed of sale, which, it will be observed, contains not only the most absolute and complete, but the most thoroughly independent conveyance, by the Delhi and London Bank, Limited, of all the property comprised in it, and this solely in the interest of the Bank itself, and without the slightest reference to the rights of the defendant as a beneficiary under the will.

Now if all this does not amount to a delegation by these executors to Mr. Beresford not only of the control of the property and its sale, but of *their discretion* and of the *confidence* reposed in them by the will, I do not know what possible arrangement of this kind can have that effect. These executors undoubtedly, in my judgment, delegated their office, and, in doing so, took no sufficient measures, *indeed*, no measures at all, to protect the estate, and all that was done in virtue of that delegation was of course illegal, and the sale to Mrs. Brown was and is invalid. The legal estate remained in the executors, and they undoubtedly did not divest themselves of it by the power of attorney to the Manager, and the right and title to the property remains in the executors still. Although retaining therefore complete dominion over the property under the will, and bound in all transactions relating to it to exercise their own discretion, they left everything to the discretion of their attorney, who appears to have dealt with Mrs. Brown as if the property had become his own or the Bank's independent estate. This they **[718]** could not do—Sugden on Powers, 8th ed., pp. 179, 180—and the result therefore is that as against the defendant Alfred Seale there has been no sale to the plaintiff.

As to S. 269 of the Indian Succession Act, that enactment, as I have said, has nothing to do with the case. It relates solely to direct dealing with, or on account of, the estate by the executor or administrator himself, and not by means of delegation to any other person, or by means of any other intermediary. The case of a mortgage under this section is

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quite different from a sale out and out, for a mortgagor in that case retains in his own person not only the equity of redemption, but the right to pay up the debt on the contract made by it, such contract being the contract of the mortgagor himself, and not of any delegated agent or attorney. For these reasons my answer to this reference is that the sale-deed is not a good and binding conveyance of the property it purports to sell.

PEARSON and TURNER, JJ., concurring.—The questions addressed to this Bench we understand to be the following: Whether the execution of the sale-deed by Mr. Beresford selling under a power of sale created by the executor of a will executed by an Englishman domiciled in India, after the Indian Succession Act came into operation, is valid, and whether, in the absence of other defects, such a conveyance operates to transfer the property sold to the purchaser. We do not understand that our opinion is sought on the question whether the deed of mortgage and the power-of-attorney are invalid by reason that Mrs. M. V. Read was no party thereto, or whether any objection on that ground is not answered by the 271st section of the Indian Succession Act, which declares that, when there are several executors or administrators, the powers of all may, in the absence of any declaration to the contrary, be exercised by any one of them who has proved the will or taken out administration. The three instruments executed on the 20th July 1874 must be regarded as parts of the same transaction. The mortgage was intended to be a collateral security for the bond. The power-of-attorney was intended to give effect to the power of sale in the mortgage. The questions then put to us resolve themselves into these: Are execu-[719]tors under a will to which the Succession Act applies competent to execute a mortgage of immoveable property, to create a power of sale in favour of the mortgagee, and to appoint the agent of the mortgagee their attorney to give effect to the power of sale.

In the case before us the testator charged his debts on his moveable and immoveable property, and in addition to this power executors have, under the Indian Succession Act, S. 269, which makes no difference between moveable and immoveable property, power to dispose of the property of the testator either wholly or in part in such manner as they think fit. It has we are aware been held in England that, before a power of sale has been given to executors, they cannot sell by attorney, but it has also been held by the Courts in that country that an executor may mortgage with a power of sale property which by the law of England wholly vests in him. In *Russell* v. *Plaice* (1), Lord Romilly, when Master of the Rolls, held that a purchaser was bound to accept an assignment of leaseholds executed by a mortgagee under power of sale created by an executor. "The power," said His Lordship, "which an executor, or administrator possesses of making a valid mortgage includes in it a power to give all that is properly incidental to that species of alienation * * The power of sale given to the mortgagee must be considered not as the delegation of a power intrusted to the executor, which is a power to sell, for the benefit of the *cestui que trust*, but as the creation of a new power not for the benefit of the persons interested in the testator's estate, but for the benefit of the persons interested in the mortgage; it is a power to render the mortgage effectual, and the right to create that power is incidental to the authority of the executor to mortgage." In *Bridges* v. *Longman* (2) it was held that a power to raise money by sale or mortgage authorizes a mortgage with a power of sale. We have cited these rulings because

(1) 18 Beav. 21; 18 Jur. 254; 23 L. J., Chanc. 441. (2) 24 Beav. 27.

the learned counsel for the appellant relied in support of his argument on English authorities. But the points raised must be decided by the law of India. The charge of debts on the real and personal estate would probably be held sufficient by itself to authorise a sale or mortgage by the executor for the payment of debts. There is **[720]** it is true no express devise of the estate to the executors, but there is a direction for the application of the rents and profits during the life of the testator's widow, or until her re-marriage, and then a direction for sale, and it may be taken that the testator was aware that by law his estate would vest in his executors, and that he intended the powers and trusts created and declared by his will should be exercised and performed by the executors.

The respondent is not, however, constrained to rely on the charge created by the will. She is entitled to rest the validity of the sale on the power given to executors by the Succession Act, and it is impossible that any power could be conferred in larger terms. The executors may dispose of the property of the deceased "in such manner as they may think fit." This language, in our judgment, authorises an executor to execute a mortgage with a power of sale. It is true that a power of sale is unusual in mortgages made by natives of this country, but it is not an unusual power in mortgages drawn after English precedents, and executed by and in favour of Englishmen resident in India, and, if it were unusual, we are not prepared to hold, having regard to the wide language in which the power to dispose of property is by law given to executors, that a power of sale created in a mortgage by executors would be invalid. For the purpose of his office an executor is by the law of India invested with the same powers of conveying a testator's estate as the owner himself possessed. It is of course his duty to mortgage or sell the estate only when there is necessity for it. But in creating a power of sale in a mortgage he does not, as Lord Romilly pointed out, delegate the duty imposed on him. In the exercise of the discretion conferred on him he has decided that a mortgage is necessary, and as a power of sale increases the value of the security and facilitates the procuring of the required fund at the lowest rate of interest, he for the benefit of those interested under the will creates a new power to be exercised for the benefit of the mortgagee. The power of attorney is simply auxiliary to the power of sale and almost invariably is conferred by the same deed as the power of sale. It is not invalidated by being created by a separate instrument. We therefore reply that the conveyance to the purchaser is not invalid on any of the grounds suggested in the referring order.

[721] SPANKIE, J.—The executors in this case were acting under the authority vested in them by S. 269 of Act X of 1865, and not under any power of sale delegated to them as a trust by the testator relying on the exercise of their own personal discretion and judgment in effecting a sale. The power given by S. 269 of the Succession Act is unqualified. They may dispose of the property of the testator, real and personal, as they think fit. They have the same power to deal with the property that the owner himself would have had. If he could have empowered his agent or attorney to sell the whole or any portion of the property, the executors can do the same by virtue of the large authority given to them by the Act. It would appear that we are not called upon to look to English law in replying to the reference made to us. I would say that the attorney in this case could give a valid title to the purchaser acting as he was under the authority given to him by the executors.

When the case was returned to the Division Court (STUART, C. J., and SPANKIE, J.), in disposing of the appeal, the following further

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observations were made by Stuart, C. J., on the question referred to the Full Bench:

STUART, C.J.—This case was referred by us to a Full Bench as to whether the sale-deed not being under the hands of the executors, but by and in the name of the person to whom they delegated their authority under the power-of-attorney, is valid, and is a good and binding conveyance of the property it purports to sell. All the Judges consulted have now returned their opinions, and, with the exception of myself, they have answered the reference in the affirmative, that is, they are all of opinion that the sale-deed to the plaintiff is a valid conveyance of the property to her.

Having fully considered all that has been recorded by my colleagues, I regret to say that I find myself wholly unable to adopt their reasoning, and I remain of the opinion expressed by me in my judgment in the reference. I am quite clear that S. 269 of the Indian Succession Act has nothing whatever to do with this case. That section provides that "an executor or administrator has power to dispose of the property of the deceased either wholly or in part in such manner as he may think fit." Now this is a proposition which, properly understood, it never occurred to me to controvert. But [722] the question raised in the present case is a very different one, and it is not whether any executor has power to dispose of any portion of the testator's estate as he thinks fit, but whether he can refuse or abstain from disposing of the property himself by handing over the duty, the power, and the discretion to another party, a stranger to the estate and who as a creditor has an interest, not in its profitable or just administration, but an interest of a nature which is necessarily adverse to the interests of the legatees and others who take under the will. The Succession Act in this section appears to me to assume that the power to deal with the testator's estate is a power that must be exercised by the executors themselves directly, and not by a person delegated or authorised by them to act on their behalf, much less a person whose only interest is to obtain satisfaction of his own claims on the estate. As to the case of a mortgage, I have sufficiently expressed my opinion at the conclusion of my answer to the reference.

I may now add that, my attention having been directed by one of my colleagues to the fact, that there is evidence by letters addressed by one of the Seales to the Manager of the Bank showing that the family were extremely anxious to save the property in 1874 and 1875, and that a proposal for the management of the estate in the interest of all concerned was made, and that this proposition was in due course communicated to the Directors of the Bank in London—not a very competent body one would imagine to decide such a question—but that these gentlemen declined to entertain the offer, thinking no doubt more about the assets of the Bank and their responsibility to account for them than of any consideration or favour to the appellant's family being allowed a chance of saving the property. Be that as it may, the fact that the family were willing at the last moment to prevent the sale, adds considerable force I think to my contention that Mr. Beresford had no authority to exercise the power and the discretion reposed in the executors, and that neither could the executors place him in such a position, nor, if they did so place him, could he legally and effectually accept such authority at their hands, so as of himself to give a good title to the plaintiff as purchaser.

I also desire to point out that I never suggested that the bond to the Bank was executed for the purpose of discharging private [723] debts personal to the executors themselves. What I meant to convey was

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that the debt to the Bank had been incurred, not by the testator himself, but by the executors in the course of their administration of the estate; and although they could have sold the property themselves, that is, by a deed of sale under their own hands, subject to their liability afterwards to account for the transaction to the defendant or others concerned, they could not delegate or otherwise transfer the power to do so to a stranger, much less to a creditor of the estate, and who had become such by means of their own administration.

In my judgment in the reference I referred to, although I did not quote from, the well-known work of Sugden on Powers, but I had better give the words of that great authority. In the chapter (1) on the "Transfer of Powers," the learned author lays down the law as follows: "Wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare.*" Therefore, where a power of sale is given to trustees or executors, they cannot sell by attorney. So where a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, Lord Hardwicke said that this must be considered as a power of attorney which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person. Again, where personal estate was given to such charitable use as *A* should appoint, and he directed the money to be applied as *B* should appoint, Lord Hardwicke held the delegation void. So where a testator gave his wife a power to appoint personally amongst their children, and she delegated this power by her will to others, Sir Thomas Clarke determined that the delegation was void; and this is now a settled point. On the same ground a person whose consent is made requisite to the due execution of a power, cannot authorise another as his attorney to consent to any execution of it. This is doctrine, the application of which to the present case derives increased force **[724]** from the fact to which I have already alluded, that the donee of the power was a creditor and claimant against the estate for which the executors were responsible, and had therefore a direct interest opposed to that of the legatees and beneficiaries under the will. On the other hand the author points out that it is the delegation of the *confidence and discretion* reposed in executors and other donees of powers that the law refuses to recognise. He says: "It is frequently contended in practice that the donee of a power cannot execute a deed of appointment by attorney. But the cases by no means authorise this position. They merely establish that the donee cannot delegate the *confidence and discretion* reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion, is delegated. The appointment is in every respect an exercise of his own judgment, and there cannot be any reason why he should not be permitted to execute the *deed* of appointment by attorney (at p. 180)." The meaning of this as applied to the present case is simply that, where the executors or donees themselves make the contract, its execution and completion by deed may be by attorney; that attorney, however, exercising no confidence or discretion or judgment, but merely being the agent or officer deputed to carry the contract

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(1) Ch. vi,, 8th ed., pp. 179, 180.

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already made into effect. Now, in the present case everything was left to Mr. Beresford, the confidence and discretion of the executors was delegated or transferred to him, and he was left to his own judgment to make such bargain as he thought fit for the sale of the estate, a state of things which, if countenanced by any authoritative reading of the law, would, it is easy to understand, lead to the most pernicious consequences.

On all these grounds my judgment is that the sale to the plaintiff was and is wholly illegal. But the Judges consulted in the reference being differently minded, we must for the present hold, as matter of law, that the executors acted within their powers, that therefore the Manager of the Bank acted within his, and that the plaintiff has got a good title to the estate.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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1 A. 650.

KALESHAR PRASAD (*Plaintiff*) *v.* JAGAN NATH AND ANOTHER (*Defendants*). [25th April 1878.]

1 A. 650.

C.P.C. (1859), S. 7—Relinquishment of part of claim—Simultaneous institution.

Where two suits are simultaneously instituted, even if the claims in both of them arose out of the same cause of action and should have been included in one and the same suit, the determination of one of them is no bar to the entertainment of the other; for, in such a case, there is no relinquishment of a claim, and no question of entertainment of a suit *after* such relinquishment or omission, or *after* the institution and determination of the other suit.

[**F.**, 76 P.R. 1890; **Overruled**, 16 A. 165 (172) = 14 A.W.N. 165; **F.**, 76 P.R. 1890; **D.**, 9 M. 279 (280, 281)].

JUDGMENT.

[650] The plaintiff instituted two suits at the same time, one against Jagan Nath, lambardar, for profits of the mauza for 1281 and 1282 fasli, the other against Jagan Nath and another share-holder, Bala Nand, for a settlement of the account of sir-land held jointly by the parties for 1281, 1282 and 1283 fasli. This last suit is the subject of appeal, and was dismissed with reference to the provisions of S. 7 of Act VIII of 1859. The provisions of this section do not appear to us to apply. The suit which is the subject of appeal is **[651]** for an adjustment of the account of profits of sir-land between not only the plaintiff and Jagan Nath, but between them and a third share-holder who is also a defendant, and it is not clear that the accounts of this sir-land are included in the general account of the profits of the village for which the lambardar is responsible to account to the plaintiff, so as to give in both suits the same cause of action to the plaintiff against Jagan Nath. But were it so, the suit would not be necessarily unmaintainable against Bala Nand, and besides we should hesitate to rule that the provisions of S. 7 of Act VIII of 1859 are applicable to such a case as this. Here the plaints in the two suits were filed at the same time. We cannot say that one suit has a priority over the other in point of time. The claims were divided for the convenience of trial, but there was no relinquishment of a claim, and there will be no

question of entertaining a suit after such relinquishment or omission within the meaning of S. 7. There was no institution and entertainment of a suit after one had been already instituted and determined. The suits were not successive, but simultaneous, and to allow the objection, which can only be one of form and not of substance, would be to strain the obvious object of S. 7, which is not to allow persons to be harassed by successive claims. If the Court in which the plaints were filed, considered they should have been tried together, the proper course was to allow one of the plaints to be amended, so as to combine both claims. As this suit has not been tried, and is one for a Revenue Court to determine, we reverse the decisions of the Courts and remand the case for trial on the merits to the Court of first instance. Costs to abide the result.

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APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Turner.

1878 APRIL 30. — APPELLATE CIVIL. — 1 A. 651.

PITAM SINGH AND OTHERS (*Defendants*) *v.* UJAGAR SINGH (*Plaintiff*).

[30th April 1878.]

1 A. 651.

1. *Hindu Law—Joint family—Partition—Compromise.*

In a joint Hindu family, the father fully represents the estate which has devolved on and would on partition fall to, the separate share of himself and his sons; and a compromise entered into by him with reference to the partition of the property between himself and his co-parceners, is, in the absence of fraud or collusion, binding on his sons.

2. *Ibid.—Obstructed inheritance.*

In the case of inheritance liable to be obstructed, the acts of the obstructing or intermediate heir with respect to the property, cannot be questioned by the next heir.

Where, therefore, a compromise was entered into by a father with respect to the partition of the separate property of his deceased issueless uncle, his son was not allowed to question it.

[1—F., 16 A. 231 (233); **R.**, 9 B. 198 (217) (**F.B.**), 31 C 111 (120), 27 A. 203 (250) = 2 A.L.J. 729 = A.W.N. (1904), 244, 1 C.L.J. 388, 12 C.W.N. 687.]

JUDGMENT.

[652] TURNER, J.—The common ancestor to the parties to this suit was Anand Singh, who had five sons, Chattar Singh who died with-**[653]** out issue, Darjan Singh who died in 1823 leaving a son, Chakarpan, Sundar Singh who died in 1826 leaving a widow, Gulab Kuar, Des Raj who died in 1852 leaving a son, Gandharp Singh, and Chattarpat who died in 1829 leaving a widow, Sahib Kuar. Chakarpan had three sons, who are the appellants; and Gandharp Singh had two sons, Ujagar Singh, the respondent, and Madho Singh, who is still a minor. The estates in suit was, after Chattar Singh's death, originally recorded as held in four shares of five biswas each, held respectively by Darjan Singh, Sundar Singh, Des Raj, and Chattarpat. On the death of Darjan Singh, Chakarpan was entered as the holder of his share, and after the deaths of Sundar Singh and Chattarpat, Des Raj was at first recorded as the owner of their shares, but shortly afterwards the names of the widows Gulab Kuar and Sahib Kuar were entered as the holders of their husbands' shares. Again, at a later period, the names of Ajudhia Prasad

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and Budh Singh, who were then aged four and two years old respectively, were substituted for those of the widows. The estate fell into arrears and was eventually sold at auction for a balance of Government revenue, but a farm was given to Chakarpan, Ajudhia Prasad, Budh Singh, and Des Raj. In 1853 the Government having purchased the estate at auction-sale proposed to re-grant it to the old zamindars and farmers, and a report regarding the ownership of the estate was called for. The tahsildar reported that it appeared from the statement of Chakarpan and Gandharp Singh, son of Des Raj, that the widows of Sundar Singh and Chattarpat had made a gift of their shares to Ajudhia Prasad and Budh Singh by deeds attested by the kanungo, and the kanungo confirmed the statement. On the 2nd May 1853, the Collector of Farukhabad inquired of Chakarpan, Gandharp Singh, Budh Singh, and Ajudhia Prasad in what manner they proposed to divide the estate among themselves if it was granted to them by the Government, and they replied that all four would hold five biswas each. The Government eventually agreed to grant the estate on condition that the arrears of revenue which had accrued when the estate was sold should be discharged. This offer was accepted, and each of the four persons above-mentioned contributed his quota. On the 3rd April 1855, the same persons appeared before the revenue officer, and requested that each of them might be recorded **[654]** as the owner of five biswas, and that Chakarpan and Gandharp Singh should be entered as lambardars, and Ajudhia Prasad and Budh Singh as pattidars. It was ordered that a village administration-paper should be prepared, and in that document, which is dated the 5th April 1855, they were entered as in possession each of five biswas. So matters continued until 1864, when, on the 15th November, they agreed to the appointment of arbitrators and an umpire to divide these shares. The arbitration proceedings lasted for upwards of two years, when Gandharp Singh advanced a claim to a ten biswas share, and the arbitrators refused to proceed with their award.

On the 29th March, 1867, Gandharp Singh brought a suit to obtain possession of a two and half biswas share out of the five biswas originally held by Gulab Kuar, then deceased, and for a declaration of his right to a two and a half biswas share out of the five biswas originally held by Sahib Kuar. He alleged that each of the four sons of Anand Singh had, on the death of Chattar Singh, obtained a five biswas share; that the widows of Sundar Singh and Chattarpat had been recorded as the holders of their respective husbands' shares to ensure their maintenance; that these ladies had in 1855 appointed Ajudhia Prasad and Budh Singh their agents to take the account of the profit and loss on these shares, and that in the lifetime of the ladies Chakarpan wrongfully procured the substitution of his sons' names for the names of the widows. He claimed that the estate of Sundar descended on the death of his widow to Chakarpan and Des Raj, and that on the death of Sahib Kuar he would become entitled to possession of one moiety of her share. On the 26th June, 1867, the parties to the suit effected a compromise, agreeing to divide the estate into four lots on the conditions set out in their petition to the Court. A decree was accordingly passed in the terms of the compromise. The respondent now sues to obtain the same relief as was sought by his father in 1867, and a declaration that the arrangement effected by the compromise and the decree are ineffectual. The respondent's father is still alive. There is this difference between the claim asserted by the respondent and his father, that the latter treated the estate as held in separate shares, the former asserts the estate remained joint until 1867. If by "joint" he,

means undivided there is no difference in **[655]** the claims. The Subordinate Judge has decreed the claim. It appears to us impossible to support the decree. Assuming, which is not certainly proved, that the family remained joint until 1867, the respondent's father for all intents and purposes represented the interest in the estate which devolved and would on partition fall to the separate share of himself and his children, and the respondent must be bound by his acts unless he can show such fraud and collusion as would entitle him to relief on those grounds. Of this there is no evidence. On the contrary, Gandharp Singh asserted his claim, and if he forbore to press it in view of the circumstances to which we have adverted, it can hardly be doubted he prudently put an end to litigation which must have resulted in failure. There can hardly be a question that the shares of Sundar Singh and Chattarpat were entered in the names of Ajudhia Prasad and Budh Singh, then mere children, with the consent of Des Raj. Gandharp had by his declarations in 1853 and 1855 provided cogent evidence of his own acquiescence, and had this been absent, there was the difficulty in his way that the property had been granted to Ajudhia Prasad and Budh Singh by the Government. If, as there is strong evidence to show, the property was held in separate shares, the shares of the great uncles of the respondent descended as inheritance liable to obstruction, and he could not question his father's acts. For the reason that there is no proof of any fraud or collusion on the part of Gandharp Singh in entering into the compromise of 1867, the suit cannot be maintained. The appeal is decreed and the suit dismissed with costs.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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1 A. 655.

ALI MUHAMMAD AND OTHERS (*Plaintiffs*) *v.* LALTA BAKHSH AND OTHERS (*Defendants*). [30th April 1878.]

1 A. 655.

Redemption—Limitation Act (1871), Sch. II, Art. 148—Adverse possession.

The mere assertion of an adverse title will not enable a mortgagee in possession to abbreviate the period of sixty years, which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit.

Where, therefore, the mortgagee, in possession of certain property, purchased, before the expiry of the term fixed in the mortgage-deed, the equity of redemption of such property, from a person not entitled to sell it, set up a proprietary title to it and procured mutation of names, etc., *held*, in a suit for redemption brought by the party really entitled to it, more than twelve years after the sale of the equity of redemption, but only three years after the expiry of the term of the mortgage-bond, that the suit was not barred by limitation. (H.C.R., N.W.P., 1875, p. 220, *F.*).

[Ap., 14 B. 279 (280, 281), 21 B. 793 (796); **R.**, 10 M. 189 (191), U.B.R. Civil (1892—1896), 502 (505), 21 B. 424 (426), U.B.R. (1897—1901), 464 (466).**]**

JUDGMENT.

[656] The estate of which redemption is sought in this suit belonged to Kali Khan, and had before his death been in mortgage, and in June 1854, was re-mortgaged for a term of 20 years to Lalta Bakhsh and Lakhan Singh, the sons of the former mortgagee, by his sons Azmat and Niamat. On the 31st July 1863, it was sold to the respondents by his

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widow, Munni, as her own property, and the sale transaction is said to have been followed by mutation of registry, notwithstanding an objection preferred by the present appellants in the registry department. Shortly before the expiry of [657] the terms of the mortgage, his daughter, Imaman, sued to establish her right to a share of the estate as one of the heirs of her father and brothers. On the 18th September, 1874, the Court of first instance passed in her favour a decree which was upheld in special appeal by this Court on the 22nd June 1875. She and other heirs of Azmat and Niamat aforesaid have now joined in this suit for the redemption of the mortgage. Her claim is not disputed, but the claim of the plaintiffs, appellants, is resisted by the defendants, respondents, Lalta Bakhsh and Lakhan Singh, the original mortgagees, on the ground that, as more than twelve years have elapsed between the date of the deed of sale executed by Munni and the date on which the present suit was instituted, their rights have ceased to exist. The defence has been accepted by the lower Courts as a complete and conclusive answer to the suit. The Court of first instance holds their claim to be barred by the general limitation of twelve years. The lower appellate Court, concurring, expresses its opinion that, as the plaintiffs, appellants here, did not sue within twelve years from the 31st July, 1863, to avoid the sale deed of that date, the defendants, respondents, must be considered to have been in adverse possession from that date of the property which those plaintiffs claim to redeem as belonging to them.

The suit as brought is simply a suit of the nature described in Art. 148, Sch. ii of Act IX of 1871. Sixty years is the period of limitation fixed for such a suit. The ruling of the Court below that the suit is barred by limitation is obviously wrong; but of course the suit is liable to be dismissed if the plaintiffs, appellants here, have really lost their rights by reason of not having sued to set aside the sale-deed of the 31st July 1863, within twelve years from that date. S. 29 of Act IX of 1871 declares that, at the determination of the period limited to any person for instituting a suit for possession of any land, his rights to such land shall be extinguished; but it does not appear that the plaintiffs, appellants, have lost their rights under the operation of this section, inasmuch as the right of redeeming and recovering possession of the landed property in suit only accrued to them in June 1874, on the expiry of the term of mortgage. The possession of Lalta Bakhsh and Lakhan Singh under the deed of mortgage of June 1854, of the rights conveyed to them thereby was certainly not adverse to the mortgagors of their repre-[658]sentatives, who still remained possessed of the equity of redemption, or the right of re-entry on their property after the term of mortgage on re-payment of the mortgage-debt. It does not appear that the plaintiffs, appellants, were divested of this right by the sale-deed of the 31st July 1863, to which they were not parties. Munni, by whom it was executed, could transfer or surrender her own rights, but was not legally competent to transfer or surrender the rights remaining in the property of the plaintiffs, appellants, and those rights consequently could not pass to her vendees by means of that instrument. How then the possession of the original mortgagees, which was not adverse before the 31st July 1863, became after that date adverse to the plaintiffs, appellants, it is not easy to understand. The possession of a mortgagee does not become adverse whenever a mortgagee chooses to style himself or is styled proprietor of the mortgaged property. One does not see then why the plaintiffs, appellants, were bound to sue for the avoidance of what was actually void. The sale-deed by which their rights were illegally disposed of did not practically effect them, for their

rights of re-entry by redemption could not practically be enforced until the expiry of the term of mortgage in June 1874, and therefore, although its execution would doubtless have justified them in suing for its avoidance, had they deemed such a precaution expedient, such a proceeding was not necessary or obligatory upon them. They required no immediate relief. Now that they are asserting their right of redeeming the property from those to whom it was mortgaged by persons whom they represent and to whom they have succeeded in title, it is surely for the mortgagees, if they dispute the right in reliance on the deed of sale of the 31st July 1863, to show that it destroyed that right. The mere exhibition of their names as the vendees of the property in the proprietary registers of the revenue department cannot create a proprietary title in them: such a title must be proved to have a legal origin. The ruling of the lower Courts is in direct contravention of the Full Bench ruling in *Sheopal* v. *Khadim Hossein* (1), to the effect that the mere assertion of an adverse title will not enable a mortgagee in possession to abbreviate the pericd of 60 years which the law allows to a mortgagor to prosecute his right to redeem and **[659]** seek his remedy by suit. There is no evidence that the defendants, Raghu Nath and Khuman Singh, who have not defended the suit, have ever been in possession of the property in suit under the sale-deed of the 31st July 1863. The defence which the lower Courts accepted must be rejected as untenable. Reversing the decree of the lower Court in so far as it dismisses the claim of the plaintiffs, appellants, we decree this appeal and claim with costs in both Courts.

1878 APRIL 30. — APPEL-LATE CIVIL. — 1 A. 655.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

MUHAMMAD ALI (*Plaintiff*) *v.* KALIAN SINGH (*Defendant*).

[30th April 1878.]

1 A. 659.

Sir-land not included in Rent-roll – Suit for profits of such land.

The fact that a certain sir-land is not included in the rent-roll of the village, or that it has not been assessed with rent under S. 14 of the N.W.P. Rent Act, does not debar a proprietor of the mahal from claiming his share of the profits of the sir-holding.

1878 APRIL 30. — APPEL-LATE CIVIL. — 1 A. 659.

JUDGMENT.

[660] PEARSON, J.—It appears that the mahal of which the plaintiff claims one share of the profits of 1283 fasli belonged in equal shares to the defendant and his two brothers, who held 159 bighas and 9 biswas of land as sir in partnership. The plaintiff recently acquired the share of one of the brothers by name Sultan Singh by purchase at auction. The sir-land is not included in the rent-roll, but is admitted by the defendant to be assessable at five rupees per bigha. The Court of first instance considered the plaintiff to be entitled to a third of the assessable rent, after making the deduction of four annas per bigha required by S. 7 of Act XVIII of 1873 in favour of an ex-proprietary tenant. The lower appellate Court has ruled that he is not entitled to claim a share of the profits from the sir-land aforesaid because it has not been assessed with rent

(1) H.C.R., N.W.P., 1875, p. 280.

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1 A. 659.

under S. 14 of the Act above-mentioned. The special appeal calls in question the correctness of the ruling. The section on which it purports to be based provides for the enhancement or determination of the rent of an ex-proprietary tenant. How it would possibly be applied in a case like the present in which Sultan Singh has no separate holding but holds jointly with his brothers the sir-land aforesaid, it is not now necessary to discuss. There is some show of reason in the appellant's contention that, if action in the matter should be taken under the section, it ought to be taken by the defendant who is the lambardar of the mahal. [661] But whatever may be the course proper to be taken for the purpose of assessing the sir-land or Sultan Singh's share of it with rent, we are not prepared to admit that, because such course had not been taken, the plaintiff is debarred from claiming and obtaining his fair share in the profits of the sir-holding. To this he seems entitled in reason and equity, and we decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice.

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CRIMINAL.
1 A. 664.

EMPRESS OF INDIA *v.* BHAWANI AND ANOTHER.

[6th May 1878.]

1 A. 664.

Evidence Act, S. 530—Confession by one of several co-accused.

Although the law allows a Court to consider statements made by accused persons when dealing with the case against other accused persons, who are tried with them, a conviction based on such evidence only, without corroboration on a material point, is not proper.

[F., 1 A. 675.]

The Deputy Commissioner of Jhansi tried certain persons, 11 of whom were residents of the same village on a charge of *dacoity*. On the confession of some (of the 11) who pleaded guilty, Pheran and Bhawani (of the remainder of the 11) were convicted and the conviction was upheld by the Commissioner of Jhansi.

Bhawani and Pheran appealed to the High Court.

JUDGMENT.

[665] TURNER, O.C.J.—It is to be regretted that, in a case of this magnitude, no evidence was obtained by inquiry to support the charge against the accused. Had none of them confessed, not one of them could have been convicted. But where the police inquiry (if indeed there was one) so completely fails, it was competent to the Deputy Commissioner to have tendered a pardon to such of the accused as he considered were the least guilty, and then to have obtained some evidence better than the mere statements of accused persons to bring to justice those whom he regarded as the most influential among the accused. Although the law allows a Court to consider statements made by accused persons when dealing with the case against other accused persons who are tried with them, I know of no instance in which on such evidence only a conviction has been affirmed, and I should hesitate to establish a precedent. It appears to me that if, as has been established by experience, the evidence of an approver

examined on oath and liable to cross-examination ordinarily should not be accepted without corroboration on a material point, *a fortiori* such corro-[666]boration should be required to support the statement of a person naturally desirous of earning the favour of the Court in the hope of a lenient sentence, who makes a statement which does not expose him to the penalties of perjury, and who cannot be cross-examined by the other accused in turn. There existing against the appellants no other evidence than such statements, I do not consider them by themselves sufficient to place the guilt of the appellants beyond reasonable doubt, and I therefore acquit them.

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APPELLATE CRIMINAL.
1 A. 664.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Spankie.

EMPRESS OF INDIA *v.* PARTAB. [20th May 1878.]

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CRIMINAL JURISDICTION.
1 A. 666.

1. *Whipping Act, VI of 1864, Ss. 2, 3—Sentence of whipping—Previous conviction—Penal Code, Ss. 378, 411.*

Held, that, on conviction for dishonestly receiving stolen property, the accused could not be sentenced to be whipped in addition to rigorous imprisonment, on the ground that he had been twice previously convicted of theft, as the offence of theft is not the same as that of dishonestly receiving stolen property.

2. *Crim. Pro. Code, 1872, Ss. 504, 505—Security for good behaviour on conviction.*

Where a person was sentenced to a period of imprisonment for having dishonestly received stolen property, and also ordered to furnish security for good behaviour, *held*, that the order requiring security should not have formed part of the sentence. There should have been a proceeding drawn out representing that the Magistrate was satisfied, from the evidence as to the general character adduced before him, that the accused before him was by repute an offender within the terms of S. 500, Crim. Pro. Code, and therefore security would be required of him. An order also should have been recorded to the effect that, on the expiration of the term of imprisonment, the prisoner should be brought up for the purpose of being bound over.

[2—F., 9 C. 215 (216).]

Partab, who was convicted by a First Class Magistrate of dishonestly receiving stolen property, confessed on his trial that he had twice previously been convicted of theft, and the sentence passed on him was as follows :—"The sentence of the Court upon the prisoner is that he receives thirty stripes, and be kept in rigorous imprisonment for the space of two years, including three months' solitary confinement; and the Court further directs that, on the expiration of this term of two years, the accused Partab shall furnish security, himself in Rs. 100, with two sureties of Rs. 100 each, to be of good behaviour for the further term of one year. In default of furnishing such security, he shall be kept in rigorous imprisonment for such further term of one year." Partab appealed to the High Court.

JUDGMENT.

[667] SPANKIE, J.—The whipping in this case might have been awarded *in lieu* of the punishment to which the accused was liable under S. 411, and if previously convicted of an offence under this section, he might have been punished with whipping *in lieu of or in addition to* any

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other for which he would have been liable for the offence. But there is no record of previous convictions of the accused. He does not admit that he was twice before punished for a similar offence to that with which he was now charged. He stated that he had been twice punished for theft, but the offence of theft is not the same offence as that of dishonestly receiving stolen property, knowing the same to have been stolen. Whipping therefore should not have been added as a punishment, and that portion of the sentence is annulled.

1 A. 666.

[668] In making an order for security for good behaviour, I presume that the Magistrate holds the powers of a first class Magistrate, and that he was acting under S. 505 of the Criminal Procedure Code. I have some doubt whether the Magistrate had adduced before him such *evidence as to general character* as to justify his dealing with the accused as a person known by repute to be a thief or receiver of stolen property. He had already sentenced the accused for the offence of which he was found guilty, and in the record of the trial I find no evidence from which it could be gathered that the accused was by repute a receiver of stolen property. But the prisoner certainly allowed that he had been punished twice for theft, and here he was again tried and found guilty of receiving stolen property. I am therefore unwilling to disturb the order. But the order should be no part of the sentence for the offence of which the accused was convicted. There should have been a proceeding drawn out representing that the Magistrate from the evidence as to general character adduced before him in this case, was satisfied that Partab was by repute an offender within the terms of S. 505 of the Criminal Procedure Code, and therefore security would be required from him. But as he had been sentenced to two years' rigorous imprisonment, which term has not expired, an order should have been recorded to the effect that, on the expiration of the term, the prisoner should be brought up for the purpose of being bound (Cl. 2, S. 504).

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FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

THAKUR PRASAD (*Decree-holder*) *v.* AHSAN ALI AND ANOTHER (*Judgment-debtors*). [27th May 1878.]

1 A. 668.

1 A. 668.

1. *General Clauses Act, S. 6—Execution proceedings.*

The provisions of S. 6 of the General Clauses Act operate on proceedings in execution of decrees. (2 B. 148, *Appr.*)

2. *Saving of "proceedings commenced" extends to appeals also.*

The saving of "proceedings commenced" extends to appeals from such proceedings. (6 Bom. H.C.R., A.C.J. 166, *Appr.*)

Where, in execution of a decree for money, the attachment of certain moneys, deposited in Court to the credit of the judgment-debtor, was applied for and refused by the Court of first instance and also on appeal, *held*, in special appeal from the order of the appellate Court, presented after the Civil Procedure Code, 1877, came into operation, (the execution proceedings having been commenced before it came into operation), that the appeal lies under the old Civil Procedure Code by virtue of the General Clauses Act, S. 6, and also under Act X of 1877.

[1 and 2—Diss., 2 A. 74; **F.**, 2 A. 91; **Ap.**, 13 C. 86 (89); **R.**, 1 A. 745 (747); 1 A. 748 (750), 12 B. 449 (452), 16 C. 267 (273) **(F.B.).]**

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1 A. 668.

JUDGMENT OF THE FULL BENCH.

[669] TURNER. O.C.J., and SPANKIE and OLDFIELD, JJ., concurring. —In the case in which this application is presented, the decree-holder applied for execution of his decree by the attachment of moneys deposited in the Court to the credit of the judgment-debtor. On the 4th June, 1877, the Court of first instance refused attachment on the ground that the decree directed the sale of certain immoveable property for the satisfaction of the sum decreed, and awarded no other relief. The order of the Court of first instance was affirmed by the lower appellate Court on the 4th August, 1877. The new Code of Civil Procedure came into operation on the 1st October, 1877. On the 13th November, 1877, the decree-holder applied for the admission of a special appeal from the order of the lower appellate Court on the ground that the decree had been misconstrued. The Judge to whom the application was made referred it to the Full Bench. Two questions are raised in this reference: whether the application is governed by the provisions of the repealed Code of Civil Procedure or by those of the existing Code; and if by those of the existing Code, whether the second appeal lies from the order of the lower appellate Court.

[670] The 3rd section of the Code now in force, Act X of 1877, declares that the enactments mentioned in the second schedule in that Act (which includes so much of Acts VIII of 1859 and XXIII of 1861 as had not been theretofore repealed) were thereby repealed, subject to the proviso that nothing in that section contained should affect the procedure prior to decree in any suit instituted or any appeal presented before that Code came into force. The proviso does not go on to exclude in express terms the operation of the General Clauses Act, but by implication it does exclude the operation of the 6th section of that Act in respect of the procedure after decree in suits or appeals. While then it is not denied that proceedings in execution of decree initiated after the existing Code came into operation must be governed by the provisions of that Code, the question remains whether such proceedings initiated before the Act came into operation are affected by that law, so that thereafter they must be governed by it, or whether they are not to be prosecuted and brought to a conclusion as if the law under which they were instituted were still in force. By the 6th section of the General Clauses Act it was enacted that the repeal of any Act should not affect any proceedings commenced before the repealing Act shall have come into operation.

That the provisions of S. 6 of the General Clauses Act operate on proceedings in execution of decree has been already held by the High Court of Bombay (1), and we agree with the opinion expressed by the learned Chief Justice, Sir Michael Westropp, that the chapter of the Code which deals with execution of decree is prospective and does not affect proceedings already commenced. We may refer to several sections in support of the view. S. 311 empowers the decree-holder or any person whose property has been sold *under that chapter* to take objection to the sale on the ground of a material irregularity in publishing or conducting it, but it makes no reference to sales which have taken place under the repealed Code, though the period allowed for such objections under that Code might not have expired when Act X of 1877 came into operation. S. 312 declares orders passed under the preceding section final, but it does not refer to similar orders **[671]** passed under the repealed Code. S. 283 declares any party affected by an order passed under Ss. 280, 281, 282,

(1) 2 B. 148.

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entitled to institute a suit to establish his right to the property in dispute, but it is silent as to similar orders passed under the provisions of the repealed Code. Lastly, S. 588 declares that an appeal shall lie from certain orders "under this Code." Among the orders specified as appealable are some which would be passed after decree, and which, if passed under the repealed Code, would under that Code have been appealable. It is not unreasonable then to conclude that, in abstaining from making provision for cases arising under the repealed Code in the instances to which we have alluded, and in giving prospective effect to the chapter relating to execution of decrees, the Legislature had in view the provisions of the General Clauses Act.

However this may be, unless the 6th section of the General Clauses Act is excluded by the Code, and as we shall presently show it is not in our judgment excluded, in respect of proceedings in execution, it cannot be disregarded, and its effect is to leave such proceedings initiated before the repealing Act came into force to be dealt with under the provisions of the repealed Code. For the position that the saving of "proceedings commenced" from the operation of a repealing Act extends also to appeals from such proceedings, we find authority in *Ratanchand Srichand* v. *Hanmantrav Shivbakas* (1). An appeal is in fact a stage of a proceeding, and if, as it might happen, the right of appeal was taken away by a repealing Act, and a proceeding theretofore appealable converted into a final proceeding, it cannot be doubted that the proceeding would be affected by the alteration of the law. If in such a case it be intended to deprive the parties of the right of appeal, the intention to exclude the operation of S. 6 of the General Clauses Act should appear clearly in the repealing Act.

For the reasons we have stated, we arrive at the conclusion that proceedings in execution of decrees instituted under Act VIII of 1859 are to be governed by the provisions of that Code, and that an appeal should be entertained from all orders passed in such proceedings which under the provisions of that Act were appealable. **[672]** But it has been suggested that, inasmuch as by S. 647, Act X of 1877, the procedure in that Act prescribed is to be followed, so far as it can be made applicable, in all proceedings other than suits and appeals, the provisions of the last paragraph of S. 3 declaring that nothing in the Act contained shall affect the procedure prior to decree in any suit instituted, &c., apply also to proceedings in execution, so that the procedure in such proceedings (whether instituted before the passing of the Act or not) subsequently to the formal order of the Court wherein the result of the proceeding is embodied is governed by the provisions of Act X of 1877.

That proceedings in execution of decree are among the proceedings other than suits or appeals to which S. 647 applies may be admitted. The Code, following the usage in this country, does not treat appeals as mere stages in a suit; and similarly, under Act VIII of 1859, proceedings in execution of decree have in accordance with the same usage been treated, not as stages in a suit, but as miscellaneous proceedings. The provisions of the analogous section in the former law, S. 38, Act XXIII of 1861, were held by this Court applicable to proceedings in execution of decree (2), on the same ground on which it must be held that the provisions of S. 647 are applicable to such proceedings, namely, that otherwise no procedure is provided for such proceedings. It does not, however, follow from the admission that the provisions of S. 647 are applicable to proceedings in execution of decree, that we must be compelled to the conclusion that

(1) 6 Bom.H.C.R., A.C.J., 166.

(2) 1 A. 178; 1 A. 180.

the last paragraph of S. 3 is also applicable to the proceedings, or to all the proceedings, to which S. 647 applies. While had such been the intention of the Legislature, it could have been made to appear clearly by the introduction of a few words in S. 3, we find cogent evidence to the contrary in the prospective character of the sections relating to execution of decree to which we have already adverted. We would then reply that the last paragraph of S. 3 is not to be extended to proceedings in execution of decree. Should, however, our opinion on this point be erroneous, it would be necessary to consider what are the orders passed in execution of decree referred to in S. 588, cl. (*j*), and whether other orders passed in execution of decree are appealable under the Code **[673]** save such as are referred to in S. 588, cl. (*j*); and inasmuch as these questions are necessarily raised in a number of references which are now before the Court arising out of proceedings instituted after the Act came into operation, it will be convenient to dispose of them on the reference now before us. By the provisions of the first paragraph of S. 588 read with cl. (*j*) appeals are allowed from orders under S. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit. The first observation that arises on this section is that, if, as we have held, the provisions of S. 647 apply to proceedings in execution of decree, cl. (*j*) is unnecessary, unless it was intended to restrain the larger right of appeal that would be given by S. 647. Yet unless we import a limitation which the terms do not warrant, the clause declares no more than is implied in S. 647, for, under S. 647 the procedure prescribed by the Act is to be followed in proceedings other than suits, and consequently the orders passed in such proceedings would be open to appeal when of the same nature as appealable orders made in the course of a suit. It is then argued that the term "orders" made in the course of a suit is to be confined to orders passed in the course of a suit prior to decree, and that inasmuch as the Code distinguishes between appeals from orders and appeals from decrees, the Court is constrained by the declaration that an appeal shall lie from those orders and no other such orders, to hold that no orders passed under S. 244 are open to appeal save such as are of the same nature with appealable orders passed in the course of a suit prior to decree.

On referring to S. 244, it will be seen that all the questions therein mentioned are to be determined by the "order" of the Court. They embrace not only the minor questions which may arise prior to determination of a proceeding, but the determination of a proceeding itself, which may be a matter of the utmost importance to the parties. It is scarcely to be supposed that no appeal would be provided from such orders, while an appeal is given from interlocutory orders of comparatively minor importance.

Again, orders passed after decree as well as orders passed before decree may be properly termed orders passed in the course of a suit, and indeed the decree itself is in one sense an order, **[674]** and is so defined in the Code. By adopting the construction which has been urged, we import a limitation which, as we have said, the terms of the clause do not warrant. We are then compelled to the conclusion that the provisions of S. 588 do not embrace all the directions on the determination of proceedings which are termed in the Code "orders," and that, in declaring that an appeal should lie from the orders therein mentioned and from no other such orders, we must understand orders of a similar nature to those specified, and not to all "orders" that might be passed under the Code. The expression "orders" under S. 244 as to questions relating to execution of decree of a similar nature to appealable orders made in the course of

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a suit would be awkward if it were intended to apply to orders determining such questions; and again orders made in the course of a suit may fairly be understood as not embracing the order which is also the decree. While then the provisions of cl. (*j*) allow an appeal from the orders made in the course of execution-proceedings where an appeal is allowed from similar orders passed in the course of a suit, the provisions of S. 647 declare that the procedure prescribed by the Act shall be followed (so far as it is applicable) in all proceedings other than suits and appeals. It follows that an appeal will lie in such proceedings from the order which is analogous to a decree in a suit.

The definition of the term "decree" supports the conclusion at which we have arrived. "A 'decree' means the formal order of the Court in which the result of the decision of the suit or *other judicial proceeding* is embodied." Applying this definition to proceedings in execution of decree, we feel ourselves at liberty to hold that the formal order of the Court in which the result of the proceeding is embodied, is a decree within the meaning of that term in the Code. It is therefore appealable in all cases in which a decree is appealable, and the procedure must in such cases be governed by the provisions of the chapters which relate to appeals from decrees.

It is true that the definition of the term "decree" is so large as to embrace some of the orders which are appealable under S. 588, but we are not on that account at liberty to reject it. It is also true, as we have shown, that cl. (*j*) is, on our construction of S. 647, superfluous, but the clause does not appear in any draft of the **[675]** Code submitted to the Council save the last Bill, No. 5, and it may be that the effect of S. 647 escaped attention.

We reply to this reference that the application is governed by the proverned bythe repealed Code, but that, if it be governed by Act X of 1877 ined freal would lie from the order.

PEARSON, J.—The appealed order falling within the definition of a decree contained in S. 2 of Act X of 1877, is, in my opinion, appealable under S. 584 of that Act.

The appeal appears to be admissible also under the repealed Act VIII of 1859, under the provisions of S. 6 of Act I of 1868.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice and Mr. Justice Spankie.

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1 A. 725.

AFZAL-UN-NISSA (*Plaintiff*) *v.* TEJ BAN (*Defendant*). [27th May 1878.]

1 A. 725.

Reception in evidence of unstamped pro-note—Irregularity not affecting the merits—Appellate Court's powers.

1. The reception in evidence of an unstamped pro-note is an irregularity not affecting the merits.

2. Such an irregularity does not justify an Appellate Court in reversing the decree of the Court of first instance.

The Court of first instance, treating an unstamped promissory note (chargeable with a stamp duty of 15 annas under Act XVIII of 1869),

the after-stamping of which was inadmissible, as a bond, and receiving such bond in evidence, on payment of the requisite stamp duty and the penalty, passed a decree in favour of the plaintiff. But the lower appellate Court reversed it and dismissed the suit. The plaintiff preferred an appeal to the High Court.

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JUDGMENT.

[726] TURNER, O.C.J.—The document could not be received in evidence on payment of any penalty. It should not then have been received in evidence, but it having been admitted by the Court of first instance, the lower appellate Court was not justified in reversing the decree of the Court of first instance and dismissing the suit, for the irregularity did not affect the merits. The decree of the lower appellate Court cannot be supported on the ground on which it proceeds. The appeal to the Judge must then be tried on the merits, and if, as the appellant alleges, and as she proved to the satisfaction of the Court of first instance, the note was given to induce the appellant to consent to the mutation of names, the consideration is sufficient, and the appellant will be entitled to a decree. The costs of this appeal will abide and follow the result.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Pearson.

1878 MAY 28. — APPELLATE CRIMINAL. — 1 A. 675.

EMPRESS OF INDIA v. RAM CHAND. [28th May 1878.]

1 A. 675.

Evidence Act, S. 30—Confession made by one of several co-accused—Its value.

[R., 25 C. 594 (F.B.).]

This case merely follows 1 A. 664, for which see p. 512, *supra*.

PRIVY COUNCIL.

PRESENT:

The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith and the Right Hon. Sir Robert Porrett Collier.

1878 MAY 31. — PRIVY COUNCIL. — 4 C. 184=3 Suth. P.C.J. 553=5 I.A. 171 =1 C.L.R. 113=3 Saraswati's P.C.J. 840.

On Appeal from the Court of the Commissioner of Fyzabad, Oudh.

MAHARAJAH PERTAB NARAIN SINGH v. MAHARANEE SUBHAO KOER. [31st May 1878.]

4 C. 184=3 Suth. P.C.J. 553=5 I.A. 171=1 C.L.R. 113=3 Saraswati's P.C.J. 840.

Privy Council order, grounds for re-opening.

The finality of a judgment of the Privy Council, particularly after its confirmation by an order in Council, cannot be generally questioned. Such an order will not be allowed to be re-opened or varied, unless it is shown that, by some accident, without any blame and without any default on the part of the party himself, he has not been heard and an order has been inadvertently made as if he had been heard. (1 Moore's P. C. Ca. 117 and L. R. 2 P.C. 274, *Appr.*)

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JUDGMENT.

[184] The Right Hon. Sir JAMES WILLIAM COLVILE.—

This application seems to involve two distinct questions:—

1*st*. Whether the petitioner, if assumed to have been properly made a party to the suit in the Courts below, and bound by the proceedings therein, is entitled to have a re-hearing of the appeal by reason of his not having entered an appearance as [185] respondent to the appeal, or authorized any person to do so for him; and of the appellant having failed to take the usual steps against him in order either to compel his appearance, or to have the appeal regularly heard *ex parte* against him.

2*ndly*. Whether, under the circumstances stated in the petition, he ought not to be treated as a person not properly represented in the suit in the Courts below, and therefore not bound by the proceedings therein; and if so, whether he is entitled to have the order of Her Majesty in Council varied so as to prevent its being used against him as a bar to any proceedings which he might otherwise be entitled to take in the Courts of India.

The first question must, their Lordships think, be answered in the negative. The jealousy with which this tribunal regards any attempt to question the finality of one of its judgments, particularly after its confirmation by an order in Council; the very rare instances in which such an order has been allowed to be re-opened or varied; and the peculiar grounds upon which, if at all, this can be permitted are elaborately considered in Lord *Brougham's* judgment in the case of *Rajunder Narain Roy* v. *Bijoy Govind Singh* (1); and in the more recent case of *ex parte Kistonath Roy* (2). It results from these authorities that the thing cannot be done unless by some accident, without any blame and without any default on the part of the party himself, he has not been heard and an order has been inadvertently made as if he has been heard.

Now, what are the facts in this case as regards the proceedings on the appeal here. The appellant, who has been successful here, brought his suit in the proper Court of Oudh for a declaration of his title as the successor of *Talookdary* estates of the late Maharajah *Man Singh* (not praying for a decree of possession) against the Maharanee and widow of *Man Singh*, the petitioner, then an infant, as represented by *Luchmi Nath*, his brother and guardian, and two other parties (one being *Luchmi Nath* in his own right), who, for the present purpose, may be left out of consideration. The Court of first instance dismissed the plaintiff's claim, and that decree was affirmed by [186] the Appellate Court, with only a variation as to the costs of the suit, which the Appellate Court directed to be paid to all parties out of the estate, instead of leaving each party to bear his own costs. In the heading of both decrees the petitioner is named as one of the defendants; in the lower Court as an infant, appearing by his guardian *Luchmi Nath*; in the Appellate Court as an ordinary defendant.

The crucial question in the cause was, whether an instrument in the nature of a will executed by the late Maharajah on the 22nd of April, 1862, and under which his widow had executed an appointment in favour of the petitioner, had been revoked by the Maharajah in his lifetime.

This tribunal decided this question in favour of the plaintiff (appellant), reversing the decree of both the Courts below, and substituting a declaration of the title of the appellant as heir to the

(1) 1 Moore's P.C. Cases, 117 = 2 M.I.A.C. 214 = 1 P.C.J. 175.
(2) Law. Rep. 2 P.C. 274 = 6 Moore's P.C. (N.S.) 360 = 2 P.C.J. 428.

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Maharajah under Cl. 4 of S. 22 of Act I of 1869. The report to Her Majesty was made, after a full hearing, on the assumption that the petitioner, as well as the Maharanee, was represented by the Counsel who appeared as for the respondents on the appeal; and the order in Council made in pursuance of it is, on the face of it, a final adjudication against both in favour of the appellant's title.

It is now said, however, that the petitioner never appeared to, and was not represented on, this appeal; and that the proper steps to have it heard against him *ex parte* were not taken. This case is supported by the affidavit of Mr. *Wilson*, the solicitor, who ostensibly conducted the appeal for the respondents, who swears that he was retained only for the Maharanee; that he entered an appearance for her alone; that he had no instructions to appear for the petitioner, and never entered an appearance on his behalf; and that, although the case filed by him was instituted in the same manner as the appellant's petition of appeal, and was headed, "Case of the above respondents;" this was by a clerical error, which was not discovered by him until it was *recently* (that is presumably after the hearing of the appeal) brought to his notice.

On the other hand, it seems to their Lordships to be established by the affidavits of Mr. *Lattey* and his clerk, **[187]** Mr. *Hewitt*, by the record itself, and by the bill of costs hereafter mentioned, all taken together, that although Mr. *Wilson* sent to Messrs. *Watkins & Lattey*, the solicitors for the appellant, a note to this effect, "*Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer*—I have this day entered appearance for the respondent in the above appeal," Messrs. *Watkins & Lattey*, on the 26th of May following, when they sent the manuscript record to Mr. *Wilson* in the usual course of business, distinctly asked him by letter whether he appeared for all the respondents, and received no answer to that inquiry: that afterwards, and in the month of November, 1876, when a clerk of Mr. *Wilson's* and Mr. *Hewitt* on behalf of Messrs. *Watkins & Lattey*, met at the Council Office for the examination of the printed record, the former indorsed his own, and allowed the appellant's proof of the record to be indorsed, "*T. L. Wilson*, for the respondents," so that the record as finally printed bears that indorsement; that Mr. Wilson, in May and June, 1877, was served with orders calling upon him to bring in the printed cases of all the respondents; that he made no objection to the form of such orders, but ultimately brought in the printed case, headed as the case of "the above-named respondents;" that he thus induced his opponents and this Committee, on the hearing of the appeal, to believe that he was acting for all the respondents; and that after their Lordships had pronounced their decision, which, amongst other things, directed the costs of all parties to the appeal to be taxed, with a view to the payment of them out of the estate, he brought in before the registrar a bill of costs, which was not only headed as the bill of costs of all the respondents, but contained items of charge relating to the correspondence between himself and the petitioner in *India* with reference to the appeal.

Their Lordships must remark, that if the case stood here, they would, upon these facts, have serious ground of complaint against Mr. *Wilson*, whose conduct of the case of his admitted client, if he really had no authority to represent the petitioner, was such as to mislead not only his opponents but their Lordships. They cannot admit his explanation that the heading of the case was a mere clerical error, and that in fact he was **[188]** acting, and purporting to act, for the Maharanee alone. Whatever may have been his personal knowledge of these proceedings, he must be held to be responsible for the acts of his clerks, and cannot be

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acquitted of, to say the least, gross carelessness in allowing the appeal to be conducted as he says it was.

The case, however, does not rest on Mr. *Wilson's* conduct of the appeal. The petitioner has himself filed an affidavit from which it appears that in May, 1875, after the decree of the Appellate Court in *India*, but whilst the appeal to Her Majesty was pending, the Maharanee executed a further appointment in his favour, by which she relinquished the life-interest which she had reserved by the former instrument; that he, being then of full age, though a minor when the suit was commenced, was put into possession of the property; and in 1877 corresponded directly with Mr. *Wilson* touching the appeal, in which, in fact, he had become the sole person interested, and furnished the funds for defending it, at all events in the name of the Maharanee. He had, therefore, full knowledge of the pendency of the appeal; and unless he was content, as he might well be, since their title was almost identical, to defend it in the name of the Maharanee, he might have taken, and ought to have taken, the necessary steps to appear by separate counsel in order to defend his interests. It seems, then, to their Lordships, that this is not a case in which, according to the principles laid down in the cases above referred to, the order of Her Majesty can be re-opened or varied, on the mere ground that he was not properly represented upon the appeal, or cited to appear to it. It cannot be said that there has been no default on the part of the petitioner.

He asserts, however, that he was never properly made a party to the suit in the Courts below, and that the proceedings in *India*, so far as he is concerned, were *coram non judice*. He alleges that his brother *Luchmi Nath* was not his guardian; that the objection was taken in an early stage of the suit; that *Luchmi Nath* was then dismissed from the suit, not only as a defendant in his own capacity, but also as the supposed guardian of his infant brother; that no guardian *ad litem* was ever appointed in his place; that whatever part *Luchmi Nath* afterwards [189] took in the management of the suit, he took as agent on behalf of the Maharanee alone; that he, the petitioner, was never properly represented in the suit, was never duly served with process therein, and that if his name was retained in the title of the cause, it was so retained irregularly and improperly. If these facts can be established, it may be that the final decree in the suit, *i.e.*, the declaration of the plaintiff's title, considered independently of the order in Council, and merely as a decree of the Indian Courts, would not be *res judicata* against the petitioner. But it is clear that that issue can only be properly tried in a new suit in *India*. And there is the more reason for trying the question in *India*, since what the petitioner desires is not a mere re-hearing of the cause on the evidence as it stands, which would probably be of little advantage to him, but a re-trial of it on fresh evidence.

It is, however, said, that in such a suit in *India* the order in Council might be opposed to him as a fatal bar. It would, however, be open to the petitioner to contend that it was not such a bar, if he should succeed in shewing that he was not bound by the decree against which the appeal was preferred. Their Lordships do not wish to prejudge that question, as they would prejudge it, if upon this application they were to recommend Her Majesty to vary the order in Council. Should a new suit ever be brought, the determination of the Indian Courts upon that, as upon any other question raised in such suit, will be subject to appeal. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this petition with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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BEHARI LAL (*Decree-holder*) *v.* SALIK RAM (*Judgment-debtor*).
[3rd June 1878.]

APPELLATE CIVIL.

1 A. 675.

1 A. 675.

Execution of decree– Limitation—Application to keep in force a decree.

Per PEARSON and OLDFIELD, JJ.—For purposes of limitation, an application under S. 216, C.P.C. (1859), for the issue of a notice to the judgment-debtor (without any other prayer), is an application to keep in force a decree; and limitation should be computed from the date on which notice to the debtor was issued. (H.C.R., N.W.P., 1875, p. 75, *impugned*).

Per SPANKIE, J., *contra.*

[F., 22 P.L.R. 1905=57 P.R. 1905; **R.**, 11 C.P.L.R. 157 (159 and 160); 25 C. 594 (599) **(F.B.).]**

On 3—3—1875, an application was made by a decree-holder to the Court executing the decree which did not, as required by S. 212 of Act VIII of 1859, state the mode in which the assistance of the Court was required, whether by the arrest and imprisonment of the judgment-debtors or by attachment of their property, but prayed that the Court would, under S. 216 of that Act, issue notice to the judgment-debtors to show cause why the decree should not be executed against them. Notices were issued on 28—3—1875. Since the decree-holder did not desire further proceedings to be taken, the execution-case was struck off the file on 27—4—1875. The decree-holder's application on 30—4—1877 for the execution of the decree by arrest and imprisonment of one of the judgment-debtors having been opposed on the ground of limitation, the first Court held that it was not barred, as it was made within three years from 28—3—1875. But the lower appellate Court, relying on H.C.R., N.W.P., 1875, p. 79, and Misc. S.A. No. 60 of 1876, dated 14th December, 1876, held that the application was barred by limitation as the application of 3—3—1875 was informal. The decree-holder preferred an appeal to the High Court.

JUDGMENT.

[677] PEARSON, J.—The precedent to which the Judge refers supports his decision. But I am not myself able to assent altogether to the ruling in the precedent. In the first place, I doubt whether the notice issued by the Court can be regarded as good for nothing and a mere nullity, because it was issued on the strength of an application not strictly in the form and of the nature prescribed by S. 212 of Act VIII of 1859. Probably the Court should have rejected the application for the issue of a notice and required an application of the kind required in S. 212 specifying the particular relief sought, although no relief could be granted until the notice had been issued, and the omission might have been supplied afterwards. But it did, upon the application presented to it, issue a notice, and Art. 167, Sch. ii of Act IX of 1871, allows an application to be made for the execution of the decree in case where a notice under S. 216 of the Code of Civil Procedure has been issued within three years from the date of issuing such notice. In the next place I conceive that the application for the issue of a notice under S. 216, though not an application on which such a notice could properly issue, was still an application to keep in force

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the decree. The Procedure Code, it is true, provides only for application for the execution of decrees under S. 212, but the limitation law recognises applications having for their object to keep decrees in force. An application which [678] might be irregular in reference to S. 212 might still be an application of the other kind, and I cannot conceive that the decree-holder had any other object in view in making his application of the 3rd March, 1875, than to keep the decree in force by warning the judgment-debtor that its enforcement was contemplated. The present application is within three years from that date. I am therefore disposed to uphold the order of the Court of first instance and to reverse that of the lower appellate Court. Apparently Chuni Lal (1) has been improperly made a respondent to this appeal, as he was not a party to the proceedings in the lower appellate Court, the subject of the appeal.

SPANKIE, J.—I am still of the same opinion as that expressed in the decision of this Court dated the 14th December, 1876 (2), to which I was a party.

The terms of S. 216 of Act VIII of 1859 are precise and clear. "If an interval of more than one year shall have elapsed between the date of the decree or the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue notice to the party against whom execution may be applied for, &c., &c.;" but there must be an application for execution, alluding to the provisions of S. 212. It precedes and does not succeed the Court's issue of notice under S. 216 to the heir or representative of an original party to the suit, and where no application for execution has been made within three years from the date of the decree, I do not think that the decree-holder can fall back upon the notice issued under S. 216. If the application under S. 212 were bad, it seems to me that the Court had no power to issue the notice, and under such circumstances the mere issue of the notice cannot be regarded as giving the decree-holder a fresh period of limitation. The old procedure ap-[679] plies to this case. The order affirmed by my Honourable colleague would, I suppose, issue. But this appeal was filed on the 9th November and, therefore, perhaps Act X of 1877 applies. If so, I should wish to refer the point of law to another Judge.

The learned Judges differing in opinion on the point of limitation, the appeal was referred to Oldfield, J., under the provisions of S. 575 of Act X of 1877.

OLDFIELD, J.—I am of opinion that the execution of the decree is not barred by limitation.

The decree-holder filed an application on the 3rd March, 1875, accompanied by a copy of the decree, asking that, after service of notice on the judgment-debtor, steps might be taken to realise the amount of the decree. Most of the particulars required by S. 212 were entered in the application, but it was silent as to the mode in which the assistance of the Court was required, whether by delivery of property specifically decreed, the arrest and imprisonment of the judgment-debtor, or attachment of his property or otherwise; but this defect in the application will not, I

(1) The second judgment-debtor.

(2) Misc. S. A. No. 60 of 1875. The holder of a decree dated 25—1—1872 applied on 22—1—1875 praying for issue of a notice and stating that application would subsequently be made to the Court for its assistance in bringing the property of the judgment-debtor to sale. A notice was issued, but the decree-holder took no further steps, and the case was struck off the file. On a subsequent application on 23—11—1875 for execution of the decree, *held* by Stuart, C. J., and Spankie, J., that it was barred, as the notice issued under the previous application had not the effect of bringing it within time.

consider, render it of no legal effect for the purposes of limitation. All that the law of limitation enacts is that the limitation shall run from the date of applying to the Court to enforce or keep in force the decree, and all that would seem to be required is that there shall have been an application with the object of enforcing or keeping in force the decree. We should strain the language of the law by putting any other construction on it. If the application is such as to show that it was made with that object, though informal, it will be an application within the meaning of the law of limitation, and there can be no doubt in this case that the application had the object of enforcing and keeping in force the decree.

But the law of limitation also provides that the time shall run from the date of issuing a notice under S. 216 of the Code of Civil Procedure. A notice was issued in this case by the Court acting under S. 216 upon the application above referred to, and it appears to me too that the date of the notice will give a period from which the limitation will run. The issue of such a notice is incumbent on the Court where an application has been made under the circumstances **[680]** stated in S. 216. The issue of the notice is the act of the Court apart from any requisition by the decree-holder to issue it, and I think it cannot be held that this act of the Court, when purporting to be done under the authority of S. 216, is illegal, and the notice issued of no legal effect in consequence, merely because the application filed by the decree-holder, with reference to which the Court acted, may have been irregular in form, or defective in some of the particulars required by S. 212. The fact that the Court treated the application as one for enforcing the decree and issued the notice upon it under S. 216 of Act VIII of 1859, appears to me sufficient.

I find that the rulings of this Court have been conflicting on the points raised in this case. While two rulings have been pointed out against the view now taken, a later one is in favour of it.

The order of the lower appellate Court is reversed and that of the Court of first instance restored, and this appeal is decreed with costs.

1878
JUNE 3.
APPEL-LATE CIVIL.
1 A. 675.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1878
JUNE 8.

MANIK SINGH (*Defendant*) *v.* PARAS RAM (*Plaintiff*).

[8th June 1878.]

APPEL-LATE CIVIL.

1 A. 727.

1 A. 727.

Sale of immoveable property in execution of decree—Decree-holders with liens—Right of priority.

Where immoveable property is sold in execution of decrees declaring a lien upon it, the decree-holders have a right to be paid out of the sale proceeds, in the order of the priority of their claims, provided they have, before the order for distribution, taken out execution of their decrees against the judgment-debtor.

JUDGMENT.

[729] PEARSON, J.—The sale was made on the 20th June, 1876, in execution of the defendant-appellant's decree, dated 15th January, 1876, which declared a lien created by a bond, dated 17th July, 1873, in pursuance of an attachment made by him on 13th April, 1876, on which date the plaintiff, respondent, also attached the same property in execution

1878 JUNE 8. — APPELLATE CIVIL. — 1 A. 727.

of his decree dated 21st January, 1876, which declared a lien dated 28th September, 1875. Both Courts are agreed that it was proper that the defendant-appellant's decree above-mentioned should first be discharged out of the sale-proceeds. Defendant-appellant had another decree, dated 11th November, 1875, declaring a lien on the same property created by a bond dated 27th October, 1874; the Court of first instance held that this decree should also be discharged out of the surplus sale-proceeds in preference to that of the plaintiff-respondent; the lower appellate Court held otherwise for the reason stated in its judgment, *viz.*, that neither attachment nor sale had been made under the decree of 11th November, 1875.

But it appears that on 2nd June, 1876, the defendant preferred a petition to the Court praying that, as the property on which **[730]** his decree of 11th November, 1875, declared his lien was about to be sold in execution of his decree, dated 15th January, 1876, the surplus sale-proceeds might be attached for the purpose of being applied to the satisfaction of the decree of 11th November, 1875, and that an order was passed on 3rd June, 1876, in accordance with the petition.

Under the circumstances, we are of opinion that the decree-holder of 11th November, 1875, was entitled to share in the sale-proceeds under the provisions of S. 271 of Act VIII of 1859. as one who had prior to an order for distribution, before the sale even, taken out execution of his decree against the same judgment-debtor and not obtained satisfaction thereof; and as his lien as well as the decree which declared it were prior in date to the lien and decree held by the plaintiff, was entitled to share before him.

We therefore decree the appeal with costs, modifying the lower appellate Court's decree so far as it modified that of the Court of first instance, and restoring the latter in its entirety.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1878 JUNE 10. — APPELLATE CRIMINAL. — 1 A. 680 = 2 Ind. Jur. 864.

EMPRESS OF INDIA *v.* KARAN SINGH. [10th June 1878.]

1 A. 680 = 2 Ind. Jur. 864.

Crim. Pro. Code, 1872, Ss. 228, 233—Summary trial—Record in appealable cases—Defective record—Duty of appellate Court.

A Sessions Judge should not quash a conviction in a summary trial, on the ground that the substance of the evidence was not embodied in the Magistrate's judgment. If the Judge found it impossible to dispose of the appeal because of such defect, he should have required that officer to repair the defect in his judgment, by recording a judgment in which the substance of the evidence should be fully embodied and, if necessary, re-examining the witnesses for that purpose, or to have ordered a re-trial with that view.

Karan Singh was tried by a Magistrate in a summary way and convicted. He appealed to the Sessions Judge who passed the following judgment: "In this case the Subordinate Magistrate has disregarded the provisions of S. 228, Cr. Pro. Code, and has not placed on record a judgment embodying the substance of the evidence on which the conviction was had. His judgment contains the point required by S. 227, but omits the additional matter required by the next section. The Subordinate Magistrate says that the evidence that defendant sold the bullocks is 'thoroughly reliable' and 'very respectable eye-witnesses' proved the

transaction, that the proof that both the bullocks were stolen is established by 'undoubted proof,' but as no detail or description of the evidence is given by the Subordinate Magistrate as is required by law, and without which this Court can form no independent opinion on the character of or weight which should be attached to the evidence thus eulogised by the Subordinate Magistrate, his proceedings cannot but be held to be at variance with the law and prejudicial to the prisoner. The sentence appealed against must therefore be quashed and the appellant is ordered to be released." The Local Government preferred an appeal to the High Court against this judgment.

1878
JUNE 10.
APPELLATE CRIMINAL.
1 A. 680 = 2 Ind. Jur. 864.

JUDGMENT.

[682] PEARSON, J.—From the judgment of the Magistrate it may be gathered that it was stated by more than one of the witnesses for the prosecution, first, that the bullocks in question had been stolen; secondly, that they were brought for sale by the prisoner into mauza Amlea; and, thirdly, that he did actually sell them for a very good price. Nevertheless the Sessions Judge is of opinion that the substance of the evidence on which the conviction was had is not embodied in the judgment, apparently because it does not set forth in detail the deposition of each several witness. It is no doubt important that the evidence should be so set forth in the judgment as to enable the Appellate Court to perform its functions in appeal. The prisoner's right of appeal must not be defeated in consequence of an imperfect statement of the substance of the evidence. On the other hand, it does not appear necessary to cancel a conviction and sentence not otherwise apparently exceptionable by reason of such a defect. The Sessions Judge may have found authority in precedents for the course adopted by him in this case; but we think that, if he found it impossible to dispose of the prisoner's appeal because the substance of the evidence for the prosecution was not sufficiently embodied in the judgment of the Magistrate, it would have been better to have required that officer to repair the defect in his judgment by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a re-trial with that view. We therefore cancel the Sessions Judge's order of the 28th January last, and direct him to dispose of the appeal afresh inadvertence to the foregoing remarks.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

1878
JUNE 14.
APPELLATE CIVIL.
1 A. 683.

MATHURA DAS (*Plaintiff*) *v.* BABU LAL (*Defendant*).

[14th June 1878.]

1 A. 683.

Acknowledgment of debt—Limitation.

Where a letter, in acknowledgment of a debt due from B to S, was written under the directions of B by his agent, and was headed, "written by B to S," and the concluding portions of the letter were written by B in his own handwriting; *held* that there was sufficient evidence that the letter was written by an agent duly authorized, and that the heading was a "signature" within the meaning of the Limitation Act.

[F., 10 B. 71 (73).]

1878

JUNE 14.

APPELLATE CIVIL.

1 A. 683.

JUDGMENT.

[683] TURNER, O.C.J.—The plaintiff, appellant, carries on the business of a banker in the Lashkar of Gwalior, and the defendant, respon-[684]dent, is a resident of Allahabad who for some years accepted contracts in the Lashkar. In the course of his business the respondent had monetary dealings with the appellant, and in respect of those dealings the appellant asserts that a sum of Rs. 14,812-8-3 is due to him for principal and interest, and to recover this sum he has instituted the present proceedings. It is admitted that several of the items of the claim are barred by limitation, unless the appellant can establish that, by an acknowledgment of the debt or payment of interest, a new period of limitation accrued. In proof of an acknowledgment, the appellant relies on a letter he received from the respondent, bearing date Mansgar Sudi 10th, Sambat 1931, corresponding with the 18th December, 1874, and which is in the following terms:

"Written by Babu Lal to Shah Benarsi Das, Camp Gwalior, dated Mansgar Sudi, 10th Sambat 1931.

"After tendering my compliments, I beg to say that your letter came and I know the contents thereof. I received my account in which you have struck a balance of Rs. 17,679-2-0 of the Chandauri coin. You have written me to debit and credit the same, and I have known it. The account is correct, but it has not been running for the last two or three years, and my papers are at Lashkar. Now-a-days a marrige is to be celebrated in my house. I shall send for the papers from Lashkar in Phagun, and, after examining them, I shall make pucka debit and credit entries in my accounts, and shall write you to do the same; then I shall make arrangement for the payment of the money. If I fail to procure the money till Phagun, then, according to our agreement at Cawnpore, I shall give you some property yielding a monthly rent of Rs. 150. You will deduct your interest at 7¾ annas per cent., and the balance you may credit in my account. In our account of customs and tank there appears some difference in interest, &c. The letter written by me is with you. You should send the same to me. I shall examine the accounts according to the terms agreed upon by us. We shall give credit for any mistake on either side. You have not charged interest on the item relating to the tank, but I shall charge it. I had drawn a hundi for Rs. 5,000 on you, for which you have got a *rukka* written by me and Babu Sahib. You should send the same to me—all right, Mansgar Sudi, 10th Sambat 1931. If there be any mistake, credit shall be given or taken."

It appears that Bhikhari Das, gomashta of the appellant, accompanied by Gaj Mal, came to Allahabad to obtain from the respondent the payment of the amount then due to the appellant, which was shown by an account then delivered to the respondent to [685] amount to Rs. 17,679-2-0. The respondent stated that he was unable at once to satisfy the demand, but undertook to pay it within two or three months, and that if he failed to do so he would give security. For the satisfaction of the appellant it was arranged that the respondent should send him a letter expressing the terms he had offered, and a draft was prepared by Bhikhari Das of which the respondent did not approve, and he then dictated to Bhikhari Das the draft which was subsequently faired out by his own gomashta, and is the letter dated Mansgar Sudi, 10th Sambat 1931, to which we have referred. The respondent has admitted, in his deposition taken on the 19th July, 1877, that this letter was written by his directions, and it is proved that the concluding words "all right, &c.," to the end of the letter, are in his handwriting. The effect of this letter is to admit the existence of a debt due by the sender to the person addressed. While admitting that the account rendered is on the face of it correct, the sender of the letter reserves to himself the right of testing the account by his own books before finally allowing it to be correct, and he then promises to pay what may be due at a time stated, and in the event of default to give security for the debt.

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APPELLATE CIVIL.
1 A. 683.

It cannot be doubted that, if this letter has been "signed" by the respondent or his agent duly authorised in that behalf, it constitutes a sufficient acknowledgment to satisfy the Limitation Act.

It is not the practice of Hindu bankers to sign their letters at the foot. Their letters are ordinarily headed, as is the letter on which the respondent relies, with an intimation of the person to whom the letter is addressed and of the person by whom it is sent. The admission of the respondent that the letter was written by his gomashta by his orders, and the circumstance that he added a paragraph at the conclusion, is sufficient evidence that the heading was written by an agent duly authorised. There remains the question—Is this heading a signature within the meaning of the Limitation Act? The Act does not require that the signature should be at the foot or in any particular part of the document, and in our judgment, whenever the maker of an instrument of his agent acting with authority introduces the name of the maker with a view to authenticate the instrument as the instru-**[686]**ment of the maker, such an introduction of the name is a sufficient signature. We do not mean to say that every introduction of the name of the maker into an instrument is a signature. As expressed in an English decision on the Statute of Frauds, the introduction of the name must amount to an acknowledgment by the party that it is his instrument, and if the name does not give such authenticity to the instrument, it does not amount to what the Statute requires, Addison on Contracts, 7th Ed., 1859. In the heading of such a letter as that which is before us it is clear the name of the sender is introduced to authenticate the letter, or, in other words, to assure the person to whom it is addressed that the letter is sent by the person named. We consequently find that the letter is "signed" by the sender within the meaning of the Limitation Act, and that it constitutes a sufficient acknowledgment of the debt to satisfy that Act. The claim is therefore in no particular barred by limitation.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

1878
JUNE 14.
APPELLATE CIVIL.
1 A. 726.

TETLEY (*Judgment-debtor*) *v.* JAI SHANKAR AND ANOTHER (*Decree-holders*). [14th June 1878.]

1 A. 726.

Interlocutory order of High Court—Appeal to Privy Council.

Under the C.P.C. (1877), the High Court has no power to give leave to appeal to the Privy Council from an order of the High Court directing a hearing on the merits, that order not being a decree, but an interlocutory order. Nor has it any such power under Cl. 31 of the Letters Patent, as its provisions have been, by implication, repealed by the C.P.C. (1877) and by Act VI of 1874.

[R., 52 P.R. 1907=34 P.L.R. 1908=119 P.W.R. 1908.]

Application to a Division Court of the High Court for leave to appeal to the Privy Council against an order of such Division Court remanding a case to the Court of first instance for a new trial. (For the circumstances under which the said order was made, see 1 A. 586, at p. 443, *supra*.)

JUDGMENT.

[727] TURNER, O.C.J.—It is clear that, under the provisions of the Procedure Code, X of 1877, we have no power to give leave to appeal

1878 JUNE 14. — APPELLATE CIVIL. — 1 A. 726.

from the order of this Court directing a hearing on the merits, that order not being a decree but an interlocutory order; but it is argued that we have discretion to allow an appeal under the 31st clause of the Letters Patent. The case appears to be one in which, if we possessed the power, we should be inclined to exercise it, but we are of opinion that the provisions of that clause were by implication repealed by the Code and Act VI of 1874, which preceded the Code. The petitioner must apply for special leave or wait until this Court pronounces final judgment if the proceedings are brought before it. Each party to bear his own costs of this application.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield.

1878 JUNE 21. — APPELLATE CIVIL. — 1 A. 730=3 Ind. Jur. 120.

MERCER (*Judgment-debtor*) *v.* NARPAT RAI AND ANOTHER (*Decree-holders*). [21st June 1878.]

1 A. 730=3 Ind. Jur. 120.

Decree against military officer—Execution in terms of the decree—Stat. 40 Vic. (Mutiny Act), Cl. 7, S. 99.

A decree against a military officer, passed in view of the terms of the Mutiny Act, 1877, cannot be executed otherwise than in accordance with its terms.

Where, therefore, a decree directed that the judgment-creditor should be paid by the stoppage of half the military officer's pay for the current or future months, execution could not be taken by attachment of his property.

[R., 7 N.W.P. 331.]

In an application for execution of a decree for money made by a Civil Court in the Punjab against a Military Officer serving in Allahabad, directing, with reference to S. 99 of the Mutiny Act, 1877, that the judgment-debt should be paid by stoppage of a moiety of such officer's pay, the judgment-debtor's objection to the attachment of his moveable property on the ground that the decree did not award execution thereof generally, was disallowed by the District Court at Allahabad, on the ground that it ought to have been urged before the Court making the decree. The judgment-debtor appealed.

JUDGMENT.

[731] TURNER, O.C.J.—The Judge of Allahabad, in receiving the application for execution, was bound to consider whether there was anything to prevent execution in the manner prayed. At the time the decree was passed the decree-holder obtained an order from the Court which passed the decree for the satisfaction of the decree by stoppage of half the defendant's pay. So long as that order subsists the decree-holder cannot obtain satisfaction of his decree by **[732]** attachment, for it is clear to us that the decree-holder is not, as against officers to whom the Mutiny Act is applicable, entitled to both remedies at once. The object of the Act is to prevent public servants whose services may be urgently required from being incapacitated to discharge such services. The appeal is decreed and the order of the Judge discharged with costs.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from the Court of the Commissioner, Lucknow Division, Oudh.

RAMJISDAS AND IMTIAZ ALI *v.* RAJAH BHAGWAN BAX AND ANOTHER.

[22nd June 1878.]

3 Suth. P.C.J. 562=5 I.A. 197=3 Saraswati's P.C.J. 843=Bal. 174.

Act XXIV of 1870 (Oudh Talookdars Relief Act)—Rule 8—Interest—Limitation—Jurisdiction—Appeal beyond time, when allowed—Act VIII of 1859, S. 333.

The combined effect of the Oudh Talookdars Relief Act XXIV of 1870 and of the 8th Rule made under it, being that the manager of an estate is to determine the amount due for principal and interest up to the date of his determination calculated according to the contract rate (if any), and may allow subsequent interest on the amount so determined (as upon a judgment-debt) up to the time of payment at a rate not exceeding 6 per cent., the manager in this case awarded future interest at a higher rate than 6 per cent. The Commissioner on appeal, aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by S. 10 of the Act, erroneously proceeded to act under S. 333, Act VIII of 1859, and varied the manager's order so far as it gave the rate of interest prohibited by law.

Under the exceptional legislation with which they had to deal and the exceptional circumstances of the case, their Lordships were not so clearly satisfied that the Commissioner had not this power to deal with the order of his subordinate officer as he did, as to feel themselves driven to a decision the effect of which would be to reverse an order which appeared to them, except in one particular (and as to which their Lordships modified it) just and proper, and to set up another which, if acted upon, would practically repeal the 8th Rule made under Act XXIV of 1870.

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JUNE 22.

PRIVY COUNCIL.

3 Suth.P.C.J. 562=5 I.A. 197=3 Saraswati's P.C.J. 843=Bal. 174.

JUDGMENT.

[562] SIR ROBERT COLLIER.—This is an appeal from a judgment of the Commissioner of the Lucknow Division of the Province of Oudh, by which he varied an order made by the **[563]** Superintendent of Encumbered Estates under the "Oudh Talookdars Relief Act of 1870."

To make the judgment and the grounds of appeal from it intelligible a short history of the case is necessary.

On the 3rd June, 1870, Rajah Omrao Singh, Talookdar of Pakhra Ausari, executed a deed whereby he acknowledged that he had received Rs. 60,000 from the appellants, for which sum he pledged his estate to them. They were to hold the estate and receive the rents and profits of it for twelve years, after which time he was to be entitled to repay them the principal and interest at 12 per cent. per annum and to recover possession of the estate.

Soon after another advance of Rs. 12,000 was made to the Rajah, and Rs. 3,000 were advanced to his brother for which he became security. Some other small sums were advanced to him at 18 per cent.

His estate was soon after taken possession of by the Court of Wards on a representation, which turned out to be unfounded, of his incapacity; subsequently on his application, the provisions of the "Oudh Talookdars Relief Act" (XXIV of 1870) were duly applied to the estate.

The order directing the application of the Act to the estate, and appointing a manager, was dated October 30th, 1871. Mr. Glynn, the Deputy Commissioner of the Province, who had been the manager under

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the Court of Wards, was appointed manager under the Act. In November 1872 he was succeeded by Mr. Finn.

"The Oudh Talookdars Relief Act" appears to have been enacted mainly in the interest of the talookdars, for the purpose of protecting them in some degree against the claims of money-lenders by which their estates were being consumed and undoubtedly some of its provisions are somewhat stringent against creditors. With its policy, however, we have no concern. The Act, after restraining proceedings in execution against the talookdar and his estate,—invalidating all incumbrances created by him during the management investing the manager with large powers for protecting and improving the property, and other purposes, and providing for the proof of debts, proceeds to enact as follows:—

"9. The manager shall in accordance with the rules to be made under this Act, determine the amount of the debts and liabilities due to the several creditors of the talookdar, and persons holding mortgages, charges, or liens on the said property, or any part thereof.

"10. An appeal against any refusal, admission, or determination under Ss. 7, 8, or 9, shall lie, if preferred within six weeks from the date of such determination, to the Commissioner of Division to whom the manager is subordinate, and the decision of such Commissioner or of the manager if no such appeal has been so preferred, shall be final.

"11. When the total amount of such debts and liabilities has been finally determined, the manager shall prepare and submit to the Chief Commissioner a schedule of such debts and liabilities, and a scheme for the settlement thereof; and such scheme when approved by the Chief Commissioner shall be carried into effect. Until such approval is given, the Chief Commissioner may, as often as he thinks fit, send back such scheme to the manager for revision, and direct him to make such further enquiry as may be requisite for the proper preparation of the scheme."

Section 20 enables the Chief Commissioner to make rules consistent with the Act in all matters connected with its enforcement, and declares that "such rules when approved by the Governor-General of India in Council, and published in the local official *Gazette*, shall have the force of law."

Rules were duly made in pursuance of the Act, of which the 8th is in these terms:—

"When the amount of any debt, both principal and interest, has been determined, the manager may direct that interest, at a rate not exceeding 6 per cent. **[564]** per annum, shall be paid on the aggregate sum declared to be due from the date of decision till the date of payment." The combined effect, therefore, of the Act and of the Rule made under it is that the manager is to determine the amount due for the principal and interest up to the date of his determination, calculating such interest according to the contract rate (if any), and may allow subsequent interest on the amount so determined, as upon a judgment debt, up to the time of payment, provided the rate of such subsequent interest does not exceed 6 per cent.

Mr. Glynn on the 4th September 1871, while he was manager under the Court of Wards, made the following Memorandum:—

"The claim (of appellants) for Rs. 60,000 + Rs. 12,000 will now be registered. There were Rs. 3,000 let off, and I will not bring them in now against the Rajah after a compromise. About the remaining Rs. 3,107 8 annas, enquiry will be made on copies of the claimant's books being received. The Rajah will be referred to also about this money, and it will be admitted if no valid reason be shown against my doing so by the Rajah."

After Mr. Glynn was appointed as manager under the Act, the following memoranda were made by him :—

"Will not let off more than the Rs. 3,000. Imtiaz Ali will let off 10 per cent. for cash payment on interest.

"27*th April*, 1872."

"The interest on the Rs. 72,000 will be according to the bond up to September 1871, and after that at 6 per cent. per annum. The claim for Rs. 3,107 8 annas in respect to Babu Gurdat Singh is not admitted. The Babu has his own village, and the Babu should be proceeded against.

"10*th June* 1872."

It has been contended on the part of the respondent that this last memorandum was a "determination" by Mr. Glynn, under S. 10 of the Act, and that not having been appealed against within six weeks it became final. Their Lordships, however, do not regard it as such a determination. On the appointment of Mr. Finn as manager in November 1872, the appellants brought their claim before him, contending, and rightly as it appears to their Lordships, that there had been no final determination by his predecessor, whereupon Mr. Finn made an order, which he was induced to alter on review. His order on review, dated 25th November 1872, increased the principal sum, and thus concluded—

"Interest on the debt to date of decision will be calculated at the rate agreed upon. Future interest upon the sum covered by the bond at 1 per cent. (per mensem), and remainder of the debt at 6 per cent. per annum."

Soon after this order the Rajah died, and was succeeded by his infant son, who is a respondent together with the manager (or Superintendent) of the Incumbered Estates.

After a good deal of delay this order was brought to the attention of the Chief Commissioner, who, acting probably under the powers conferred on him by S. 11 of the Act, appears to have disapproved of so much of it as directed future interest at 12 per cent. per annum, regarding this rate of interest as prohibited by the 8th Rule, in which view their Lordships concur. Thereupon (and on the 8th June 1874) the following proceeding was recorded by Pundit Kali Sahae, described as Superintendent of Incumbered Estates, Lucknow Circle :—

"A docket, No. 1322, dated 29th April 1874, has been received from the personal assistant to the Chief Commissioner under cover of the Commissioner's docket, No. 1704, dated 4th May 1874, directing that the Superintendent was not authorized to award interest at a higher rate than 6 per cent. Wherefore a higher rate of interest than 6 per cent. will not be allowed.

"Ordered that a letter be addressed to the decree holders, communicating to them the above information. This proceeding will be filed with the record."

On this the appellants became unable to avail themselves of Mr. Finn's order, **[565]** and a deadlock appears to have ensued. The next material proceeding was taken by the present appellants, who appealed to the Commissioner of the Lucknow Division against the foregoing order of Kali Sahae. The Division Commissioner referred them to the Chief Commissioner, who declined to interfere in their behalf, whereupon they preferred another appeal to the Division Commissioner, dated 10th September 1874, wherein they contended that Mr. Finn's order was right and that it was final. The petition concludes in these terms :—

"Under these circumstances your petitioner most respectfully resubmits his petition of appeal with enclosures, and prays that it may be

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3 Suth.P.C.J. 562=5 I.A. 197=3 Saraswati's P.C.J. 843= Bal. 174.

formally admitted and judicially disposed of to enable any of the parties feeling aggrieved by the decision to prefer his appeal under S. 4, Act VI of 1874, to Her Majesty's Privy Council."

The present appellants therefore, in September 1874, desired a judicial determination on substantially the same questions as are raised in the present appeal.

It does not appear what, if anything, was done upon the appeal of September 1874, and it may be inferred that the proceedings dropped, or were superseded by those next to be mentioned.

On the 23rd October 1874, an appeal raising the same question in another form was presented by the present respondents against the order of Mr. Finn, on the ground (among others) that it was illegal on the face of it in giving a rate of interest prohibited by law. On this appeal the Commissioner ordered that Mr. Finn's calculation of principal being adopted, the interest should be calculated under the terms of the deed up to Mr. Glynn's order of 10th June 1872, and thereafter at 6 per cent. per annum.

This is the judgment now appealed against, and the point mainly relied upon is, that the appeal being out of time, the Commissioner had no jurisdiction to entertain it. The Commissioner was aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by S. 10 of the Oudh Talookdars Relief Act, and appeared to think that S. 333 of Act VIII of 1859 might apply to the case, in which view their Lordships cannot concur. He proceeded to dwell on the exceptional nature of the case, on the fact of the respondent being a minor and incapable of exercising his right to appeal, except through the manager, who himself made the order, and could scarcely be expected to appeal against it,—a state of things which the Act does not seem to contemplate— he referred to the action of the Chief Commissioner, who objected to the allowance of interest beyond the lawful rate, practically setting aside Mr. Finn's order, and he might have referred to the appeal of the now appellants against the order of the 8th June 1874, whereby they desired an adjudication on practically the same question as that raised in the appeal before him, expressly with the object of getting rid of the deadlock occasioned by the conflicting decisions in Oudh by an appeal to Her Majesty in Council. He finally came to the conclusion that he had power to amend so much of the order as was manifestly at variance with the law. Their Lordships, although the case is not free from difficulty, are not so clearly satisfied that under the exceptional legislation with which they have to deal, and the exceptional circumstances of this case, the Commissioner had not this power to deal with the order of his subordinate officer, as to feel themselves driven to a decision the effect of which would be to reverse an order which appears to them except in one particular just and proper, and to set up another which, if acted upon, would practically repeal the 8th Rule made under the Oudh Talookdars Relief Act. The particular referred to is that the order directs the 6 per cent. interest to commence from the 10th June 1872, the date of Mr. Glynn's Memorandum; whereas in their opinion that date should be the 25th November following, when the gross amount then due for principal and interest was finally determined by Mr. Finn. They will therefore humbly advise Her Majesty that **[566]** the order appealed against be varied so far as to direct that the amount determined by Mr. Finn on the 25th November 1872 to be due should be adopted, and that subsequent interest should be allowed thereon at the rate of 6 per cent. per annum. There will be no costs of this appeal.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

1878
JUNE 24.

APPELLATE CIVIL.

KAKAM ALI (*Decree-holder*) *v.* HALIMA AND OTHERS (*Judgment-debtors*). [24th June 1878.]

1 A. 686.

1 A.

Execution of decree by heir—Certificate to collect debts—C.P.C. (1859), S. 208.

A certificate under Act XXVII of 1860 to collect debts due to a deceased person, is not indispensably necessary to enable an heir to apply. under S. 208 of the C.P.C. (1859). for the execution of a decree held by the deceased. A person, who has not obtained a certificate, may apply under that section. It will, of course, be open to the Court, in the exercise of the discretion vested in it, if there is any doubt that the person applying for execution is entitled by inheritance to the rights decreed, to refuse the application until a certificate has been obtained.

On the lower appellate Court affirming the order of the Munsif rejecting an application by the son of the deceased, for the execution of a money-decree held by his father on the ground that the son had not obtained a certificate under Act XXVII of 1860 in respect of his deceased father's debts, the son appealed to the High Court.

JUDGMENT.

[687] The Munsif appears to think that obtaining a certificate is indispensable to the competency of an heir to apply for execution under S. 208 of Act VIII of 1859. This is erroneous. A person who has not obtained a certificate may apply under that section. It will of course be open to the Court, in the exercise of the discretion vested in it, if there is any doubt that the person applying for execution is entitled by inheritance to the rights decreed, to refuse the application until a certificate has been obtained. The Munsif appearing to consider himself precluded from exercising his discretion, we must set aside his order and the order of the Judge, and remit the case to the Munsif that the discretion may be exercised. Each party will bear his own costs of the proceedings in the Judge's Court and in this Court.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

1878
JUNE 27.

HAIDRI BAI (*Plaintiff*) *v.* THE EAST INDIAN RAILWAY COMPANY (*Defendant*). [27th June 1878.]

1 A. 687.

APPELLATE CIVIL.

1 A. 687.

Security for costs from appellant—Extension of time for furnishing security—S. 549, C.P.C. (1877).

Security for costs called for from an appellant must be furnished within the time fixed by the Court; if not so furnished, it is imperative on the Court to reject the appeal.

If an application for extension of time be made before the expiry of the time fixed, the Court may extend the time; it cannot do so afterwards.

• **[Overruled**, 17 C. 512 (513, 514) (**P.C.**); **Not F.**, 16 B. 263 (266); **F.**, 11 C. 716 (717), 11 M. 197; **R.**, 21 B. 574 (579), 8 O.C. 241 (244).**]**

1878
JUNE 27.

APPELLATE CIVIL.

In an appeal to the High Court from an original decree wherein the Court had, under S. 549 of Act X of 1877, demanded certain security for the costs of the appeal from the appellant who was residing out of British India and was not possessed of any sufficient immoveable property within British India. The appellant failed to furnish such security within the time prescribed.

JUDGMENT.

[688] TURNER, O.C.J.—Security not having been filed within the time ordered by the Court, the law is imperative that the Court shall reject the appeal.

1 A. 687.

If an application for an extension of time had been made before the expiry of the time within which it was ordered the deposit should be made, the Court might have extended the time; it cannot do so afterwards.

The appeal is rejected with costs.

CIVIL JURISDICTION.

1878
JUNE 28.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

KANHAIYA LAL (*Plaintiff*) *v.* DOMINGO AND ANOTHER (*Defendants*).

[28th June 1878.]

CIVIL JURISDICTION.

1 A. 732.

1 A. 732.

1. *Pro-note—Negotiability.*

A promissory note, not made payable to any other person than the payee, that is, not made payable to "order" or "bearer," is not a "negotiable instrument."

2. *Chose in action or actionable claim.*

Such a pro-note is, however, an actionable claim or chose in action, and can be acquired. And just as in England, Courts of equity allow the assignee of a *chose-in-action* to sue in his own name, he can do so in this country, where the Courts are both Courts of law as well as Courts of equity.

3. *Defences in suit by assignee.*

The defendant, in a suit by the assignee, can set up, against the latter, all the defences that he would have had against the assignor, at any rate, those available to him up to the date when notice of the assignment was given to him.

[2—F., 13 B. 42 (44); R., 28 M. 544 (546)=15 M.L.J. 384, 9 P.R. 1907=41 P.W.R. 1907.]

Reference to the High Court, under S. 617 of Act X of 1877, by the Judge of the Court of Small Causes at Allahabad.

JUDGMENT.

[734] The promissory note is not made payable to any other person than the payee. It is not made payable to "order," nor to "bearer." It is therefore not a "negotiable instrument." Nevertheless by the law of India a chose in action is assignable. Courts of Equity allow an assignee of a chose in action to sue in his own name, and, inasmuch as our Courts are Courts of Equity as well as of Law, in our judgment an assignee of a chose in action is entitled to sue in his own name. It is, however, requisite for the Courts to bear in mind that whatever defences might be set up against the assignor may also be set up against the assignee, or at least such defences as might have been set up to the time when notice of the assignment was given to the defendant. The Judge of the Small Cause Court may be informed accordingly.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

RUDR NARAIN SING (*Plaintiff*) *v.* RUP KUAR AND ANOTHER (*Defendants*). [3rd July 1878.]

1878
JULY 3.
APPELLATE CIVIL.
1 A. 734.

1 A. 734.

1. *Hindu Law—Gift of separate immoveable property by husband to wife—Her rights therein—Stridhan.*

Under Hindu Law, the wife has no absolute power over immoveable property given to her by her husband. She holds the property on terms similar to those on which property inherited from her husband is held.

2. *Alienation of gift by widow—Suit by reversioner.*

The reversioner has the same right to question her acts in relation to immoveable property gifted to her, as he has in relation to property inherited by her from her husband.

3. *Res judicata—S. 2, C.P.C. (1859).*

Where, in a former suit by a person against his brother's widow, for possession as heir of his deceased brother, it was decided, among other things, that the widow took only a life-interest in certain properties, *held*, in a subsequent suit by his son as reversioner against the same defendant for having certain alienations made by her declared invalid, that the decision in the former suit, as to the nature of the interest the defendant took in her husband's property, was not *res judicata*, as the plaintiff did not claim as heir of his father, the plaintiff in the former suit, but as the heir and reversioner of his uncle, the deceased husband of the defendant.

JUDGMENT.

[742] The plaintiff has brought this suit on the allegation that the estate belonged to Chait Singh as a separate estate, and his widow, the female defendant, succeeded to it at his death, and took a life-interest, and plaintiff, as the next heir to her husband at her death, sues to cancel a deed of gift made by her in favour of defendant No. 2, on the ground that there was no necessity for the alienation, and further that it was ruled, in a suit brought by plaintiff's father against the widow, on the 30th August 1865, by the Sudder Dewani Adalat, that the lady had only a life-interest, and plaintiff was heir at her death and the above decision is binding.

The defendants pleaded that the above decision does not bind the parties to this suit; that Chait Singh made a gift of the property to the defendant his wife in his life-time, by which she obtained it absolutely, and her transfer cannot be questioned; that the plaintiff is barred by limitation; and further that, in consequence of the confiscation of his father's property for rebellion, he has no *locus standi*, and the gift was a fitting reward to defendant No. 2 for services rendered as manager of the lady's property, and had been allowed by the brother of the plaintiff.

The lower Court has decided that there was a gift by Chait Singh in favour of his wife as defendants plead, and that it gave her absolute power over the estate, and on this ground he dismissed the suit.

It appears that on the 30th August 1865, there was a review by the Sudder Dewani Adalat of a former judgment in a suit brought by plaintiff's father and uncle against the defendant No. 1, the object of which was to be declared heirs of Chait Singh in respect of his property, among which is that now in suit, and to avoid certain alienations made by the widow. It appears to have been pleaded by the defendant that the estate

1878

JULY 3.

APPELLATE CIVIL.

1 A. 734.

was held separately by Chait Singh, and that some of the property had been sold, and some, including the mauza in suit, had been given to the lady by [743] Chait Singh, and some inherited, and the Court held that the estate was the separate estate of Chait Singh, and that the mauzas sold did not form part of his estate at his death, but were the absolute property of the wife, but that the plaintiffs were entitled to be regarded as the reversioners after her death of the mauzas received by gift or inherited by her from the deceased, and competent as such to impeach any transfer thereof to other parties. The Court did not consider it necessary to decide the validity of the deed of gift on the part of Chait Singh to his wife, as they held it was immaterial to the plaintiffs whether it be valid or not, seeing that the mauzas conveyed by it would devolve on the widow by the Hindu law of succession by reason of their having belonged exclusively to her husband.

With reference to the pleas in appeal, we observe that it may be that the above decision has not the effect of *res judicata*, as the plaintiff contends, since the plaintiff does not come in through or under his father when he is suing as next heir to his uncle. Nor can there be any doubt that the defendant's husband, Chait Singh, did convey the property in suit to the defendant in his lifetime by deed of gift, for the evidence adduced on this point by the defendant is convincing. So much therefore of the case of the plaintiff which rests the claim on the allegation that the defendant succeeded as heir to her husband fails, but notwithstanding, we consider that the plaintiff is entitled to succeed in this case on the view we take of the case.

Admitting that the defendant obtained the estate by gift, there can be little doubt that by Hindu law she will have no absolute power over immoveables given by her husband. "What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or give it away excepting immoveables. The meaning is that, as regards immoveable property given by the husband, the wife is allowed to use it only by dwelling in it, but not to alienate it by gift, or sale, or in any other manner," Narada, Digest of Hindu Law by West and Bühler, Bk. ii, p. 74, and Mr. Colebrooke's remarks found in Strange, vol. ii, pp. 402, 407, which are as follows:—"No doubt the widow may give away her own property, excepting land given to her by her husband or [744] inherited from him, which she cannot dispose of without consent of the next heirs." There are other texts of the same purport, and this view of the effect of the gift was taken by the Sudder Dewani Adalat in the decision already referred to, in which the learned Judges cited a case in Macnaughten's Precedents (1), and their ruling in that case has been followed by this Court in *Gunput Singh* v. *Gunga Pershad* (2). A ruling to the opposite effect by the Calcutta Court (3) has been cited to us, but it is not in accordance with the rulings of this Court.

Immoveable property given to a wife by a husband would appear therefore to be held on terms similar to those on which property inherited from her husband is held, and her acts in respect of it liable to question in a similar manner by the next heirs. And there seems no doubt plaintiff is in a position to question the alienation made by the widow as next heir, whether the property be held to be the lady's *stridhan* governed by the law of succession applicable to *stridhan*, or it be held subject to the ordinary succession of property inherited from her husband. In the latter

(1) Case xxxi, 3d. ed., p. 238. (2) H.C.R., N.W.P., 1867, p. 233.
(3) *Chattar Lal Singh* v. *Shewakram*, 5 B.L.R., 123=13 W.R. 285.

case he is next heir to the husband, and if it be subject to the succession as *stridhan*, the lady being a childless widow, he will succeed failing the husband.

The defendants' pleas of limitation fail, since the right of suit to cancel the gift cannot be said to have accrued to plaintiff before the date of the alienation, and there has been no possession on the part of the widow which can be said to be adverse to the title. Nor is there anything in the confiscation of the father's property which can affect the plaintiff's reversionary rights as heir to his uncle. There remains the question of the validity of the alienation to defendant No. 2. The ground stated for the gift is that it was a reward for good and faithful services as the lady's manager. We do not think it is shown that the defendant has not always received his regular remuneration for services performed; on the contrary, it would appear that he has; and the gift in question can only be considered to be an act of generosity, and not one strictly called for by the circumstances, and which should be met from the lady's private **[745]** resources if at all, but is not one which can justify a permanent alienation of part of the landed estate which belonged to her husband.

The plaintiff will have a decree declaring that the gift to the defendant is invalid so far as it affects plaintiff's reversionary right as next heir. The appeal is decreed with costs.

1878 JULY 3. — APPELLATE CIVIL. — 1 A. 734.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice, Pearson and Mr. Justice Oldfield.

1878 JULY 16. — FULL BENCH. — 1 A. 745.

COLLIS (*Plaintiff*) *v.* MANOHAR DAS (*Defendant*). [16th July 1878.]

1 A. 745.

Application to sue in forma pauperis *—Order rejecting the same—Appeal.*

There is no appeal from an order rejecting an application under S. 407, C.P.C. (Act X of 1877) for permission to sue as a pauper. It does not embody the result of the decision of the suit, which it merely refuses to entertain in the manner in which it is sought to be instituted. Nor is it, though undoubtedly the result of a judicial proceeding, one of those enumerated in S. 588 of the C.P.C., as appealable. (1 A. 668, *R.*).

REFERENCE TO THE FULL BENCH.

TURNER, O.C.J. and PEARSON, J., referred to the Full Bench the question :—" whether an appeal lies under Act X of 1877 from an order under that Act rejecting an application for leave to sue as a pauper."

JUDGMENT OF THE FULL BENCH.

[746] PEARSON, J.—This is an appeal from an order passed under S. 407 of Act X of 1877, rejecting an application for permission to sue as a pauper. Such an order was not subject to appeal under the old Code of Procedure (S. 311 of Act VIII of 1859). The question is whether it is appealable under the new Code of Procedure, Act X of 1877. No provision for an appeal from such an order is made in S. 588 of the Act. The appellant contends that it is appealable as a decree under S. 540, in reference to the terms of the second section, in which a decree is defined as the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied.

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JULY 16.

FULL BENCH.

1 A. 745.

The order in question certainly does not embody the result of the decision of the suit, which it refuses to entertain in the manner in which it is sought to be instituted without payment of the fee payable by law on the plaint.

It can hardly be denied that the order embodies the result of a judicial proceeding. But so also do the orders specified in S. 588 embody the result of a judicial proceeding, yet it cannot be presumed that those orders were regarded as decrees appealable under S. 540 by the Legislature, for had they been so regarded, it would have been unnecessary to declare in S. 588 that an appeal shall lie from them. It seems to follow that the judicial proceedings referred to in S. 2 are proceedings of a different nature from those which result in the orders specified in S. 588, and that they in some degree resemble and partake of the character of a suit.

The category given in S. 588 includes all important orders passed in the course of the trial of a suit and the execution of a [747] decree, except the most important of all, namely, orders finally disposing of applications for the execution of decree. As it is impossible to suppose that an appeal would be allowed from orders of secondary importance, and not from orders of the first importance, it may reasonably be concluded that orders finally disposing of applications for the execution of decrees were intended to be appealable as decrees under S. 540. A recent judgment of the Full Bench of this Court (1) has settled that they are so appealable.

Proceedings in execution of decree necessarily follow what is called the decision of the suit in S. 2. They may, indeed, be still a part of the suit, if that be held not to terminate with the decree, but with the execution of the decree. Nevertheless each application for execution may be viewed as a little suit of itself, though it be a suit within a suit; and the proceedings in each are not unlike those in the trial of the suit. That proceedings under S. 244 were so viewed by the Legislature is indicated by the provision made in S. 588, Cl. (*j*), for appeals from orders passed in the course of them of the same nature with appealable orders made in the course of a suit.

An application for permission to sue as a pauper is really the presentation of a plaint. The order passed upon it does not so much resemble an order determining matters in issue between parties relating to the execution of a decree as an order passed under S. 54, Cl. (*b*), rejecting a plaint written on paper insufficiently stamped. That order is not a decree appealable under S. 540, but is appealable under S. 588, Cl. (*e*). From an order rejecting an application under S. 407 it was presumably deemed unnecessary to allow an appeal in reference to the provisions of S. 413. The present appeal should therefore in my opinion be rejected.

TURNER, O.C.J.—I concur in the judgment pronounced by Mr. Justice Pearson.

OLDFIELD, J.—I concur in the judgment of Mr. Justice Pearson.

(1) 1 A. 668.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

1878

JULY 16.

FULL BENCH.

1 A. 748.

GULAB SINGH (*Petitioner*) *v.* LACHMAN DAS (*Opposite party.*)

[16th July 1878.]

Application to set aside ex parte *decree—Order rejecting the same—Appeal—S. 105, C.P.C. (1877).*

There is no appeal from an order under S. 108, C.P.C. (1877), rejecting an application to set aside an *ex parte* decree, as it is neither a decree nor one of those orders made appealable under S. 588 of the Code. (1 A. 668, R.)

[D. 4 A. 387 (F.B.).]

On the Court of first instance rejecting an application by the defendant-in-suit for an order to set aside an *ex parte* decree passed against him, he appealed to the High Court against it.

REFERENCE TO THE FULL BENCH.

PEARSON, J., referred the case to the Full Bench, observing that, unless orders made under S. 108 of Act X of 1877 fell within the definition of decrees and were appealable as such, there seemed to be no provisions in Act X of 1877 for appeals from orders made under that section.

JUDGMENTS OF THE FULL BENCH.

[748] PEARSON, J.—S. 119 of Act VIII of 1859 provided that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," but that, "in all cases in which judgment may be passed *ex parte* against a defendant, he may apply within a reasonable time to the Court by which the judgment was passed" for an order to set it aside, and that "in all cases in which the Court shall pass an order for setting aside the judgment, the order shall be final, but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable."

Under the new Code of Procedure an *ex parte* decree is appealable like any other decree. The provision that no appeal shall lie [749] against an *ex parte* decree has not been re-enacted. S. 108 of Act X of 1877 provides that, as before, "in any case in which a decree is passed *ex parte* against a defendant under S. 100, he may apply to the Court by which the decree was made for an order to set it aside." S. 119 of Act VIII of 1859 made provisions of a somewhat similar nature in respect of judgments against a plaintiff by default. He was not allowed to appeal against the judgment, but was permitted to apply within thirty days from its date for an order to set it aside; and in all appealable cases in which the application was rejected, the order of rejection was appealable. By the new Code of Procedure it may be a question whether a plaintiff is not precluded from appealing from a judgment against him by default; but he may, under S. 103 of Act X of 1877, apply for an order to set the dismissal of his suit aside; and under cl. (*f*), S. 588, orders rejecting applications under S. 103 (in cases open to appeal) for an order to set aside the dismissal of a suit are expressly declared to be appealable. As there is no provision of a like nature made in S. 588 of Act X of 1877, for appeals from orders

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JULY 16.

FULL BENCH.

1 A. 748.

rejecting applications under S. 108 for setting aside *ex parte* decrees, it is *primâ facie* inferrible that such orders were not intended by the Legislature to be appealable. There remains the question whether such orders can be held to be decrees within the scope of the definition of a decree given in S. 2 of the Act, and as such appealable under S. 540. It is obvious to remark that if such orders could be regarded as decrees, so also might orders on applications under S. 103 refusing to set aside *ex parte* decrees be regarded as decrees. The circumstance that provision has been made in S. 588 for an appeal from orders rejecting applications under S. 103 seems to show that they were not regarded as decrees appealable under S. 540 by the Legislature, and warrants the conclusion that orders rejecting applications under S. 108 cannot properly be so regarded. "Decree" is defined in S. 2 as meaning the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. An order refusing an application to set aside an *ex parte* decree certainly does not embody the result of the decision of the suit. Such an order does, indeed, it must be admitted, embody the result of a judicial proceeding. But so do the orders specified in S. 588 embody the results of judicial proceedings, and yet they cannot be presumed to have been [750]regarded by the Legislature as decrees appealable under S. 540; for had they been so regarded, it would have been unnecessary to declare in S. 588 that an appeal shall lie from them. It is presumable then that the judicial proceedings referred to in S. 2 are of a different nature from those which result in the orders specified in S. 588, and that they in some degree resemble and partake of the character of suit. The category given in S. 588 includes all important orders passed in the course of the trial of a suit and the execution of a decree, except the most important of all, namely, orders finally disposing of applications for the execution of decrees. As it cannot be supposed that an appeal would be allowed from orders of secondary importance, and not from orders of the first importance, it may reasonably be concluded that orders finally disposing of applications for the execution of decrees were intended to be appealable as decrees under S. 540. A recent judgment of the Full Bench of this Court (1) has settled that they are so appealable. Proceedings in execution of decree, following the decision of the suit, may be still a part of the suit, if that be held to terminate not with the decree, but with the execution of the decree. Nevertheless each application for execution may be viewed as a little suit of itself, though it be a suit within a suit; and the proceedings in each are not unlike those in the trial of a suit. That proceedings under S. 244 were so viewed by the Legislature as proceedings of a distinct kind, analogous to proceedings in a suit, is indicated by the special and remarkable provision made in S. 588, Cl. (*j*), for appeals from orders passed in the course of proceedings under S. 244 of the same nature as orders appealable in the course of a suit. The proceeding which results in an order rejecting an application to set aside an *ex parte* decree is a proceeding very different from that which results in an order determining matters in issue between parties relating to the execution of a decree and is not at all of the same character as a suit. The present appeal should, therefore, in my opinion, be rejected.

TURNER, O.C.J.—I am of the same opinion.

OLDFIELD, J.—I concur in the view expressed by Mr. Justice Pearson.

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(1) 1 A. 668.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

1878
JULY 18.

APPELLATE CIVIL.

1 A. 751.

FATEH SINGH (*Plaintiff*) *v.* SANWAL SINGH (*Defendant*).

[18th July 1878.]

1 A. 751.

Cr. P.C., 1872—Security for good behaviour—Suit for money deposited by accused with surety—Unlawful consideration—Void agreement—Contract Act (IX of 1872), Ss. 23, 24.

Where a person, called upon under the provisions of the Cr. P. C., to furnish security for his good behaviour, deposits the amount of the security with his proposed surety who thereupon stands surety for the former, the depositor cannot recover the amount from the surety even after the period fixed in the bail-bond had expired without any act being done by the person bound over so as to entail the forfeiture of the bond; for it is obvious that under the circumstances, the consideration for the agreement is unlawful, the responsibility undertaken by the surety being only nominal and calculated to defeat the object of the law in requiring security for good behaviour.

JUDGMENT.

[752] TURNER, O.C.J.—The appellant was required by the Magistrate to furnish two sureties for his good behaviour, each in the sum of Rs. 600. The respondent agreed to become a surety on condition that the appellant would deposit with him the sum in which he was required to go bail. The deposit was made, the period of suretyship expired without any act having been committed by the appel-**[753]**lant to forfeit the security, and therefore the appellant applied to the respondent to repay the deposit. The respondent refused, denying the deposit. The appellant brought this suit to recover the deposit, but failed to establish to the satisfaction of the Court of first instance that the deposit had been made. The lower appellate Court found that the deposit of the sum of Rs. 600 with the respondent on the terms alleged was proved, but refused relief on the ground that the consideration of this agreement was unlawful in that it defeated the object of the law.

In special appeal the appellant challenges the propriety of this ruling.

In our judgment the conclusion at which the Judge has arrived is right. The Criminal Procedure Code, Ch. xxxviii, empowers the Magistrate to require a person of notoriously bad livelihood to procure sureties who shall be responsible for his good conduct in the amounts required from them. If the amount for which a surety is responsible is deposited with him by, or on behalf of, the person for whose conduct he undertakes responsibility, it is obvious that he is responsible only in name. No Magistrate with a knowledge of the facts would be justified in accepting the surety under this chapter. The object of the law would be defeated. We must then affirm the decision of the Judge and dismiss the appeal, but seeing that the respondent denied the deposit, and that he was a party to the agreement, and that the point raised is novel, we order each party to bear his own costs in all Courts.

ORIGINAL CIVIL.

PRESENT :

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

1878
JULY 19.

ORIGINAL CIVIL.

LACHMI NARAIN (*Plaintiff*) *v.* RAJA PARTAB SINGH (*Defendant*).
[19th July 1878.]

2 A. 1.

2 A. 1. 1. *British Territory in India—Power of the Crown to cede.*

The Crown is competent to cede territory in its Indian dominions, to a foreign prince or a feudatory chief, without the intervention of Parliament. The prerogative of the Crown is exercised with the advice and through the agency of the responsible ministers of the Crown. Where it is shown that a cession of territory was effected by the Government of India, that it was accepted by the Secretary of State, as fulfilling instructions conveyed to the Government of India, and that it was approved by Her Majesty's Government, there is sufficient evidence of a cession by the Crown of such territory. (1 B. 367). (The Bhaunagar case, *F.*)

2. *Form or manner of grant of cession.*

Whether there has been a cession in sovereignty is a question of fact to be decided, not merely by the form or language of the documents, by which the grant or cession was made, but also by a consideration of other facts and circumstances, tending to show the nature and effect of such grant or cession.

3. *Jurisdiction of British Indian Courts over ceded territory.*

The Courts of British India have no jurisdiction over property in ceded territory; they cannot, therefore, order the sale of lands situated in such territory.

[1 & 3—R., 16 P.L.R. 1904.]

JUDGMENT.

[9] On the 22nd June, 1871, the plaintiff, a banker at Bareilly, advanced to the defendant Rs. 1,20,000 to bear interest at one per cent. per mensem, and with the following stipulations: that whatever interest might remain due at the end of each year should be added to the principal and bear interest at the rate agreed; and that, in the event of the plaintiff finding it necessary to resort to legal proceedings for the recovery of any sum due to him, the debt should, even after decree, bear interest at the rate agreed. As security for the loan, the defendant mortgaged a large number of villages. Default having been made in the payment of principal and interest, the plaintiff on the 15th September, 1876, instituted this suit to recover Rs. 2,17,402-8-0, due in respect of principal and interest up to the date of suit and future interest at the rate agreed, by bringing to sale the estates mortgaged.

[10] The defendant admitted the execution of the mortgage-deed and the receipt of the consideration; he also admitted that no moneys had been paid in respect of principal or interest; but he pleaded that the stipulation for the payment of compound interest was a penal provision which the Court was not bound to enforce; and that the stipulation for the payment of interest after decree at the rate of 12 per cent. was inoperative, in that it could not oust the discretion of the Court to award interest on the sum decreed at such rate as the Court might think proper. The defendant also pleaded that, of the estates mortgaged, nineteen were not within the North-Western Provinces nor within British India, but were within the territory of a Foreign Prince, having been ceded to His Highness the

Nawab of Rampur, and that the Court had no jurisdiction to order the sale of these estates.

The plaintiff contended that he was entitled to interest at the rate agreed, and that the estates to which the last plea referred were from of old and still continued to the British territory; that the alleged cession conferred on the Nawab merely the right to receive the public revenue assessed on the estates and not territory in sovereignty; that the Nawab was not competent to accept territory in sovereignty; and that territory in British India could not be ceded without the consent of Parliament, which consent had not been obtained.

Seeing that the issue relating to jurisdiction raised important questions of law, this Court, with the consent of the parties, called the case up to its own file for trial.

Inasmuch as the claim affects estates admittedly within the jurisdiction of the Courts of Bareilly, as well as estates which are alleged to be outside the area of the territorial jurisdiction of those Courts, we must dispose first of the issues relating to interest. * * *

* * * * We find that the plaintiff is entitled to recover Rs. 1,20,000 principal, and Rs. 97,402-8-2 interest up to date of suit, and interest on the whole debt Rs. 2,17,402-8-0 at the rate of 12 per cent. from the institution of the suit until realisation.

It remains for us to determine whether, for the satisfaction of the amount due or to become due, the Courts of Bareilly would be [11] competent to order the sale as well of the estates which lie within the territory alleged to have been ceded to the Nawab of Rampur as of the estates which admittedly still remain in the District of Bareilly.

The Nawab Mahomed Yusuf Ali Khan Bahadur, having rendered conspicuous services to the British Government during the mutiny, it was determined to confer on him a substantial reward. It was at first proposed to make over to him the pargana of Kashipur adjoining Rampur on the north-west, but bounded on three sides by British territory. The inconvenience of the existence of a "Foreign State" in the midst of British territory was pointed out to the Government of India by the Lieutenant-Governor, North-Western Provinces, on the 20th January, 1860; and for this and other reasons it was suggested that, in substitution for Kashipur, the Nawab should receive certain villages in the District of Bareilly, which had once formed part of the Rampur territory and had been taken from it at the close of the last century, and also certain villages in the District of Moradabad. These proposals were sanctioned, and Mr. Inglis, the Collector of Bareilly, in the early part of the year 1860, gave possession to the Nawab's agents of the villages in Bareilly, and among them, of the nineteen villages before mentioned. The revenue records were at the same time delivered to the Nawab's representatives, and "proclamation of the change was made throughout the whole of the assigned tract." On the 19th May, 1860, the Government, North-Western Provinces, reported Mr. Inglis' proceedings to the Government of India, and on the 23rd June, 1860, a sanad was executed by the order of the Viceroy and Governor-General in the following terms:

"Whereas Furzund Dil Pizeer Nawab Mahomed Yusuf Ali Khan Bahadur, Nawab of Rampur, exhibited from the commencement of the rebellion to the end his unswerving loyalty to the British Government by affording personal and pecuniary aid, protecting the lives of Christians and rendering other good services, to the satisfaction of Government, the Nawab has already been thanked, a killat of distinction has been conferred upon him, the number of his salute guns has been increased, and an addition has been made to his titles. In further recognition of his services the Government hereby bestows on him the villages in Bareilly and Moradabad as per separate schedules,

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assessed at Rs. 1,28,527-4-0, in perpetuity, from generation to generation. The above villages are now annexed to the old territory of the Nawab on the same conditions on which he holds that territory."

[12] The names of the nineteen villages appear in the schedule entitled "List of villages situated in Bareilly."

The transfer of the villages to the Nawab excited the apprehensions of the zamindars who petitioned the Government of India that, on the expiry of the settlement, their proprietary rights might be maintained. The substance of the petition having been communicated by the Lieutenant-Governor to the Nawab, His Highness addressed a kharita to the Lieutenant-Governor, in which, referring to the confident hope expressed by the Lieutenant-Governor that he (the Nawab) would not fail to consider the rightful claims of the petitioners, the Nawab assured His Honour that, if it pleased the Almighty, the rights of these petitioners as well as of others in the same situation would be duly respected and regarded, inasmuch as he had in his administration made a point of governing his subjects on the recognised principles of equity and justice which obtained under the British rule.

On the 7th March, 1862, a despatch was addressed by the Secretary of State to the Governor-General, of which the following paragraphs are material:

"(i) I have received and considered in Council your letter, dated 22nd June, 1861, relative to the substitution, with the consent of the Nawab of Rampur, of villages amounting in value to Rs. 1,28,500 for the pargana of Kashipur as the reward of his services during the recent disturbances.

"(iii) I learn.....with much satisfaction that the Nawab has freely and willingly consented to accept villages in the Bareilly and Moradabad districts, yielding about Rs. 1,28,000, in lieu of the Kashipur pargana, which he is stated to have estimated as prospectively worth to him two lakhs of rupees per annum.

"(iv) Among the papers submitted with your despatches is a memorial of some of the proprietors of the transferred estates, setting forth in temperate language objections which must be admitted to be far from unreasonable to the arrangement you have made.

"(v) The transfer to a Native State of villages which have been long under British administration, and formed part of one Regulation Province, is always objectionable. I observe that all these villages which have been transferred to the Nawab of Rampur by the present arrangement have ever since our acquisition of Rohilkhand belonged to the District either of Bareilly or Moradabad. They appear to be all held direct from Government. their respective proprietors being the sudder malguzars paying their revenue to the Collector without the intervention of any talukdar.

[13] "(vi) The Nawab must understand that, in those villages, all that he acquires by the transfer is the right to collect and appropriate the assessed revenue, the amount of which cannot be increased during the period of existing engagements; and that, after the expiration of the present settlement, the proprietors will be entitled to re-assessment with the Nawab on the same principles as are accorded by your officers to the villages similarly circumstanced in the District from which they are unwillingly transferred.

"(vii) I am glad to observe that you have directed that the Nawab be informed that you expect him to respect existing rights and tenures. I am of opinion that a stipulation to this effect should be inserted in the sanad of grants which I request may be done, and that a copy of the sanad may be forwarded for my information."

The Government of India, having received from the Nawab the kharita above mentioned, considered it unnecessary to alter the sanad which had been already executed. Replying to the despatch of the Government of India on this subject, the Secretary of State, in a despatch dated 9th February, 1863, observed:

"Her Majesty's Government regret that, in the original grants transferring the several tracts of country, no words were introduced for the maintenance of existing rights in the land; they do not wish you to adopt any other measures for the furtherance of the object in view than such as may be resorted to without giving offence to the respective Chiefs or exciting mistrust in their minds."

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It was subsequently discovered that, owing to similarity of names, an error had occurred in the assessment of villages. To rectify this error, it was proposed that the Nawab should re-transfer to the British Government Piparia and Chakarpur, but should remain in possession as *muafidar* of these villages, which should be subject to the Civil, Criminal and Revenue Regulations in force in British territory; and that in exchange for Piparia and Chakarpur in Serouli, he should receive Piparia and Bhikampur in pargana Chowmehla. The Nawab assented to these terms in a *khut*, dated 22nd March, 1864, and the arrangement was communicated to the Secretary of State. In a despatch, dated 7th November, 1864, the Secretary of State approved the alterations that had been made; and observed that "the instructions of Government that a territory yielding an annual revenue of between Rs. 1,28,000 to Rs. 1,29,000 be made over to the Nawab in exchange for the pargana of Kashipur were fulfilled." The despatch continues: **[14]** "Under these new arrangements, the Nawab will continue to hold, but only as *muafidar* and subject to British Civil, Criminal, and Revenue Regulations, Piparia and Chakarpur (worth Rs. 1,681) lately made over to him in full sovereignty under a misapprehension that they were identical with two villages of the same name.....(iv) Her Majesty's Government are gratified that the Nawab should have again complied with your request involving a small loss to him of revenue and diminution of his jurisdiction. A communication to this effect should be made to His Highness."

From the year 1860, when Mr. Inglis gave possession to the Nawab, up to the present time, it has not been shown that the British authorities have exercised any administration or judicial functions in the villages transferred. On the other hand, it is shown that in November, 1862, the Sadr Diwani Adalat, North-Western Provinces, refused to disturb an order of the Judge of Bareilly declining to issue process in execution of a decree of the Privy Council against certain estates of the defendant in this suit on the ground that they had been transferred from British territory to that of the Nawab of Rampur (1). It has not been denied on the part of the plaintiff that, from the date above-mentioned, administrative and judicial functions have been exercised in the transferred villages under no other authority than that of the Nawab.

The documents to which we have referred and the admitted facts have no room for doubt that there has been not merely an assignment of revenue but a transfer to territory. We assent to the argument that in such arrangements we are not to look to documents as operating by their own force to transfer sovereignty—Kent's Commentaries, 10th Ed., Vol. i, S. 177. We are not to look to what was done; though we may consider the language of documents as evidence of what was intended to be done. The circumstance that the arrangement was recorded in a sanad is not incompatible with a cession. It is not inconsistent with usage in this country that a grant of sovereignty or territory by the Paramount Power to a Feudatory should be expressed in a sanad. The East Indian Company in 1818 entered into a treaty **[15]** with the Nawab of Bhopal, whereby it was stipulated that the Nawab and his successors, although bound to act in co-operation with the British Government and to acknowledge its supremacy, should remain absolute rulers of their country—Aitchison's Treatise, Ed. by Talbot, vol. iii, 370; yet when, as the reward for services in the mutiny, pargana Bairsea was granted to the Bhopal State in sovereignty, the grant was expressed in a sanad—Aitchison's Treatise, Ed. by Talbot, vol. iii, 374. So also, treaties had been made with Holkar in 1805

(1) Misc. R.A. No. 1384 of 1862, decided the 1st November, 1862.

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and 1818, but when in 1844 the *guddee* became vacant, intimation of the bestowal of the principality on Maharajah Tookajee and the heirs of his body lawfully begotten was conveyed to him by sanad. Pattiala is the largest of the Sikh States. In recognition of the assistance rendered by the Maharajah during the Nepal war, portions of the Keonthul and Bughut States were conferred on him and his heirs for ever by sanad, dated 20th October, 1815. At the close of the Sikh war, the Maharajah received a sanad, dated 22nd September, 1847, recognising him as entitled to continue in possession of his ancient hereditary estates with all Government rights thereto belonging, of police jurisdiction and collection of revenue, free from any demand of tribute or revenue on the part of the British Government, and it was declared that his chaharumains, feudatories, adherents, and dependents would continue bound in their adherence and obligation to the Maharajah as theretofore. Again, in 1860, the British Government gave additional territory to Pattiala, and by sanad declared that His Highness the Maharajah and his heirs for ever, should exercise full sovereignty over his ancestral and acquired domains— Aitchison's Treatise. Ed. by Talbot, vol. vi, pp. 65-69.

Nor is it inconsistent with a cession of sovereignty that it should be accompanied by conditions for the benefit of the inhabitants of the ceded territory. Gibraltar and Minorca were ceded to the English in 1713, on condition that the Spanish inhabitants should enjoy their estates and religion—Smollett, vol. ii, p. 97. Upper Assam was, in 1833, ceded to Rajah Poorunder Singh, subject to the payment of an annual tribute, the Maharajah binding himself in the administration of justice to abstain from torture and barbarous punishments which had been practised by former Rajahs of Assam.

[16] The sixth paragraph of the despatch of the 2nd March, 1862, above quoted, must be read with the other despatches we have cited, and indeed is explained by the seventh paragraph. The cession to the Nawab was to be accompanied by the stipulation that he was to respect existing rights and tenures. This condition would not, as we have shown, be inconsistent with the cession of territory in sovereignty, and the despatch of the 7th November, 1864, states distinctly that the territory granted had been made over to the Nawab in full sovereignty.

The sanad, as we have said, declares that the territory granted "is annexed to the old territory of the Nawab to be held on the same conditions as those on which he holds that territory." Unless it can be shown that the old territory is held on conditions incompatible with sovereignty, it does not admit of dispute that the territory made over to the Nawab in 1860 was ceded in sovereignty. In the course of his address Mr. Evans conceded that a cession of territory, with rights of sovereignty, could not be made to a mere subject, and therefore the learned counsel for the defendant raised the question as to the status of the Nawab. The Nawab holding in 1860 no other territory than Rampur, the question as to his status is involved in the conclusion at which we may arrive as to the conditions on which the old territory was held. In determining it, we must not be taken to assent to the learned counsel's position without some qualification. In Coke's Inst. Bk. iv, C. 71, it is mentioned that Henry VI crowned the Earl of Warwick, King of Wight; but it is added "we could never find any Letters Patent for this creation because as some do hold the King could not by law create him a king within his own Kingdom, because there cannot be two kings of the same place in one Kingdom." Countries Palatine were however created within the realm of England, and bestowed on subjects, and in its foreign dependencies the

Crown of England has granted to subjects what have been termed proprietary governments "in the nature of feudatory principalities with all the inferior regalities and subordinate powers of legislation"—Broom and Hadley's Commentaries, vol. i, p. 124. Pennsylvania, Delaware, Maryland and Barbadoes are cited as instances, and to these may be added Bombay, granted by Charles II in 1669, and **[17]** St. Helena, granted by the same King in 1674, to the East India Company. The Governments established by Charter, of which we have had examples in British India, are also instances of the grant by the Sovereign of subordinate sovereignty to private persons, and the history of this country under native rule would, we apprehend, furnish precedents establishing the right of the Paramount Power to elevate subjects to the rank of Feudatories and to assign to them territories. We are, however, relieved of the necessity of determining this point by the conclusion at which we have arrived as to the status of the Nawab.

The case of *The Charkieh* (1) was cited by Mr. Evans as authorising a Court to consult histories, firmans, treaties, and even replies from the Foreign Office for the elucidation of such questions. The Evidence Act, S. 57, requires Courts in this country to take judicial notice of (*inter alia*) the existence.....of every State or Sovereign recognised by the British Crown, and declares that in such cases and in all matters of public history, the Court may resort for its aid to appropriate books or documents of reference. From such sources, and mainly from the collection of treatises originally published by Mr. Aitchison, the Secretary to the Government of India in the Foreign Department, we have ascertained the following particulars respecting the State of Rampur, and its ruler.

His Highness the Nawab of Rampur claims descent from a Rohilla Chief. Ali Mahomed, who, having rendered service to the Emperor of Delhi in the suppression of the Bara Syuds, received the title of Nawab and a grant of a large territory in Rohilkhand. Owing to intrigues on the part of the Nawab of Oudh, Ali Mahomed was for a time deprived of his territory by Mahomed Shah. But taking advantage of the weakness of the Delhi ruler, Ali Mahomed regained the territory that had been assigned to him, and was confirmed in his possession by the son and successor of Mahomed Shah. In the absence of his elder son detained as a hostage at Delhi, and during the minority of his younger son, Ali Mahomed intrusted his territories to Hafiz Rahmat Khan and Dudi Khan; and on the 13th June, 1872, Hafiz Rahmat Khan **[18]** and the other Rohilla Chiefs by treaty entered into an offensive and defensive alliance with the Nawab Wazir Shujah-ul-Dowla. On the division of Ali Mahomed's territory among his sons, the Jaghir of Rampur fell to Faizullah Khan. The Nawab Wazir shortly afterwards declared war with the Rohillas, and with the assistance of troops of the East India Company, furnished by Warren Hastings, the Sirdars were defeated and forced to sue for peace.

By a treaty to which Colonel Champion, the Commander of the Company's forces was a party, the Nawab Wazir agreed to give Faizullah Khan the country of Rampur, and some other districts dependent thereupon, producing an annual revenue of Rs. 14,75,000: while Faizullah undertook to continue in submission and obedience to the Nawab Wazir, to retain in service no more than 5,000 troops, to furnish 3,000 troops to the Nawab if and where required, to enter into no relations with any other power save the Nawab, nor to hold correspondence with any save the Nawab, the English Chiefs excepted. By an agreement dated September

(1) L. R. 4 A. and E. 59.

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19th, 1781, which recited that by his breach of treaty Faizullah Khan had forfeited the protection of the British Government, and caused by his continuance in his present independent state great alarm and detriment to the Nawab, the Governor-General permitted the Nawab to resume his lands and pay him in money the amount stipulated by the treaty, after deducting the charges he stood engaged by treaty to furnish. This resumption was not, however, effected. In 1783 Major William Palmer, acting on behalf of the Nawab and "the gentlemen," in consideration of the payment of fifteen lakhs of rupees, released the Nawab Faizullah Khan from the obligation to supply the force of 3,000 men stipulated by the treaty, and in other respects affirmed the treaty. On the death of Faizullah, Gholam Mahomed Khan murdered his elder brother Mahomed Ali Khan and usurped the Jaghir. The Nawab intervened, and being assisted by the British compelled the Rohillas, who had taken up arms to support Gholam Mahomed, to accept terms. What remained of the treasure of the Nawab Faizullah was given over in deposit to the Company. The Nawab Wazir Ausuf-ul-Dowla in December, 1794, by sanad granted to Ahmud Ali Khan, the minor son of Mahomed Ali Khan, mahals in jaghir, including the town of Rampur, producing a revenue of Rs. 10,00,000, and received **[19]** from him that treasure deposited with the Company, amounting to Rs. 3,22,000 gold mohurs, as a *nazarana* for the jaghir and in lieu of all rights of confiscation of the property of the Nawab Faizullah Khan and Mahomed Ali Khan. The East India Company was a party to, and guaranteed the performance of, these engagements. In 1801 the Nawab Wazir ceded to the East India Company several provinces and, among others, the territory since known as Rohilkhand. No mention of Rampur is made in this treaty; whereas the paramount sovereignty over Farukhabad and its dependencies, which paid an annual tribute of Rs. 4,50,001, is ceded in the following terms: "Farukhabad and others, Rs. 4,50,001."

It may be noticed that by another treaty made in 1802, the Nawab of Farukhabad ceded the province of Farukhabad and its dependencies to the East India Company in full sovereignty. Rampur, it must be remembered, paid no annual tribute, and possibly on this account was not mentioned in the treaty of 1801. By Regulation XI of 1804, S. 22, certain specified articles exempted from export duty when exported to the territory of the Nawab Wazir, were also exempted from the same duty when exported from the Ceded Provinces to "the territory composing the Jaghir of Rampur;" and in Regulation IX of 1810 the same provision was re-enacted, and it was declared that all goods and articles of trade imported into the Province of Rohilkhand from Rampur Jaghir, being of the description of goods and articles of trade which were liable to the payment of Government customs under that Regulation, should be subject to the payment of the same import duties to which the same goods and articles of trade were subject on importation from the dominions of the Nawab Wazir. These provisions were cited by Mr. Evans to show that the territory of the Jaghir of Rampur was regarded as foreign territory, and on the same footing in respect of trade as the dominions of the Nawab Wazir.

In 1839, the Nawab Ahmad Ali Khan died. The claims of his daughter were set aside, and his cousin Mahomed Syed Khan, having been admitted to the succession, executed an agreement in the form not unusually employed by feudatories, dated 21st August, 1840. It commences as follows: "Agreeably to the orders of the **[20]** Governor-General the Government of Rampur having devolved on me, I therefore declare that all matters connected with my rule shall be conducted with a view to maintain justice, &c., &c."

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From this document it appears that the Nawab recognised the British Government as having acquired the paramount rights of the Nawab Wazir over the Jaghir of Rampur.

In 1855 Nawab Mahomed Syed Khan was succeeded by his son Nawab Mahomed Yusuf Ali Khan, who, acknowledging that his succession had been sanctioned by the British Government, also executed an agreement declaring he would administer the affairs of the Jaghir with justice and equity and would govern the Pathans with consideration.

In 1862 the Nawab received from the Government a sanad in the following terms, which are identical with the terms of a similar instrument given on the same occasion to the Nizam and other Feudatory Princes :

"Her Majesty being desirous that the governments of the several Princes and Chiefs of India who now govern their own territories should be perpetuated, and that the representation and dignity of their houses should be continued, I hereby, in fulfilment of this desire, convey to you assurance that, on failure of natural heirs, any succession to the government of your State which may be legitimate according to Mahomedan law will be upheld. Be assured that nothing shall disturb the engagement thus made to you so long as your house is loyal to the Crown and faithful to the conditions of the treaties, grants, or engagements which record its obligations to the British Government."

In 1864 certain lands lying within the territory of Rampur, and it is stated at the bar also lands lying within two of the transferred villages, were required for the purpose of constructing a railroad. The Nawab, in answer to inquiries addressed to him by the Government, North-Western Provinces, replied that he would give up the lands required in full sovereignty, and that duties should not be levied on goods in transit through his territories, but only on goods imported and exposed for sale in his markets.

In 1865 His Highness Nawab Mahomed Kulb Ali Khan Bahadur, on succeeding to the Jaghir, executed an agreement in nearly the same words and to the same effect as the agreement executed by his predecessor in 1855.

[21] Mr. Aitchison estimates the area of Rampur at 1,140 square miles with a population of 507,103 souls. No tribute is paid to the British Government. The Nawab maintains a force of 315 artillery with 28 guns, 505 cavalry, and 977 infantry. He has also a police force of 1,023 men, and regularly constituted Courts for the administration of justice.

The facts to which we have adverted show that the ancestors of the Nawab of Rampur were admitted to treaty engagements with the Nawab Wazir, when that Prince was in all but name independent; that they and His Highness the present Nawab have been recognised by the British Government as in possession of such powers of sovereignty as are enjoyed by the Feudatories of the Empire, and that the State of Rampur has been held by them subject indeed to the extraordinary control of the Paramount Power but otherwise independent.

The learned counsel for the plaintiff contended that such sovereignty was inconsistent with the name "jaghir," which we have seen was applied to the territory before the cession of Rohilkhand, and has since been retained. The etymology of the term is not inconsistent with the sovereignty enjoyed by a Feudatory, though it may be admitted that the term is applied more frequently to tenures which do not partake of sovereignty; but as were declared in *Calvin's Case, sæpenumero ubi proprietas verborum attenditur sensus veritatis amittitur.* The circumstances of India in the 18th century were such that the names of forms of government or rulers would afford little indication of their actual sovereignty or

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attributes. "The conquered rajahs or the appointed subadars, though still professing themselves dependent, had ceased to pay any real obedience or submission to the Mughal. In this distinction between nominal and substantial authority, the state of India might be not inaptly compared to the state at the same period of Germany. According to the ancient forms, the Princes who had long since become independent of the German Emperor, nay who were sometimes hostile to him, still continued in name the humblest of vassals."—Lord Mahon, History of England, vol. iv, 427. It would be more than ordinarily dangerous to accept the denomination acquired by a State or a ruler at such a period as affording any certain test of status.

[22] The learned counsel who represented the Government went on to argue that, if the Court arrived at the conclusion there had been an actual cession and occupation of territory by a foreign Sovereign, the Court need go no further. We understood him to contend that a *de facto* occupation of territory by a foreign Sovereign of itself ousted the jurisdiction of the territorial Courts, and much more so if the occupation had been acquired peaceably and with the acquiescence of the territorial authorities. In support of his argument the learned counsel relied on the rule that persons born during the hostile occupation of territory by a foreign prince are subjects of the foreign prince. It is, however, a condition of this rule that the persons so born should be born of parents who are in obedience, and not hostile to, the foreign power—*Craw* v. *Ramsay* (1), cited in Forsyth's Constitutional Law, p. 340. "There are three incidents to a subject born: first, that the parents be under the actual obedience of the King; second, that the place of his birth be within the King's dominion; and third, the time of his birth"—*Calvin's Case*, cited in Wheaton, Int. Law, Lawrence's 2nd annotated Ed. p. 895. The *de facto* occupation of territory is sufficient for the purpose of constituting allegiance by birth if the parents are in obedience to the power in occupation; but if the parents are not so subject but hostile, we apprehend the allegiance would be due to the *de jure* prince of the territory. It, however, appears to us that no conclusion can be drawn as to the question before us from the peculiar rules which determine allegiance. The jurisdiction of Courts is not ousted by the inability or the unwillingness of the Executive to assist in the execution of process. The French Courts did not lose their jurisdiction in the territories occupied by the German Army during the late Franco-Prussian War by the mere fact of foreign occupation. Nor would such jurisdiction necessarily be lost if for a season a foreign power was allowed peaceably to occupy territory. At the same time in this, as in other matters, the Courts of Justice would be guided by principles recognised in Municipal Law. They would, we apprehend, infer from a long occupation of territory peaceably enjoyed by a foreign power that there had been a valid cession or such acquiescence as would amount to a valid cession. They could [23] not, however, draw such inferences from an occupation of a few years, although it had been acquired without the exercise of hostile force and peaceably enjoyed.

We must then proceed to determine whether the transfer was made by authority competent to make a cession. It is contended by the learned counsel for the plaintiff that a valid cession of British territory cannot be made without the sanction of Parliament. On this point it was admitted at the bar that little could be added to the exhaustive arguments of Sir Vernon Harcourt, Sir Fitzjames Stephen, and Mr. Forsyth before the Privy Council at the hearing of *Damodhar Gordhan* v. *Deoram Kanji* (2),

(1) Vaughan, p. 281.

(2) 1 B. 367.

known as the *Bhaunagar Case* and to the observations of the eminent Judges, who, although they did not eventually decide the point, intimated with some distinctness their opinions on the arguments advanced.

It is held by jurists that the authority competent to bind the nation by treaty may alienate the public domain and property by treaty—Kent's Commentaries, 10th Ed., vol. i, Ss. 165, 166; Wheaton, Int. Law, Lawrence's 2nd annotated Ed., pp. 457, 873; and although the opinions of Grotius and Puffendorf differ from the opinion of Vattel on the point, the Lord Chancellor appears to prefer the opinion of the latter writer, that there is no presumption against the power of the Sovereign to alienate without the consent of his subjects. It is declared by writers on Constitutional Law and is established by precedent that the Sovereign of Great Britain is the authority to which is committed the power to make treaties. *Il appent tantum a roy fœdus percutere et bellum indicere—Calvin's Case.* "To make leagues and alliances belongs to the King only" —Comyn's Digest, Prerogative, Bk. iii; Stephen's Blackstone, vol. ii, p. 503. At a very early period in Parliamentary history, Sovereigns of England consulted the Parliament in reference to questions of peace and war, and in two instances treaties made by the Sovereign were confirmed by Parliament. A league of mutual assistance made by Henry V with the Emperor Sigismund on the 11th August 1416 was confirmed by Parliament on October 14th, 1416,—Coke's Instit. Bk. iv, C. 26. The treaty of Troyes, whereby England and France were to be united under one King, received the sanction of Parliament on the 21st May 1420—Hallam's **[24]** Middle Ages, vol. iii, p. 97. The submission of the latter of these treaties to Parliament (and it will be observed that neither was submitted until after it had been concluded by the Crown) may be explained by the circumstance that it dealt with the Crown and territory of England; but it is more probable it was due, as was perhaps also the submission of the former treaty, to the King's consciousness of the weakness of his title to the Crown and to his frequent need of the subsidies over which the Parliament had then established its control. Coke's Instit. Bk. iv, C. 26, states it to have been one of the charges brought by the Commons against the Duke of Suffolk that he had procured the King to have conference with the French Ambassador in his presence only, without any other of the Council. This was in 1450: again in 1529 of the articles exhibited against Cardinal Wolsey, the 2nd and 3rd charged him with infringing the prerogative of the king in negotiating treaties; but on neither of these occasions was complaint made of any invasion of the functions of Parliament. In 1698-1700 William III negotiated and ratified the "Partition" treaties without communicating them to the Privy Council. It is true Lord Somers was impeached for carrying out the King's instructions with regard to these treaties, but the impeachment fell through and the treaties were not disaffirmed. With the exception of the Treaty of Versailles in 1783, no precedents have been produced to show that in modern times the Crown has sought or received the intervention of Parliament in regard to treaties except in those cases in which it has required the action of Parliament to give effect to the treaty. The Treaty of Versailles as was pointed out in the Privy Council stands on a peculiar footing. Its object was to conclude a peace with the American Colonies whose people had been declared by Parliament rebels with whom no intercourse was to be maintained, and therefore it was necessary that authority to treat should be given by Parliament.

It is argued that the Crown cannot of itself cede territory because it cannot release the inhabitants of the territory from their allegiance. But

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allegiance is correlative with protection; *mutua debet esse domini et subditi connexio, ita quod quantum debet domino exhomagio tantum debet dominusex-dominio...est reciprocum ligamen, quia sicut subdstws teneter obedite, itadex regereet protegere*—[25] Glanville cited in *Calvin's Case*. When then the Crown withdraws its rule from territory, and consequently no longer affords protection to the inhabitants of the territory, they are free either to continue their allegiance to their former Sovereign, or to transfer it to the Sovereign who succeeds to the territory. Nor is it necessary that allegiance should be transferred by express submission: its transfer may be accomplished by tacit submission; and tacit submission may be inferred from remaining in the territory under the dominion of the succeeding Sovereign and fulfilling the obligations of subject—Forsyth's Constitutional Law, p. 335.

It was shown by the instances cited in the Privy Council that the Crown has without the intervention of Parliament ceded territory. Thus by the Treaty of Breda, in 1667, Nova Scotia, then known as Acadia, was restored to France, and Surinam to Holland. By the Treaty of Ryswick, in 1697, a part of the Hudson's Bay Territory was ceded to France. It was also shown by the instance of the cession of Florida in 1793 that a cession is not necessarily restricted to territory which has been the subject of conquest or re-conquest during the particular war at the end of which it is made.

That the authority to cede enjoyed by the Sovereign is not confined to cessions made to put an end to, or at the close of, war is shown by the instances of the cession of Guadaloupe to Sweden in 1813, and of Sumatra and Bencoolen to the Netherlands in 1824; and we may here observe that Wheaton, in discussing the possession of the rights of cession by the treaty-making authority, admits it to extend to cessions when deemed necessary not for the national safety only, but for "policy"—Wheaton, Int. Law, Lawrence's 2nd annotated Ed., p. 873.

It is further shown by the instances of Bencoolen and Florida above mentioned, and of portions of Canada ceded in 1873, that even after Parliament has legislated for a territory, it is competent to the Crown to cede it. As was observed by the Lord Chancellor, the circumstance that territory has been the subject of legislation by Parliament does not take away from the Crown its prerogative of cession. To the instances adduced on this point there may also be added the cession of Nawabganj to the Nawab of Oudh in 1816, inasmuch as that pargana had theretofore formed part of the [26] district of Gorakhpur, and, as such, had been the subject of numerous Regulations enacted under the authority of Parliament.

We are not concerned to inquire whether the Crown can without the authority of Parliament cede any portion of the realm of Great Britain and Ireland. The authorities and precedents cited to the Privy Council, and the observations which fell from the eminent and learned members of the Committee in the course of the argument, appear to establish conclusively the prerogative of the Crown to cede territory which does not form part of the realm of Great Britain and Ireland; but it is also to be inferred that, where the inhabitants of a territory have been admitted to a share in the government through the instrumentality of representative institutions, the Crown lies under a moral obligation to consult them through their representatives before it proceeds to make a cession of their territory.

Whatever be the extent of the prerogative of cession enjoyed by the Crown in other of its dominions, it is certainly not more restricted in this country.

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It is an axiom of English law that, when dominion is acquired by Great Britain in an infidel country already subject to law, the laws of England do not extend to that country: but the laws of the country are to be observed so far as they are not repugnant to the law of God until they are abrogated, and that, where such laws are rejected or silent recourse is to be had to natural equity—*Calvin's Case*; *Blankard* v. *Glady* (1); *Smith* v. *Brown* (2)—precedents the more noteworthy in that they appear to have influenced legislation for India. The Crown of England having acquired by conquest or cession all the sovereignty or the paramount power in this country obtained, with that sovereignty, the prerogative of cession, which from the nature of its authority had theretofore been exercised by the paramount power without control. The prerogative so acquired has not been curtailed by any legislation.

Furthermore, even before the complete acquisition of paramount sovereignty in India, the Crown had exercised the prerogative of cession by delegation without any intervention or objection on the part of Parliament. By Letters Patent granted in the 13th **[27]** year of Charles II, April 3rd, 1661, the Company thereby incorporated was authorised for the security and protection of their factories and other places of trade in the East Indies to send ships of war, men, and ammunition, and to appoint commanders over them, and to give commanders authority to *continue or make peace or war* with any prince or people that were not Christians, in any place of their trade, to exact reprisals, and to erect castles and fortifications. By Letters Patent issued in the 20th year of Charles II, March 27th, 1669, the Port and Island of Bombay were granted to the Company to be held in free socage as of the Manor of East Greenwich on payment of an annual rent of £10, in the same manner as Maryland had in 1632 been granted by Charles I. to Lord Baltimore, to be held in socage as of the Manor of Windsor, he yielding yearly two Indian arrows. In this Charter it was thought necessary to introduce a distinct declaration that the Company should not aliene the territory thereby granted to any Prince, Potentate or State or person except such as should be the subjects and of the allegiance of the King. By the same Letters Patent power was given to the Company and to Governors to be appointed by them to retain by force of arms possession of the territory thereby granted, and also of any territory they might thereafter acquire in the East Indies.

By Letters Patent granted in the 10th year of William III, September 5th, 1698, the United Company thereby incorporated was empowered to appoint Governors who, under their direction, might raise and muster troops for the defence of their forts, factories, and plantations; and by Letters Patent granted in the 26th year of George II, January 8th, 1753, the Company was empowered to appoint Generals of all the forces belonging to Fort St. George, Bombay, and Fort William respectively, and such Generals were authorised not only to protect by force of arms their respective territories, but upon just cause to invade and destroy the enemies of the same.

But in relation to the question before us by far the most important of the several Charters granted to the Company is the Charter granted by George II in the 31st year of his reign, dated January 14th, 1758. The Letters Patent, after reciting that the Company had been compelled to carry on war against the French **[28]** and likewise against the Nawab of Bengal and other Princes and Governments in India, and that some of

(1) Salk. 411.

(2) Salk. 666.

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their territories and possessions had been taken by the Nawab and afterwards re-taken, empower the Company by any treaty or treaties of peace made or to be made between them and any of the Indian Princes or Governments to "cede, restore, or dispose of any fortresses, districts or territories acquired by conquest from any of the said Indian Princes or Governments," or which should be acquired by conquest in time to come.

It was at the same time provided that the Company should not have any power or authority to cede, restore, or dispose of any settlements, fortresses, districts or territories conquered from the subjects of any European power without the special license and approbation of the Crown.

By the Act 13 Geo. 3, c. 63, known as "the Regulating Act," there was committed to the Governor-General and Council of the Presidency of Fort William superintendence and control over the Presidencies of Bombay, Madras and Bencoolen, and in S. 9 it was declared unlawful for the President and Council of the last mentioned Presidencies (except in the cases therein excepted) to make any orders for commencing hostilities or declaring or making war against any Indian Princes or Powers or for negotiating or concluding any treaty of peace or other treaty with any such Indian Princes or Powers without the concord and approbation of the Governor-General and Council, and by the same Act the Governor-General and Council were directed to pay due obedience to all orders they might receive from the Board of Directors.

The Act 24 Geo. 3, c. 25, established a Board of Commissioners for the better government of the territorial possessions of the Kingdom in the East Indies. For this purpose the Board was invested with the superintendence and control over the territories and over the affairs of the Company, and with power to direct all acts, operations and concerns which in any wise related to the civil and military government of the territories. It was also enacted that the Commissioners should be furnished with copies of all despatches received by the Directors of the Company and of all despatches proposed to be sent by the Directors to any of their [29] officers in the East Indies, and that their orders relative thereto should be obeyed by the Directors. The 15th section of the Act empowered the Commissioners, if they considered the subject-matter of their deliberations "concerning the levying of war or making of peace or negotiating with any of the Native Princes or States in India" required secrecy, to send secret orders and instructions to the Secret Committee of the Court of Directors, who were thereupon required to transmit them to the respective Governments and Presidencies, and such Governments and Presidencies were required to obey the orders so conveyed to them.

By the 24th section of the same Act the Governor-General and Council of Fort William were prohibited (except in the case thereby excepted), without the express command of the Secret Committee of the Court of Directors, either to declare war or commence hostilities or enter into any treaty for making war against any of the countries, Princes or States in India, or any treaty for guaranteeing the possessions of any countries, Princes or States*** and in all cases where hostilities should be commenced or treaties made the Governor-General and Council were ordered to communicate the same to the Court of Directors by the most expeditious means they could devise.

These provisions were repealed and again enacted by the Act 33 Geo. 3, c. 52, and with some alterations by the Act 3 and 4 Wm. 4, c. 85. From 1734 then up to 1858 the power of cession granted by the Charter of George II was exercised by the Company subject to the control of the

Board of Commissioners. But before and during that period it was construed as extending not only to territories acquired directly by conquest but also to territories ceded doubtless in many cases as a consequence of conquest: nor were these cessions made only for the purpose of concluding war or rectifying frontiers, but for the promotion of the policy of the Government.

In 1765 the Nawab Wazir was restored to his dominions with the exception of the districts of Corah and Allahabad; and among others he received Ghazipur and Benares, of which the Company had obtained a grant from the Emperor.

[30] The districts of Allahabad and Corah were given to the Emperor for the maintenance of his dignity, but on his granting a sanad for Currah and Corah to the Maharattas they were resumed by the Company in 1773 and ceded to the Nawab Wazir. In 1816 the Company in the name of the British Government, in order to extinguish a debt due by the Government to the Nawab Wazir, ceded to the Nawab the district of Khyraghur and the territory then lately conquered from the Ghurkas, and exchanged pargana Nawabganj, part of the district of Gorakhpur, for pargana Handia.

In 1782 the city and pargana of Broach was ceded by the Company to Scindiah, in testimony of the sense entertained of the generous conduct manifested by the Maharajah to the Government of Bombay at Wargaon, and of his humane treatment and release of the British gentlemen who had been delivered to him as hostages on that occasion.

In 1805, at a time of peace, the Company ceded to Scindiah the territories of Gwalior and Gohud, which had been ceded to them by Rajah Umbaji, who had held them as Governor for Scindiah but had revolted.

In 1806 the Governor-General restored by cession to Raghojee Bhooslah the territories of Sumbulpur and Patna which had been ceded to the Company in 1803.

In 1817 a part of the territory captured from the Rajah of Nipal and ceded to the company by a treaty of peace was ceded in full sovereignty to the Sikimputti Rajah. In 1833 a portion of Assam was ceded to Rajah Poorunder Singh.

It is unnecessary to refer to the other instances cited in argument in the Privy Council. They are all consistent with the opinion we have expressed as to the exercise of the power of cession by the Company; and inasmuch as the Company acted only in virtue of the authority committed to it by the Crown, they establish the exercise by the Crown of the prerogative of cession in this part of its dominions without any limitation, and without any intervention on the part of Parliament. But it is also important to remember that, notwithstanding the Crown permitted the Company to exercise its prerogative of cession in the East Indies **[31]** it had not divested itself wholly of the prerogative in respect of its Indian dominions. Chandernagore was captured from the French in 1793, and Chinsurah from the Netherlands in 1795. They were administered by the Company and Regulations passed for the establishments of Courts of Justice—Regulations I and XVI of 1805; II of 1808; and XI of 1809. Chinsurah was restored to the Netherlands in pursuance of the treaty made in London on the 13th August 1814, and Chandernagore was restored to the French in accordance with the stipulations of the treaty made in Paris on the 30th May 1814. In pursuance of the treaty signed at Kiel on January 14th, 1814, the town of Serampore and its settlements were restored to the King of Denmark.

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In 1824 Bencoolen and the English possessions were ceded to the Netherlands in exchange for establishments on the continent of India and the town and fort of Malacca and its dependencies.

This cession is the more noteworthy in that it was immediately brought to the notice of Parliament that the prerogative of cession had been exercised by the Crown. The treaty was concluded on the 17th March 1824; and on the 24th June 1824 an Act 5 Geo. 4, c. 108, was passed transferring to the Company the island of Singapore and all the colonies and possessions ceded to His Majesty by the treaty, to be held on the same conditions and subject to the same restrictions as the factory of Bencoolen and the possessions in the island of Sumatra had been held by the Company immediately before the conclusion of the treaty.

The exercise of the prerogative by the Crown concurrently with the Company is established by these instances.

By Act 16 and 17 Vic., c. 95, the territories administered by the Company were continued under their government in trust for the Crown, and they so remained until 1858, when it was deemed expedient they should be governed by and in the name of Her Majesty. Consequently by Act 21 and 22 Vict., c. 106, it was enacted that the government of the territories then in the possession or under the government of the Company, and all powers in relation to government vested in or exercised by the Company, and all territories in the possession or under the government of the Company, and all rights vested in or which, if the Act had not been passed, might have been exercised by the Company in [32] relation to any territories, should become vested in Her Majesty. The rule of the Company thus came to an end; and the privilege to exercise the prerogative of cession, which the Crown had conceded for the government and protection of the territories administered by the Company, expired when the occasion for it could no more arise.

We find then that the Crown is competent to cede territory in its Indian dominions without the intervention of Parliament. The prerogative of the Crown is exercised with the advice and through the agency of the responsible minister of the Crown. In the case before us it is shown that the cession of territory to His Highness the Nawab of Rampur was effected by the Government of India, that it was accepted by the Secretary of State as fulfilling instructions conveyed to the Government of India, and that it was approved by Her Majesty's Government. We have then sufficient evidence of a cession by the Crown: and when it is proved that a cession has been so made, it is not for this Court to inquire whether in the particular instance the exercise of the prerogative was called for.

We therefore find that the nineteen villages which fell within the territory transferred to His Highness the Nawab of Rampur had passed by valid cession out of British territory before the institution of this suit, and that the Court in which the suit was instituted had no jurisdiction to order a sale of those villages.

A decree will pass for the sum found due and for the sale of the remaining villages in satisfaction of the debt and interest due up to the date of realisation if the debt, interest, and such costs as are decreed, be not paid into Court within two months after the date of the decree. The claim to bring to sale the nineteen villages in Rampur is dismissed. The plaintiff accepted the security which he now seeks to enforce many years after the territory had been ceded, and could not therefore claim "benevolence" from the British Government. He must, should his security in British territory prove insufficient, pursue his remedy in the Courts of Rampur, and we doubt not he will receive justice. But inasmuch as the

defendant was willing to admit the debt (save in respect of a minor item of interest), and the costs, with the exception of **[33]** the stamp-fee, have been incurred chiefly by reason of the plaintiff's contention regarding the jurisdiction of the Bareilly Court, we order that the plaintiff recover the stamp-fee from the defendant, to be realised in the same manner as the debt and interest: and that, in respect of costs other than the institution-fee, each party shall bear his own costs.

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PRESENT:

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

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BERESFORD (*Plaintiff*) *v.* CHARLOTTE HURST AND ANOTHER (*Defendants*). [22nd July 1878.]

1 A. 772.

N.B. See in their connection 1 A. 753 and 1 A. 762, *supra*.

Real property—Legacy—Husband and wife.

When property is devised to a married woman, so as to be absolutely for her sole use and benefit, and free from the control, debts and liabilities of her husband, its conversion into any other form of property does not change its character and conditions, even though such conversion may be made in anticipation of the legacy.

A married woman entitled to such a legacy purchased real property by borrowing the purchase money from her husband on the understanding that she would repay him when she obtained her legacy. In the deed conveying the property to her, it was not recited that it was to her separate use. She subsequently assigned her legacy, and with the moneys realized discharged the loan due to her husband. They were married before the Indian Succession Act came into force, and had acquired an Indian domicile.

Held that even if English law were applicable to the case, and any interest accrued to the husband in the property purchased by his wife, he still, in consequence of the agreement between them, held it only in trust for her; and when the property was purchased in execution of a decree against the husband as his property, with notice that she claimed it as her separate property, the purchaser could not obtain a title to it as against the wife.

JUDGMENT.

[775] In 1876 the respondents, Mr. J. and Mrs. C. Hurst, were in pecuniary difficulties. In suit No. 155 of 1874 the **[776]** Mussoorie Bank, Limited, held a decree against both respondents. In suit No. 185 of 1874 the same bank held a decree against Mr. J. Hurst and his brother-in-law Mr. Heseltine, and in a third suit brought by Khushal Rai and another a decree had been passed against Mr. J. and Mrs. C. Hurst. In execution of the decree in suit No. 155 of 1874 the village Mohkampur was attached on the 21st March, 1876, and an order for sale issued on the 4th April, 1876, fixing the 20th May, 1876, for the sale, but on the application of the respondents and on payment of Rs. 3,747-15-0, and on the execution of an agreement for the satisfaction of the balance, the sale was postponed *sine die*. Mohkampur was again attached on the 9th June, 1876, in execution of the decree obtained by Khushal Rai, but no further proceedings were taken till October 6th. Finally, Mohkampur was attached on the 13th July, 1876, in execution of the decree obtained by the Mussoorie Bank against J. Hurst and Heseltine, and on the 17th July an order was made for the sale of the property on the 20th September. The respondent

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Mrs. C. Hurst at once filed an objection, claiming that Mohkampur, as her separate property, should be released from attachment. Her objection was disallowed on the 9th August, 1876. On the 18th August, 1876, the respondent Mrs. C. Hurst filed a suit claiming that her right might be declared to Mohkampur, that she might be put in possession of it and the order of sale declared void. Her suit was dismissed by the Court of first instance on the 15th September, 1876, and on the 20th September, 1876, the property was put up to sale in execution of the decree obtained by the Bank against Hurst and Heseltine as the property of J. Hurst. It was purchased by the appellant with notice of the claim asserted by Mrs. Hurst, and notwithstanding Mrs. Hurst's opposition the appellant obtained possession on the 22nd November, 1876. Meanwhile Mrs. C. Hurst appealed to the High Court, and on the 3rd May, 1877, obtained a decree declaring her right to Mohkampur and to possession of the estate, and at the same time the order of the 9th August, 1876, was declared null and void and all subsequent acts and orders under the said order were also declared null and void. The appellant was not made a party, nor did he apply to be made a party, to the appeal brought by Mrs. Hurst, but on the 11th July, 1877, in execution of Mrs. Hurst's decree, possession of Mohkampur was delivered to her **[777]** and the appellant's servants were turned out of possession. The appellant instituted a possessory suit which was dismissed, and he then instituted the suit out of which the appeal arises. The Court below found that the sale of Mohkampur operated to transfer only what rights were possessed by Joseph Hurst in that estate, that the order in pursuance of which the sale was made was in fact set aside by the decree obtained by Mrs. Hurst, that Mohkampur was the sole property of Mrs. Hurst, that the appellant purchased with full knowledge of Mrs. Hurst's claim and was not on any ground entitled to be protected against it, and that Mrs. Hurst was entitled in execution of her decree to oust the appellant. The Court of first instance consequently dismissed the suit with costs.

In appeal it is contended that Mohkampur was in fact purchased by Joseph Hurst for himself and not for his wife, and that, if it was not purchased for himself but for his wife, when it was conveyed to the wife Joseph Hurst acquired her estate by *courtsey*, which will pass to the purchaser of his right and interests, and that, if Mrs. Hurst had an equitable title to the property, she is not entitled to protection against the purchaser, inasmuch as, as the equity was so doubtful, he was not bound to take notice of it. The last objection in appeal is expressed in such general terms that it is not clear what is the particular ruling to which this plea is directed. At the hearing the pleader who appeared for the appellant advanced, though he did not seriously press, the objection that the sale was made in execution of all the decrees in which the property had been attached, but it is clear that this was not so. We have the order for attachment, and though there is no application on the file, there is the order for sale. Then there is the objection of Mrs. C. Hurst which would have been frivolous if at the time an order existed for the sale of her rights also, and then there are sale-proceedings and a certificate,—all made in the one cause in which Hurst and Heseltine were defendants, and to which Mrs. Hurst was no party.

The pleader for the appellant more strenuously urged that the property was in fact purchased by Hurst on his own account, and that the conveyance was merely taken in the name of his wife as his *ismfarzi*. On the other hand, the respondents allege that Mrs. **[778]** Hurst, being entitled under her father's will to a legacy of Rs. 12,000,

which was to be paid to her separate use in instalments of Rs. 3,000 per annum, was desirous of investing the legacy in land, and as it was not immediately payable, she borrowed the purchase-moneys of Mohkampur and two other properties from her husband, and received conveyances in her own name, her husband consenting that the property so purchased should be held by her to her separate use. It is not denied that Joseph Nelson Heseltine by his will, dated February 16th, 1864, and a codicil, dated the 24th February, 1865, devised an estate known as the Ellenborough Hotel estate to his son Robert Henry Heseltine, subject to the condition that Robert Henry Heseltine should, when requested so to do by the trustees, execute a mortgage of the estate to secure the payment of Rs. 16,000 by instalments of Rs. 3,000 per annum, without interest, the first instalment to be paid on the expiration of one year from the testator's decease; and the testator bequeathed to his daughter Mrs. C. Hurst, the respondent, the sum of Rs. 12,000 to be paid out of the instalments provided by the mortgage, commencing with the second instalment, for her sole use and benefit, free from the control of her husband then living or of any future husband. Joseph Nelson Heseltine died on March 8th, 1865, and on March 2nd, 1866, Robert Henry Heseltine executed a mortgage of the Ellenborough Hotel estate to Joseph Hurst and Charles Frederick Vaughan, to secure the sum of Rs. 16,000, with the intention of giving effect to the condition imposed on him by his father's will. There had then accrued due to Mrs. Hurst in November, 1868, when the purchase was negotiated, Rs. 6,000; in March, 1869, she would be entitled to a further sum of Rs. 3,000. It is said that in 1868 Hurst was in debt, and it is suggested he might have desired to place any property he might acquire beyond the reach of his creditors. It is, however, admitted he had a large cash credit with the Mussoorie Bank. He negotiated the purchase of Mohkampur without informing the seller that the purchaser was Mrs. Hurst, but when the terms of purchase had been settled, he directed the seller to convey the property to Mrs. Hurst. The sale-deed does not state that the property was conveyed to Mrs. Hurst's separate use, but in this country deeds are ordinarily prepared by persons who have little, if any, acquaintance with English law, and therefore **[779]** we do not attribute any weight to this circumstance. At the time of registration of the sale-deed a power-of-attorney executed by Mrs. Hurst was also registered appointing her husband manager of the estate on her behalf. Hurst paid the purchase-money, Rs. 6,350, out of his cash credit. He subsequently purchased two other properties, one for Rs. 2,000 and another for Rs. 2,500, and these also were conveyed to his wife. The total of these purchase-moneys, Rs. 10,500, would not have exceeded with interest the sum which Mrs. Hurst was to receive under her father's will, if her legacy had been duly paid. For some cause or other its payment was not pressed, possibly because Hurst and R. H. Heseltine were connected in pecuniary affairs, and in 1870 the legacy was sold with Hurst's consent to a trustee, Mr. Vaughan, for the sum of Rs. 7,875, and it is not denied that Hurst received this sum and used it as his own. It is admitted that what cattle and implements of husbandry were used in the sir cultivation of Mohkampur belonged to Hurst. Hurst was called upon to produce accounts shewing the disposal of the profits of the estate; he failed to do so; and it may be assumed that the profits were used either in the ordinary course of business or in the maintenance of his household. It does not necessarily follow that the estate was not purchased on behalf of and held by Mrs. Hurst as her own; she was living with her husband, and may well have consented to allow him to cultivate her land and to receive

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the profits of the estate and appropriate them to the general expenditure. It has been shown that in February, 1875, Hurst swore he had purchased landed property in India, that he had bought Mohkampur, and was the zamindar of Mohkampur, and paid revenue for it. If these statements had been made when the question of the ownership of Mohkampur was in issue, of course they would have gone far to discredit any evidence now given by Hurst in support of his wife's case, but the question then raised was only as to Hurst's knowledge of zamindari matters. While, then, these statements are not to be altogether disregarded, too much weight is not to be given to them. It is also urged that Hurst obtained a loan from a Mrs. Dick on a mortgage of Mohkampur representing himself as the owner, but Mrs. Hurst was a party to the mortgage and would be bound by it. Considering the evidence as a whole, we are not satisfied that the conclusion at which the Court below **[780]** arrived on this issue is incorrect. It is not shown that Hurst was pressed by his creditors in 1868, nor that he apprehended difficulties, and it is shown that Mrs. Hurst was entitled to funds which would have enabled her to repay the sum advanced to her by her husband, and that in fact she did pay over to her husband the sum she received, which was in excess of the purchase-money of Mohkampur. If a scheme had been devised to conceal Hurst's ownership of Mohkampur, it is improbable that Mrs. Hurst would have made over her legacy to her husband at a time when he had, as is alleged on the part of the appellant, became more involved, and there was every probability that the money would be applied to discharge his debts, or be seized by his creditors. The conveyance to Mrs. Hurst was in our judgment *bona fide*, and executed in pursuance of the agreement alleged by her. The pleader for the appellant insists principally on the plea that the conveyance to Mrs. Hurst operated to convey the legal estate in Mohkampur to her husband, and that the conversion of the legacy operated to set it free from the separate use of Mrs. Hurst, and that her husband is entitled to the rents and profits during her life, and may obtain an estate by *courtesy* if he survives her. The parties were, we understand, born in this country; they married in this country before the Succession Act of 1865, and are domiciled here. We are not prepared to hold that the English law would regulate their interests in landed estate in this country acquired by the wife during coverture, but if it were applicable, and if any interest in the estate accrued to her husband, in view of the agreement which we have found proved, it must be held that it came to his hands upon a contract between them that he would hold it in trust for her—*Ridout* v. *Lewis* (1); *Trupp* v. *Harman* (2); *Newlands* v. *Paynter* (3); *Parker* v. *Brooke* (4).

The appellant purchased with full notice of the claim set up by Mrs. Hurst, and it must be held his purchase will not defeat her title. The appeal then fails and is dismissed with costs.

(1) 1 Atk. 269.
(2) 2 M. and K., 512.
(3) 4 M. and C., 408.
(4) 9 Ves., 583.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson and Mr. Justice Oldfield.

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FULL BENCH.

BABU LAL AND OTHERS (*Defendants*) *v.* ISHRI PRASAD NARAIN SINGH (*Plaintiff*). [23rd July 1878.]

2 A. 582.

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1. *Suit against surety for tenant—Jurisdiction of Revenue Court.*

A Revenue Court has no jurisdiction to entertain a suit against a surety for payment of rent.

2. *Purchase by first mortgagee, of equity of redemption—Suit to enforce lien against second mortgagee.*

A first mortgagee, under a security bond, who brings to sale and purchases the equity of redemption, in execution of a money-decree, passed by a Revenue Court on such bond, is not precluded from suing to enforce his lien on such property against the second mortgagee.

3. *Suits between first and second mortgagee—Res judicata.*

Where, in a suit by the second mortgagee for the sale of the mortgaged property, the first mortgagee asserts his lien and is referred to a separate suit for enforcing it, this does not bar such separate suit, for the first mortgagee cannot resist the claim of the second mortgagee to bring the property to sale subject to the mortgage.

4. *Erroneous suggestion by Court—Party acting upon it.*

Where the defendant raised certain contentions, and the Court, instead of trying and adjudicating on them, referred him to a fresh suit, his acquiescence in such suggestion, instead of preferring an appeal, is reasonable submission to the Court; and, in such circumstances, the rule of *res judicata* cannot be applied with justice.

5. *Security bond for payment of rent—Costs of Revenue suit.*

Where a security bond, charging immoveable property for payment of rents, does not provide for payment of costs of suits in Revenue Courts, such costs cannot be charged on the property as against a subsequent incumbrancer.

[R., 14 B. 31 (39).]

JUDGMENT OF THE DIVISION BENCH.

[585] STUART, C. J.—Mr. Justice Oldfield has correctly stated the facts and proceedings in this case, and I quite agree with him that the decree of the Revenue Court against the surety was without jurisdiction. It is in fact absolutely null and void—mere waste paper. But I am extremely unwilling to cast the plaintiff by applying to him the principle of *res judicata*. I do not know when or in what way this plea was taken. It is not to be found in any part of the record, and I am not aware that it was taken or suggested at the hearing; but, as Mr. Justice Oldfield has allowed it to govern his judgment on the appeal, I feel bound to consider it.

I have in several cases in this Court taken occasion to express my regret that the law on this subject as recognized by English Courts should have been so inconsiderately imported, as I conceive it has been, into the practice of the Courts of this country, where there are few, if any, of the safeguards which render this plea a reasonable one in a European Court; and there are even judgments of the Privy Council in appeal from the High Courts of India which carry the principle of this plea so far, that I would hesitate to apply the doctrine they lay down although approved by

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so august a tribunal, unless the facts were precisely the same. It should be remembered that there is not here that *copia peritorum*, that resource of skilled appliance afforded by the presence of a thoroughly trained and experienced bar that there is in England (or rather I should say in Great Britain and Ireland, for the legal practice on this subject is the same in all parts of the United Kingdom), and that to introduce into the practice of the District Courts of India a legal principle which, especially as recently developed and ex-[586]pounded, is the result of a high degree of legal refinement, is not considerate towards suitors who form part of such a population as we have to deal with, if it is not tantamount to a denial of justice to them. These poor people avail themselves of the best professional assistance they can get in the zila within which their villages are situate; but that is often poor indeed, if it is not generally unreliable; and to refuse relief to a plaintiff who makes an apparently just claim simply because his ignorant district pleader had omitted a particular plea in a previous suit is surely a proceeding of doubtful wisdom.

We were referred to several cases in support of this plea, three in particular: *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1), *Baldeo Sahai* v. *Bateshar Singh* (2), and *Woomatara Debia* v. *Unnopoorna Dassee* (3). None of these cases, however, appear to me to apply to the present. But after what I have suggested on the general character of the plea, I may be allowed to say that I cannot withhold my sympathy from the views of Sir Richard Garth, the Chief Justice of the Calcutta Court, in the long and elaborate judgment he gave in the first of these cases, dissenting from the other members of the Court, and in which he refers to the inconvenience and unreasonableness of applying the principle of this plea to the litigation of the natives of this country.

The plea, however, is taken in a different manner in the present case, and what occurred was this: there had been another suit between the same parties, certain of the present defendants being therein plaintiffs, in which a decree was made in their favour. In that suit the plaintiff pleaded all his pleas, and among others the prior lien under which he now claims. He brought his position and contention fully before the Court, and yet the Subordinate Judge refused to adjudicate upon the prior lien, and referred the plaintiff to another suit for that purpose. The words of the judgment are these:—"The Maharajah may sue in a proper Court to establish his lien, and then claim the benefit as against a subsequent hypothecation. When he does so, the plaintiff, or the purchaser under his decree, will have the option of paying off the first incumbrance." And this advice the plaintiff followed, and because he did so and ac-[587]quiesced in and obeyed the judgment, we are told that he is barred by the plea of *res judicata*. Now, even assuming that the Subordinate Judge was wrong, and had failed to satisfy the legal requirements of the case by his order, still the plaintiff was guilty of no neglect of his duty as a litigant in such a case, nor of anything that could reasonably be called *laches* on his part. He simply did as he was told by the judicial authority to which he owed obedience in his suit, and I trust he is not in consequence ousted of his rights by the plea in question, for a more unjust—I had almost said a more mischievous—use of this plea I cannot conceive.

But I may be permitted to doubt whether the plea of *res judicata* is relevant to the present suit as against the plaintiff, or that it in any way applies so as judicially to raise any question calling for determination respecting the Maharajah's prior lien. In the first place, Babu Lal and

(1) 2 C. 152. (2) 1 A. 75. (3) 11 B.L.R. 158.

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others, the plaintiffs in the former suit, are not defendants in the present case in that litigious character, but simply as auction-purchasers of the property which had previously been transferred in security to the Maharajah. But in the second place, even if it had been otherwise, the Maharajah's security-bond was not in any way disputed in the former suit, and therefore did not call for any adjudication in the present case on the part of the Subordinate Judge. Again, the Maharajah's title as purchaser was not only legally bad but absolutely void, and his rights under his bond could only be determined in a suit with a distinct issue on the subject between him and Lalta Bibi. But such a question was altogether beside the legal requirements of the first suit, and it was competent to the Subordinate Judge to do as he has done in the present case by restoring the Maharajah to his original place under his security, and, as a consequence, allowing him to enforce it by a separate suit. There, therefore, seems to have been no place for such a defence in the former suit.

Nor do I consider the plaintiff was bound to apply for a review of judgment, for the presumption on which he was entitled to act was in favour of the Subordinate Judge's judgment; and the plaintiff ought not to be prejudiced because he did as he was directed by it, instead of applying for a review of judgment, which would have been a proceeding under an opposite presumption altoge-[588]ther—*viz.*, a presumption that made him bound to assume that the judgment was wrong. I do not consider that he was bound so to assume, but was entitled to adopt the course recommended to him by the Court, and that he is entitled to our judgment on his lien, and, as that lien is prior to that of the defendants, I would allow the third reason of appeal, decree the plaintiff's claim for enforcement of the hypothecation in his security-bond, dated the 4th July, 1870, and reverse the decree of the Court below, with costs in both Courts.

I may add that the provisions relating to the plea of *res judicata* in the new Procedure Code (Act X of 1877), and which carry the principle of the plea further than I approve in this country, do not appear to cover such a case as the present, where the Subordinate Judge does not decide on the plea one way or another, but by express order leaves it for determination in another suit; the plaintiff simply obeying the order, and the defendant recording no plea to the contrary or objection thereto.

OLDFIELD, J.—The plaintiff (1) sues to recover a sum of money representing instalments of rent for 1279 and 1280 fasli, due by a lessee, by enforcement of an hypothecation in a registered security bond, dated 4th July, 1870, executed by defendant No. 1, (2) in which she became surety for the lessee, and hypothecated mauza Asravi and a house in mauza Naini as security for the payment of the rent.

The plaintiff obtained two decrees in the Revenue Court against the lessee and the surety (defendant No. 1) for these instalments, and in execution of one of these decrees he caused to be sold the surety's rights and interests in mauza Asravi, and purchased them on 20th July, 1874, for Rs. 1,800, being less than the amount of the decrees. The defendants Nos. 2 to 5 held a bond, dated 30th November, 1871, from defendant No. 1, in which mauza Asravi was hypothecated to them, and they brought a suit against defendant No. 1, and this plaintiff set up his purchase and the lien under his bond, and it was held, on 28th June, 1875, that his purchase did not give him a lien since it was made under a decree of a Revenue Court, which was only a personal decree against the surety and

(1) The Maharaja of Benares. (2) Lalta Bibi.

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did not declare the lien, nor had plaintiff in the Reve-[589]nue Court claimed to enforce the lien, and he was referred to a regular suit to establish his lien. The defendants Nos. 2 to 5 have since purchased the property at auction-sale in execution of their decree.

Plaintiff now brings this suit, and its object is to have his lien under his security-bond enforced, and the property declared liable to sale under it for realisation of the unsatisfied balance of the instalments which were decreed to him in the Revenue Court. The lower Court has held that, as the plaintiff elected to proceed against the surety in the Revenue Court for a money-decree, he gave up his lien, which he cannot now enforce in another suit; and that the fact that the Revenue Court had no jurisdiction to give a decree against a surety does not affect the case, as he made his purchase in execution of the Revenue Court's decree with full knowledge of the lien claimed by these defendants. The Court further held that there was no valid hypothecation of the house under the bond. The plaintiff has now appealed.

There is no doubt, under rulings of this Court, that the suit in the Revenue Court against the surety for rent on the bond was not maintainable, and that the decree against the surety was made without jurisdiction. The Revenue Court, moreover, was not a Court which could have entertained a claim for enforcement of the hypothecation under the bond. These proceedings in the Revenue Court will not, therefore, operate to bar this suit. Nor is the present claim affected by the sale of the property to plaintiff under the Revenue Court's decree, for that sale was made without authority, being in execution of a decree of a Court not having jurisdiction. The sale could confer no valid title, nor invalidate any previous title by way of lien which the plaintiff may have by reason of the security-bond.

The case which has been brought to our notice (1) is not in point. In that case the Court which made the decree and ordered the sale was a Court of competent jurisdiction, although the decree was reversed by a superior Court. It appears to me, however, that this suit cannot be maintained with reference to the suit between the same parties decided on 28th June, 1875. In that [590] suit the defendants in this case Nos. 2 to 5 sued this plaintiff to enforce their lien under their bond dated 30th November, 1871, and they obtained a decree in their favour, and have had the property sold in execution of their decree, and have bought it. This plaintiff was bound in that suit to set up all his defences, and he should have set up the prior lien he now claims under his bond against the enforcement of the defendant's bond by sale of the property. Indeed, he appears to have done so, and the question of the validity of the prior charge he claims should have been determined, and he should not have been referred to a separate suit as appears to have been the case. This plea, to the best of my recollection, was raised at the hearing before us, and appears to me to fall within the scope of the 2nd and 8th objections taken by the defendants Nos. 2 to 5 in their written statement of 4th July, 1876. He may possibly have a remedy by review of judgment, but not by a separate suit. I concur with the Judge in considering that the power-of-attorney dated 19th July, 1870, executed by defendant respondent Lalta Bibi (2) in favour of Mahesh Parshad, did not empower him to hypothecate the house which is the other property sued for. I would dismiss the appeal with costs.

The defendants appealed from the judgment of Stuart, C. J., to the Full Bench, under Cl. 10 of the Letters Patent.

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(1) 1 B.L.R., A. C., 56.

(2) Surety for the lessee.

JUDGMENTS OF THE FULL BENCH.

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TURNER, O.C.J.—In appeal to the Full Court several pleas are urged. It is contended that the Maharajah's right to insist on his incumbrance on Asravi was put in issue in the suit brought by the second mortgagees and determined against him and that it cannot now be enforced. This objection proceeds on a misapprehension of the judgment pronounced in that suit. It was not there held that the Maharajah had not the right to enforce his lien, but that he could not enforce it until by bringing a suit he had obtained an order for sale, and **[591]** that the second mortgagees were entitled to an order for sale subject to the first incumbrance, which a purchaser under the decree would be at liberty to discharge. The right which the Maharajah now asserts was not disaffirmed by the Subordinate Judge but declared, and a first mortgagee cannot resist the claim of a second mortgagee to bring the mortgaged property to sale subject to the first mortgage. The decree of 1875 does not therefore preclude the Maharajah from claiming to enforce his incumbrance on mauza Asravi. Nor is the claim affected by the circumstance that the Maharajah brought to sale in execution of the decree of the Revenue Court the rights and interests of Musammat Lalta Bibi in Asravi. All that was then sold was the equity of redemption, which was sold to satisfy the money-decree held by the Maharajah. No doubt the proceeds of the sale would after satisfaction of the costs of the decree go *pro tanto* for the satisfaction of the sums secured by the first incumbrance, but the Maharajah by selling in execution the mortgagor's equity of redemption did not forego his incumbrance.

It must be admitted that some issues were left undetermined by the judgment of His Honor the Chief Justice. It is clear that the power-of-attorney did not warrant the hypothecation of the house in Naini and the claim to bring to sale this property must be dismissed. The decree then must in any case be limited to the sale of mauza Asravi. An oral objection was taken to this part of the claim that there was no consideration for the execution of the surety-bond, seeing that the bond was executed on the 4th July, 1870, whereas the lease had been executed on the 11th May, 1870. But the circumstance that the two documents were not executed on the same date does not necessitate the conclusion that the execution of the one was not the consideration for the execution of the other. It is not always convenient for the several parties to assemble at one place and at one time. We see no reason to doubt that the lease would not have been executed except on the understanding that the surety-bond was in fact given in consideration of the execution of the lease. It was a part of the original contract for the lease that a surety should be procured and the Musammat consented to be the surety. It remains to be determined for what sums the incumbrance may be enforced. It is contended **[592]** that the costs incurred in the Revenue Courts cannot be recovered. This plea must be allowed, for there is no stipulation in the bond to provide for the payment of such costs. It is again contended that the Maharajah cannot claim to recover in this suit interest on the arrears decreed by the Revenue Court, but the bond does provide for the payment of interest and therefore this plea must be disallowed. Lastly, it is contended that the claim for the arrears decreed on the 24th September, 1872, should be reduced by the amount recovered by the sale of the equity of redemption. On the part of the Maharajah this claim is resisted on the ground that the decree obtained by him in the Revenue Court was a nullity, inasmuch as that Court had no jurisdiction to entertain a suit

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against the surety. At the time the suit was brought it had not been ruled that the Revenue Court could not entertain such suits. It may, however, be assumed that, had the surety appealed, the decree obtained against her in the Revenue Court would have been set aside. It may also be allowed that a sale under a decree which on the face of it has been passed without jurisdiction is voidable. Whether a sale would be set aside at the instance of the person who had procured it is open to question, but in fact the Maharajah did not disavow the sale nor were any proceedings taken to set it aside. The Maharajah took possession and realised profits until he was ousted by the purchasers under the second mortgage. The sum realised by the sale must then be applied, firstly, to the satisfaction of the costs incurred in the suit in the Revenue Court, and the balance will go in reduction of the arrear sued for in that suit, or the balance of that arrear, and for the arrear sued for in the second suit with interest at the rate agreed from the date of the accruing of the arrears respectively until realisation. The Maharajah is entitled to an order for the sale of Asravi unless in the meantime the second mortgagees bring into Court the amount found due together with the balance of costs which may be due to the Maharajah in the present proceedings. The residue of the claim should be dismissed. Each party will pay and receive costs in all Courts in proportion to the amount of the claim decreed and dismissed: the costs of the second mortgagees being estimated in respect of the claim to bring to sale Asravi and the costs of the Musammat being calculated on the value of the house in Naini. The decree of the Division Bench will be modified accordingly.

[593] PEARSON, J.—Concurred.

OLDFIELD, J.—Having re-heard the arguments in this case, I modify the opinion expressed in my former judgment, and concur in the order proposed by my colleagues.

APPELLATE CRIMINAL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson and Mr. Justice Oldfield.

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APPELLATE CRIMINAL.

2 A. 33.

EMPRESS OF INDIA *v.* CHATTAR SINGH AND OTHERS.

[15th August 1878.]

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1. *Penal Code, S. 302—Murder.*

When the deceased was returning from the bazar to his house, two of the four accused struck him with a lathi causing him to fall to the ground, and then the other two accused struck him with their lathi; *held* that, inasmuch as it was doubtful whether the deceased was dead when they began to strike him, and as they did not commence the attack, the two latter would be adequately punished by the sentence of transportation for life and the former two deserved the sentence of death. *Per Oldfield and Pearson, JJ., (Stuart, C. J., dissenting).*

2. *Note to judgment, propriety of.*

It is a most unwarrantable proceeding on the part of the Judge to add a note to his judgment, by which he tries to throw doubts on the conclusion at which he had arrived on the evidence. *Per Stuart, C.J.*

JUDGMENTS.

[35] STUART, C.J.—In this case the Judge, after stating the opinion of the assessors and recording his own judgment, by which he

convicted the whole four prisoners of murder and sentenced them to death, has added to his judgment a "note" by which he endeavours to throw doubts on the conclusion at which he had arrived on the evidence. I feel it my duty to state that, in my opinion, this was a most unwarrantable proceeding on the Judge's part, and that nothing that that note contains can be considered by us in disposing of the question whether the sentence shall be confirmed or not. The reasoning of the note is also such as ought not to be made use of in a criminal case. The Judge states in this note that he feels bound to express a doubt that has arisen in his mind as to the complicity of Kundan and Dungar in the murder, "a doubt that," he adds, "is not supported by the evidence, but by the probabilities of the case." The note further states that "it is true that the direct evidence of the eye-witnesses is to the effect that all four of the accused struck Shere Singh," adding, however, "but in this country it is no uncommon thing for the most truthful witnesses to add to their evidence somewhat beyond what they actually saw," although in his judgment he refers in terms of strong approval to the evidence of the principal witness for the prosecution, whom he describes as "a respectable-looking old man, who gave his evidence in a straightforward manner that convinced me of the truth of what he said." The note states further "probabilities," wholly unsupported by the evidence and I actually find in it the following extraordinary remark: "although I have heard it stated *out of Court* that such were the real facts of the case (that is, his probabilities and surmises after the trial) no evidence is forthcoming to support it:" and the note ends with the following conjecture: "as it appears to me *possible* that the part taken by Kundan and Dungar in this affair *may* have been somewhat exaggerated, and as it is *certain* that Shere Singh was *actually* killed by Lachman and Chattar, I would recommend the remission of the capital sentence in the case of Kundan and Dungar." Now, not a word of this is supported by the evidence, or any portion of it, which was given before the Judge himself at the trial, and I do not see that we are driven to conclude that Shere Singh was actually killed by Lachman and Chattar. On the contrary, there is evidence suggestive **[36]** of a different state of things. There are other uncalled-for remarks in this note, but I have stated enough to show its improper and unwarrantable character, and to justify me in expressing the hope that such an inadmissible appendage to a criminal record may never be brought before us again.

The facts and circumstances we have to consider appear to be these: The four convicts were all closely related to each other; three of them are brothers, and the fourth is a cousin, and they all lived together in the same enclosure. The deceased was one of the lambardars of the village, and he had on several occasions been obliged, in the discharge of his duty, to oust the accused from their holding; and bad feeling therefore existed between them and the murdered man, or rather on their part against him. As the Judge points out, no less than six different cases or causes of quarrel on his score were stated by Chattar and Lachman before the committing Magistrate, and there can be no doubt of the bitter enmity entertained by these men against the deceased. Nor is there anything in the evidence to show that this enmity was shared more largely by any one of the four than by the others. They appear to have been all actuated by the same ruthless feeling, and to have acted on the night of the murder on a plan preconcerted among them all. This concert and identity of motive will appear from the method and manner of the attack upon the deceased, as deposed to by the witnesses for the prosecution, especially Khushali, who is described by the Judge as a respectable,

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straightforward, and reliable witness. From the evidence thus afforded it appears that on the evening of the 8th June last, at about 9 P. M., Shere Singh was returning from the bazar to his house with the witness Khushali, and they had reached a shop, Shafkat's shop, when the accused Chattar Singh, accompanied by his brother Lachman Singh, came up from behind and struck Shere Singh heavily on his head with a lathi. The blow made Shere Singh stagger, but it was immediately followed by another blow from Lachman Singh, and Shere Singh then fell senseless to the ground uttering these words—"*Ram, Ram.*" Khushali, the witness, cried out when he saw his companion thus assailed, but received a blow from Lachman which appears to have induced him to refrain from further interference. Meanwhile, **[37]** from a spot which appears to have been exactly or nearly opposite to that where Shere Singh had just been attacked and felled by Chattar Singh and Lachman Singh, the two other accused, Kundan and Dungar, ran up, also armed with lathis and beat Shere Singh as he lay on the ground, on the head, also, as it would appear. The four murderers then ran off pursued by Aulad Ali, the chaukidar; but the four accused succeeded for the moment in reaching and securing themselves in their house, seeing which Aulad Ali returned and found that Shere Singh was dead. The concert and identity not only of motive but action on the part of the whole four accused is thus shown.

Nor is it, I think, material, as against the concerted action and equal guilt of the whole four criminals, to consider whether, when Kundan and Dungar came up and added their blows to those of the other two, Shere Singh was then dead or still alive. The impression made upon me on this part of the case is that Shere Singh was alive, and had not then breathed his last, and that in all probability the blows of Kundan and Dungar sealed his fate. On this subject the *post mortem* examination by the Civil Surgeon is very important. It results, in the first place, from this gentleman's report, dated the 9th June, that, when Shere Singh was attacked, he was in natural and healthy condition of body, and when he first saw the body he described it as that of a "healthy looking man." On examination the Civil Surgeon found "the top of the head smashed in, skull fractured into small pieces, scalp torn, and brain lacerated and protruding." Such being the terrible nature of violence used against the unfortunate deceased, I scarcely think it reasonable to conclude that such fearful injuries were solely produced by the blows of the two first assailants, Chattar and Lachman; the condition of the head, on the contrary, indicates that the blows of Kundan and Dungar contributed in no small degree to the frightful state of things deposed to by the Civil Surgeon; and whether the deceased was still alive or already dead when Kundan and Dungar attacked him with their lathis is, in my opinion, immaterial to the question of their guilt. That they believed Shere Singh to be alive when they attacked him I have no doubt whatever, and I do not see that we are compelled by the evidence to conclude that he was then dead. Such **[38]** would also appear to be the opinion formed by the Judge at the trial. For, in summing up the evidence in his judgment, he states that the witnesses for the prosecution "tell the same story, and swear that all four accused deliberately and barbarously murdered Shere Singh; they all say that Chattar struck first, and then Lachman, and that the blows of these two dropped Shere Singh, and that the other two prisoners, Kundan and Dungar, hammered him while on the ground." The Judge further states correctly that "the four accused lay in wait for the deceased, took him unawares, closed in on him

and beat his brains out." I have carefully read the evidence, and have no hesitation in approving this statement of the effect of it. There can indeed be no doubt that this is a correct statement of the effect of the evidence; and it shows, I think, that the whole four accused acted together and participated in the murder, and that they all are equally guilty.

Finding, therefore, that I cannot make any distinction between the two sets of the assailants, I would confirm the sentence of death on them all.

OLDFIELD, J.—Four persons have been convicted of murder, and sentences of death passed upon them and referred for confirmation. In respect of two, Kundan and Dungar, the Judge has added a proceeding, dated four days after he passed judgment, from which it would appear that he subsequently entertained doubts of the guilt of these two prisoners, and he recommends the remission of the capital sentences in their cases.

There can be no doubt of the guilt of Chattar Singh and Lachman Singh, and the evidence points to the conclusion that the attack with intent to murder Shere Singh was premeditated. He had been sitting with Khushali, a witness, at the shop of Bakhshi Chaudhri, and at 8 or 9 P.M. the two were walking homewards, and had arrived opposite the shop of Shafkat, not far off, when they were attacked by Chattar Singh and Lachman Singh. The former struck the first blow of a club, which was at once followed by a blow of a club from Lachman Singh, and the deceased fell on the ground. It then appears that the other two prisoners came up from the opposite direction and struck deceased when [39] he was down, and that all four ran off to their house not far off, where they appear to have resisted the attempt of the police to arrest them, and their arrest was finally made at 4 A.M.

There appears to me to be no appreciable difference in the guilt of Chattar Singh and Lachman Singh, and I would confirm the sentences of death passed on them. With regard to Kundan and Dungar, I see no reason to distrust the evidence or to participate in the doubts which appear to have occurred to the Judge after close of the trial, and from reports which he must have picked up out of Court. The Judge admits that these doubts are not supported by the evidence on the record, nor does he inform us that he is in a position, or that the accused are able, to support them by any evidence which is capable of being procured.

On the contrary, the recorded evidence does not appear to be open to distrust. The accusations implicating these two persons were made without any delay by persons who have no interest to accuse them falsely; the statements of the witnesses are consistent; and it is shown that these two prisoners were on or near the spot where the outrage occurred by the substance of their own statements; and that they retreated with the other prisoners to the same house after the crime was perpetrated; and they had equally with the others a motive for the murder. They seem to have joined in a conspiracy with Chattar Singh and Lachman Singh, but they did not begin the attack, and it is doubtful if the death-blows were inflicted by them: for these reasons I would commute the sentence of death passed upon them to transportation for life.

[The learned Judges who heard the case differing in opinion as to the proper sentences to be passed on Kundan Singh and Dungar Singh, the case was consequently referred to a third Judge, with reference to the provisions of Ss. 271 and 287 of the Criminal Procedure Code.]

PEARSON. J.—I concur generally in the view of the case taken by my hon'ble colleague Mr. Justice Oldfield, and am of opinion that the claims of justice will be sufficiently met by the sentences proposed by him.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

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APPEL-LATE CIVIL.

2 A. 40=3 Ind. Jur. 220.

RAJPATI SINGH (*Plaintiff*) *v.* RAM SUKHI KUAR (*Defendant*).

[16th August 1878.]

2 A. 40=3 Ind. Jur. 220.

Registration—Act VIII of 1871, Ss. 17, cl. (2), 49—Mortgage.

For the purposes of registration, the value of the interest created by a mortgage of immoveable property is not the amount of the principal, but such amount with the interest thereon payable at the time fixed in the bond. (1 A. 274, *F.*; 2 B. 353, *Diss.*)

[Diss., 5 M. 214 (215), **F.**, 2 A. 688 (689).**]**

In a suit instituted on the 26th May, 1877, on an unregistered bond dated the 9th August, 1873, which charged certain immoveable property with the payment on the 31st May, 1874, of Rs. 98 and interest thereon at one per cent. per mensem, the first Court decreed the plaintiff's claim. The lower appellate Court on appeal held that the bond could not affect the immoveable property comprised in it, inasmuch as it created an interest in the property of the value of upwards of Rs. 100, and was nevertheless unregistered. The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[41] PEARSON, J.—The bond in suit, in reference to the ruling of this Court in *Darshan Singh* v. *Hanwanta* (1) and other similar rulings in similar cases, undoubtedly required to be registered, and under S. 49 of Act VIII of 1871, cannot affect the property therein comprised, being immoveable property. We disallow the pleas in appeal, and dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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APPEL-LATE CIVIL.

2 A. 41.

GAURI DAT AND OTHERS (*Defendants*) *v.* GUR SAHAI (*Plaintiff*) AND RUKMIN KUAR AND ANOTHER (*Defendants*). [22nd August 1878.]

2 A. 41.

Hindu law—Alienation—Reversioners, near and remote—Right of suit.

A suit will lie by a person, though not the next reversioner, to set aside an alienation or other arrangement in respect of property made by the next reversioner in fraud of or to the prejudice of the reversionary interests of the former. (H.C.R., N.W.P., (F.B.) 56, (*Relied on.*)

[F., 10 C. 225 (230).**]**

On the death of Tek Chand who had by his first wife three sons, Dario Singh, Nand Lal, and Sidh Gopal, and by his second wife one son, Sheo Prasad, a partition of the family estate took place. Dario Singh died leaving two sons, who died leaving each a son, the son of one being Gur Sahai, the plaintiff in the present suit, and of the other Raja Ram, a minor. Nand Lal died in September, 1863, leaving a widow, Rukmin

(1) 1 A. 274.

Kuar, a defendant in the present suit, and a daughter, Sitala Kuar, also a defendant in the present suit, who had six daughters, one of whom had male issue. Sidh Gopal died leaving a daughter. Sheo Prasad died leaving six sons, of whom five were defendants in the present suit. The sixth son of Sheo Prasad died leaving two sons, Ram Dayal and Sankata Din, also defendants in the present suit. Differences having arisen after the death of Nand Lal between the heirs of Sheo Prasad (who asserted that they were the reversioners to such estate, and Rukmin Kuar was wasting it) on the one side and Rukmin Kuar and Sitala Kuar (Sitala Kuar asserting that she was her father's heir and entitled to succeed to the property on Rukmin Kuar's death) on the other side, *re* the estate of Nand Lal, and the parties having referred the differences between them to arbitration, an award was made which, after reciting that it was made in order to protect the property, to perpetuate the name of the ancestor, and to perform ceremonies for the spiritual benefit of the deceased (Nand Lal) disposed of all the estate of Nand Lal between the parties to the arbitration.

On the application of Sitala Kuar, this award was ordered to be filed in Court by the Subordinate Judge. The heirs of Sheo Prasad subsequently obtained possession from the Court of the property awarded to them. Gur Sahai, as a reversioner to the estate of Nand Lal, brought the present suit, against Rukmin Kuar, Sitala Kuar, and the heirs of Sheo Prasad for cancellation of the award as being fraudulent and injurious to his rights as such reversioner.

JUDGMENT.

[44] STUART, C. J.—The suit in which this appeal has arisen was instituted by the plaintiff Gur Sahai alone against Rukmin Kuar; her daughter Sitala Kuar, and other persons. descendants of Sheo Prasad, deceased, a male relative of Nand Lal, Rukmin Kuar's husband. During the pendency of this suit an arrangement appears to have been come to between the two ladies, defendants, and the plaintiff, to the effect that he would not in future make any claim in disturbance of, or in opposition to, the arbitration-award so far as it allotted property to Sitala Kuar, and that with that exception he, the plaintiff, should have a decree in his favour; and in looking into the record I find that such an arrangement or compromise, under the name of a petition of cognovit, was filed, and it bears the plaintiff's signature. The petition was sent for attestation to the Munsif of Fatehpur, who got it attested, and reported that the ladies expressed their consent; and there was thus an end to the dispute between them and the plaintiff. But the other defendants, the descendants of Sheo Prasad, being dissatisfied with the judgment of the Subordinate Judge, have preferred the present appeal, the form of which is thus explained, the respondents being not only the plaintiff but the two ladies with him.

The compromise between these parties, however, does not affect the legal questions raised by the appeal before us. It has been argued at great length on both sides, and numerous authorities have been referred to, but the case is a very simple one. The plaintiff seeks to set aside an arbitration-award made between the two ladies Rukmin Kuar and her daughter Sitala Kuar on the one side, and **[45]** the defendants Ram Dayal and other descendants of the deceased Sheo Prasad, on the other side, and the award disposed of the whole property in suit among these defendants themselves to the prejudice of the plaintiff and in disregard of his reversionary right. The Subordinate Judge has given the plaintiff a decree,

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2 A. 41.

holding that according to the law of Mitakshara he has the reversion to the estate after Sitala Kuar.

In support of the present appeal it was argued by the counsel for the appellants that the plaintiff had no such reversionary right as would enable him to maintain the suit, as his interest was too remote, and the learned counsel referred to several authorities in support of that contention. But it is unnecessary for us to examine these, seeing that the appellants themselves in their written statement admit the reversionary right of the plaintiff, and that being so, the only question is whether he can as such reversioner maintain the present suit to have the award set aside. Undoubtedly he can.

The pleaders for the respondents refer to a judgment of the Full Bench of this Court, delivered on the 12th September, 1866, in the case of *Dowar Rai* v. *Boonda* (1) in support of the plaintiff's right to maintain his suit against the defendants, appellants, and so far as it goes, that case clearly supports the plaintiff's right of suit. I was not a Judge of the Court when the judgment of the Full Bench was delivered, but I have carefully considered it, and I fully concur in its ruling. But irrespective of it and on principle, the plaintiff, although not the immediate next reversioner, has clearly a right to protect such interest as he has in the estate, and for that purpose to maintain such a suit as the present, for his right of reversion is of such a nature, according to Hindu law, that it cannot be defeated should he survive Sitala Kuar.

The judgment of the Subordinate Judge is therefore right, and the present appeal is dismissed with costs.

PEARSON, J.—The pleas set forth in the memorandum of appeal do not appear to have much weight. The award which the plaintiff sues to set aside has absolutely disposed of the property in suit in such a manner as to destroy his reversionary interest therein, which cannot be protected without or otherwise than by avoiding [46] the award *in toto*. Nor can it be admitted that no other arrangement than that made by the arbitrators for the discharge of the debts due from the estate of Nand Lal or incurred for the benefit of his soul was possible.

These pleas were not indeed pressed upon us orally. The learned counsel mainly urged that the plaintiff not being the next reversioner is incompetent to bring this suit. It is true that Sitala Kuar is the next reversioner on the death of her mother Rukmin Kuar, the present incumbent. But the plaintiff alleges that these ladies have colluded with the defendants, appellants, in the matter of the award with the view of defrauding him. The suit is therefore maintainable under the authority of the Full Bench ruling of this Court in the case of *Dowar Rai* v. *Boonda* (1). The learned counsel impugns that ruling, but we are bound by it.

He further contended that Sitala Kuar would take her father's estate after her mother's death in full proprietary tenure, so as to be able to dispose of it absolutely, and that therefore the result of the arbitration to which she had consented was not abnoxious to objection on the part of the plaintiff. Were the contention sound, he would not be the reversioner after her, and would of course have no *locus standi* in this suit; but the contention is opposed to Hindu law prevailing in these parts, and is indeed inconsistent with the pleading in the last paragraph of the written statement filed by the defendants (appellants here) in the Court below, wherein they admitted the plaintiff to be the next reversioner after the female defendants to a moiety at least of the property in suit. I would dismiss the appeal with costs.

(1) H. C. R., N. W. P., F. B. Rulings, 56.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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RAM GHULAM (*Defendant*) *v.* CHOTEY LAL (*Plaintiff*).

[22nd August 1878.]

APPELLATE CIVIL.

2 A. 46.

Registration Act III of 1877, Ss. 36, 75 and 77—Contract of sale followed by conveyance—Suit to enforce such conveyance without resort to procedure under Registration Act

Where a contract of sale is followed by a conveyance, it is not incumbent on the vendee to take steps under the Registration Act to compel the registration of the conveyance, before suing in the Civil Court for such registration. The sections of the Registration Act, relating to procedure, to be followed for the registration of documents, are merely permissive, and do not exclude a suit for the enforcement of a contract, which includes an obligation to register the deed executed in pursuance of such contract.

[Diss., 9 C. 150 (153), 16 M. 341 (342) ; **F.**, 16 A. 303 (304) = 14 A.W.N. 94 ; **R.**, 4 L. B.R. 91, 24 A. 402 (409) ; **D.**, 3 A. 397 (399) (**F.B.**)**]**

In a suit for the specific performance of a sale-contract by completion of the deed and its registration and delivery to plaintiff and possession of the property, the plaintiff alleged in the plaint that the defendant had agreed to sell a certain dwelling-house to him, and had on the 31st October, 1877, conveyed the same to him by a deed of sale, and had received a portion of the purchase-money, but that the defendant refused to register the deed of sale or to receive the balance of the purchase-money, and that he, the plaintiff, was ready and willing to pay the balance of the purchase-money. The defendant denied the execution of the deed of sale and the receipt of any portion of the purchase-money, and further pleaded that the suit was not maintainable. The first Court held that the suit could not be maintained; but the lower appellate Court held that it was impossible for the plaintiff, under the circumstances of the case, to have obtained relief otherwise than by the present suit, and finding that the defendant had executed the deed of sale, gave the plaintiff a decree directing its registration and for possession of the property.

The defendant preferred a second appeal to the High Court.

JUDGMENT.

[48] STUART, C.J.—The order of the Judge is right, and this appeal must be dismissed. The sections of the Registration Act relied on by the Munsif are merely permissive, and do not exclude such a suit as the present for the enforcement of the contract of sale, which includes the obligation to register the deed. The appeal is dismissed with costs.

OLDFIELD, J.—This is a suit for the specific performance of a sale-contract by completion of the deed and its registration and delivery to plaintiff and possession of the property.

The pleas in special appeal fail, as there is nothing in the Registration Act to bar a suit of this kind, or to prevent a Civil Court directing the defendant to register the deed. The deed was never properly presented to the Sub-Registrar, nor was there refusal to register on his part, which could bring into operation the provisions of Chapter xii of the Registration Act, and give plaintiff his remedy by appeal for an order of refusal to register rather than by a suit ; and supposing that it was in the power of plaintiff to have applied under S. 36 to the registering officer to summon

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2 A. 46.

the defendant in order that the deed might be registered, there is nothing in that circumstance which can prevent his remedy by a regular suit for the specific performance of the sale-contract, including an order to the defendant to complete the same by registration.

The pleas fail, and the appeal is dismissed with costs. The plaintiff will have a decree directing that he pay into the lower appellate Court Rs. 250, the balance of the purchase-money, if not already paid into the Court, within one week from the date of [49] this decree, and thereupon the defendant shall execute a deed of sale of the property in suit, cause registration and delivery of the same, and put the plaintiff in possession of the property sold, and defendant shall then receive the balance of the purchase-money.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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APPEL-LATE CIVIL.
2 A. 49.

LALA AND ANOTHER (*Defendants*) *v.* HIRA SINGH AND OTHERS (*Plaintiffs*). [22nd August 1878.]

2 A. 49.

1. *Cess leviable according to village custom—Re-marriage of widows—Maintainability of suit—Act XIX of 1873 (N.W.P. Land Revenue Act), S. 66.*

A Civil Court cannot enforce a cess leviable according to village custom on the re-marriage of widows of a particular sect, when such cess is not recorded in the settlement record, under the general or special sanction of the Local Government. (S. 66, N.W.P. Land Revenue Act.)

2. *Requisites of valid custom.*

Among the conditions essential for establishing a custom are that it is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character.

3. *Entry of cess—Not conclusive evidence of custom.*

The mere entry of a customary cess by a settlement officer may be important evidence of custom, but it is not conclusive proof of it.

4. *Cesses leviable on marriage—Inapplicability of English analogies.*

Per STUART, C.J.—That public policy favours marriage and that a custom, which allows the levy of a cess on marriages, is opposed to such policy, are considerations derivable from English law and are inapplicable to cases in this country where Zemindars sometimes claim such cesses on the strength of village custom.

JUDGMENT.

[50] OLDFIELD, J.—The plaintiffs sue as zamindars of Nurpur to recover Rs. 5, a sum which they assert they have a right to levy on occasion of a second marriage of a widow of the Ramaiya caste, resident in their village, from the person who marries the widow. Both husband and wife have been made defendants, and plaintiffs rest the claim on ancient custom, and support it by an entry in the administration-paper of the village drawn up in 1872, in course of the current settlement, and by other evidence. The Court of first instance dismissed the suit, holding that the evidence was insufficient to establish the right by custom, and that the administration-paper could not bind those who were no parties to it. The Judge has held that the custom has been established, and he considers that the fact that the cess was entered in the settlement record

is a sufficient fulfilment of the provisions of S. 66 of Act XIX of 1873, and he appears further to consider that this Act is not applicable to the case, as the administration-paper was prepared before it came into operation.

The defendant has appealed on several grounds, and without dealing with all, I am of opinion that the decision of the Judge cannot be affirmed, because the cess here claimed is not one which the law permits to be enforced in a Civil Court, and because no right by custom has been established, the Judge having failed to rightly appreciate the nature of the evidence necessary to establish a custom.

The settlement administration-paper drawn up in 1872 contains an entry detailing certain cesses which the zamindars have a right to levy from artizans, and among them is an entry that a sum of Rs. 5 is leviable as a zamindari due from the caste Ramaiya on occasion of "*karao*" or second marriages by widows. It is necessary for the validity of all such cesses that they be recorded at the time of settlement and sanctioned by Government. In the case before **[51]** us the settlement of the mauza had been commenced, and the record which contains the entry of the cess had been drawn up while Regulation VII of 1822 was in force, but with reference to Ss. 2 and 37 of Act XIX of 1873, the settlement then in progress was brought under the operation of Act XIX of 1873, which is now the law in force, and it is essential to see whether those conditions which give validity to a cess under Act XIX of 1873 have been fulfilled in this case. The second paragraph of S. 66 of Act XIX of 1873 applies to the cess in question, and by it a condition for its validity is not only that the cess be recorded by the settlement officer, but that it be recorded after special or general sanction by the Local Government. But there is no evidence of any such sanction, nor has the settlement, as we understand, received the final confirmation of Government. Any presumption there might be in favour of the entry of the cess having been made by the settlement officer after sanction had been obtained, is weakened in this case by the consideration that the record was drawn up before the new law came into force, which has particularly required that sanction to these cesses be obtained prior to recording them. The claim is therefore not maintainable with reference to S. 66 of Act XIX of 1873.

Amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character. To support the custom in this case we have only the evidence of three witnesses. One of them is styled the head of the Ramaiya caste, who is said to be entitled to a part of the cess; another is the plaintiff's family priest; another the patwari; it is obvious that their evidence should be received with caution, as they appear to have reasons for supporting the plaintiffs' but accepting what they say, it is clear that no custom has been established, and that any payments hitherto made, have been exceptional and voluntary.

Bhagwan Das, patwari, says that before the administration-paper was drawn up in 1872, by which the cess was fixed at Rs. 5, every one paid according to his means, and that there have been five marriages of the kind in 1875, and no cess has been paid, but it was disputed in all.

[52] Nilapat, the priest, can only say, in a general way, that the cess is paid, but he allows none has been paid for the last two years; and Hira, who styles himself the headman of the Ramaiya caste, and claims a cess for himself, admits that he has never realised the cess hitherto. Nor is it clearly shown from what particular person the cess

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2 A. 49.

is claimable. No right by custom can be established on the above evidence, and the plaintiff's case is not assisted by two decrees which he files to show that the cess has been decreed.

With reference to the entry in the administration-paper, no doubt the proceedings before the settlement officer recording a custom are to be received as important evidence, but they must be weighed against evidence on the other side, and their value has to be properly appreciated. In the case before us, the entry is entitled to little weight, for not only is it not shown that it was recorded as the law requires, but it appears for the first time in the record of the tenth settlement in 1872, and it was made manifestly in the interest of particular parties with a view to establish claims against persons who have not been shown to have been parties to the proceedings, for although the record purports to be attested by Umer, as headman of the Ramaiya caste, he was himself interested in having such a cess recorded, and his authority to represent the caste has not been shown.

It is unnecessary to deal with the other pleas in appeal, as, for the above reasons, I am of opinion that the claim is not maintainable, and I would reverse the decree of the Judge and dismiss the suit with costs.

STUART, C. J.—I entirely concur in and approve the view taken of this case by Mr. Justice Oldfield. I would only wish to add a remark on a point which was strongly insisted on at the hearing by the counsel for the appellant, namely, that the alleged custom, even if proved, was supposed to public policy which favours marriage. But in my opinion that is a consideration derived from the judgments of English Courts which is not applicable to a case like the present. In other respects I agree with Mr. Justice Oldfield. The appeal is allowed, the decree of the Judge reversed, and the suit dismissed with costs in all the Courts.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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APPEL-LATE CIVIL.
2 A. 55.

RAYNOR (*Plaintiff*) *v.* THE MUSSOORIE BANK (*Defendants*).

[22nd August 1878.]

Will, Construction of—Trust.

Technical language is not necessary to create a trust. Words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons, in whose favour such expressions are used, provided the testator has pointed out, with sufficient clearness and certainty, both the subject matter and the object or objects of the intended trust.

Where, therefore, a testator stated in his will, "I give to my dearly beloved wife the whole of my property, both real and personal, including my Government Promissory notes, Delhi Bank shares, etc., feeling confident that she will act justly to our children in dividing the same, when no longer required by her," and she, by her will, left the Bank shares to one of her children; *held* that the first will gave the widow a life-interest only in her husband's property, that she became a trustee of his estate, with a power of appointment in favour of her children, and that the Bank shares devised to one of her children, could not be sold in execution of a decree against the executors of the widow's estate as portion of her estate.

References:—*Curnick* v. *Tucker*, L. R. 17 Eq. 320; *Knight* v. *Knight*, 3 Beav. 172=11 G. & F. 513, cited in Tudor's Leading cases in Equity, 4th Ed.,

Vol. II. 949; *Le Marchant* v. *Le Marchant*; L. R., 18 Eq. 414; Jarman on Wills, 3rd Ed., Vol. I, 356; *Fox* v. *Fox* (27 Beav. 301) cited in Lewin on Trusts, 6th Ed.. 121.

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2 A. 55.

William Raynor, by his will, left to his wife Mary Anne Raynor, the whole of his property in the confidence that she would act justly to their children in dividing the same when no longer required by her. Mary Anne Raynor, by her will, left certain property to each of her children, giving the plaintiff in this suit amongst other property 24 shares in the Delhi and London Bank, Ltd. The shares were attached in execution of decree obtained by the Mussoorie Bank against the executors to the estate of Mary Anne Raynor, as belonging to her estate. The plaintiff sued to establish his right as proprietor to such shares. On the first Court dismissing the plaintiff's suit, he appealed to the High Court.

JUDGMENT.

[56] STUART, C. J.—I am clearly of opinion that the Subordinate Judge is wrong, and that this appeal must be allowed. The portion of the will material for the question before us is as follows: "I give to my dearly beloved wife Mary Anne Raynor the whole of my property, both real and personal, including my Government Promissory notes, Delhi Bank shares, my house at Firozpur, No. 50, together with all my plate and plated-ware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all monies due or which may afterwards become due, *feeling confident that she will act justly to our children in dividing the same when no longer required by her.*" These last words undoubtedly create a trust in Mrs. Raynor for the benefit of her children, and limit her own estate in the property to a mere life-interest, or to the income of the property so long as she may require it. The testator feels confident that his wife will act "justly" to their children, that is, he tells her by this will he expects that she will act, towards them not from mere caprice, but fairly, and he confides in her sense of justice towards them, and she is to act in this way by dividing the same, that is, by dividing all the property immediately before described. In fact the will makes Mrs. Raynor a trustee with a power of appoint-**[57]**ment over the whole property comprised in the will in favour of the children.

The authorities referred to at the hearing strongly support this view of the relative position of Mrs. Raynor and her children, and the case of *Curnick* v. *Tucker* (1) cited by the counsel for the appellant appears to be directly in point. There the testator by his will said—"I hereby appoint my dear wife, Elizabeth Tucker, sole executrix, to whom I leave all my property, landed, personal, and of every description whatsoever and wheresoever, for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at decease, doing equal justice to each and all of them." In deciding the case Vice-Chancellor Hall observed:—"I consider that I am not at liberty to hold otherwise than that there is a gift to her for life, with a trust imposed upon the property in favour of the children, and with a power to her of disposition between or amongst them in such shares as she may think fit." And again: "I hold, therefore, that this is a gift to Mrs. Tucker for life, with a power of disposition amongst her children in her lifetime, or by deed or will, as she may deem fit." Indeed this is a stronger case than the present, for there the property was left to Mrs. Tucker "for her sole use and benefit," and yet the Vice-Chancellor held

(1) L. R., 17 Eq., 320.

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that the words which immediately followed created a trust in her for the benefit of the children, whereas in the present case there is no gift to the wife for her sole use and benefit, but the property is given to her openly without any such qualification, and with the declaration of the testator's expectation and intention that she is ultimately to divide the property among all the children. This is a trust which may be executed for the children, and not the mere expression of a feeling or sentiment in their favour. The same principle will be found stated with great clearness and force in Lewin's well-known work on Trusts, 6th Ed., p. 115, and in Jarman on Wills, 3rd Ed., vol. i, p. 356.

PEARSON, J.—The terms of Captain Raynor's will are: "I give to my dearly beloved wife Mary Anne Raynor the whole of my property, both real and personal, including my Government Promissory notes, Delhi Bank shares, my house at Firozpur, No. 50, together with my plates and platedware, and whatsoever money, [58] furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all monies due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her."

"Technical language," says Mr. Jarman in his Treatise on Wills, "is not necessary to create a trust. It is enough that the intention is apparent. Thus it has been long settled that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favour such expressions are used, provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the object or objects of the intended trust.

The doctrine thus stated is sanctioned by the authority of decisions to which we have been referred, and I accept it as sound. Applying it to Captain Raynor's will, I cannot doubt that his widow under its terms became a trustee of his estate for their children, and that her own interest in it was a limited one. She was at liberty indeed to use it for her own deeds, but was bound to divide it among them when no longer required by her. She performed this duty by the will executed by her on the 5th September, 1868, and by that instrument she bequeathed to the plaintiff the twenty-four shares in the Delhi and London Bank which are the subject matter of the present suit. It would seem to follow that the shares in question belong to the plaintiff and cannot be sold in execution of decree as the property of the late Mrs. Raynor.

APPELLATE CRIMINAL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice.

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2 A. 53.

THE EMPRESS OF INDIA *v.* NADUA. [26th August 1878.]

2 A. 53.

Crim. Pro. Code, 1872, Ss. 36, 270, 271—Confirmation by Sessions Judge of conviction by Deputy Commissioner—Appeal.

Where a conviction passed by a Deputy Commissioner, acting under S. 36, Crim. Pro. Code, is confirmed by a Commissioner, having the powers of a Sessions Judge, to whom the former is subordinate, it is doubtful whether an appeal lies to the High Court. In accordance with the practice of the Allahabad High Court, such an appeal was admitted.

[Not F., 13 C. 162; F., 6 A. 341; R., 7 A. 528, 12 A. 129, 31 C. 511.]

A person convicted of a certain offence by the Deputy Commissioner invested with the powers mentioned in S. 36, Cr. P.C., and sentenced by him to rigorous imprisonment for four years, and such sentence being in accordance with the provisions of the same section of the Code confirmed, appealed to the High Court.

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2 A. 53.

JUDGMENT.

[53] STUART, C.J.—I doubt very much whether this appeal lies. The original trial took place before Mr. Liston, the Deputy Commissioner of Jhansi, and, as directed by S. 36 of the Criminal Procedure Code, the sentence was confirmed by Mr. Webster, the Commissioner, who, by Resolution of the Government, North-Western Provinces, of 1862, has the powers of a Sessions Judge, and to whom Mr. Liston is subordinate. But neither S. 36 nor any other provision of the chapter, Ch. IV, of which it forms part, contains anything respecting an appeal from such a conviction and sentence to this Court.

By S. 270 of the Code it is provided that any person convicted on a trial held by an officer invested with the powers described in S. 36 may appeal to the High Court, but that no appeal in such case shall lie to the Court of Session. This would apply to the present case if the procedure had stopped with the trial before **[54]** Mr. Liston, the Deputy Commissioner; but the peculiarity is that here the sentence was confirmed by the Commissioner, as it had to be by law, and it would seem anomalous to allow an appeal to the High Court from a conviction and sentence by an inferior Court like that of a Deputy Commissioner over the head of, and in fact ignoring what had been done by, the superior officer, the Commissioner. The last provision of S. 270 allows a sentence of an Assistant Sessions Judge to be appealed to the High Court, a provision which has obviously no application to such a case as this.

The only other section respecting appeals to the High Court on convictions on a criminal trial is S. 271, which provides that any person convicted on a trial held by a Sessions Judge may appeal to the High Court. But neither does this section apply to a case like the present, for here the trial was not by the Sessions Judge, but an inferior officer, and the Commissioner, who no doubt had the powers of a Sessions Judge, simply confirmed the sentence.

Under these circumstances I would have felt disposed to refer the case to a Full Bench with the question whether the appeal to this Court lies. But it would appear that the practice of this Court has been to entertain these appeals whether the sentence was confirmed by the Sessions Judge or not, and a list of cases, going over a period of three years, has been supplied me by the Office in which the appeals were entertained and apparently without objection. No such cases have come before myself, and the question does not appear to have been raised before any other Judge, the validity of the appeal having apparently been assumed. For myself I confess that I doubt the legality of the procedure. It may have been intended to allow an appeal to this Court in such a case as the present, but that intention does not in my opinion appear from the sections of the Code of Procedure to which I have referred. In deference, however, to the practice of the Court, or such practice as the Court has, tacitly at least, sanctioned, I refrain from making any order calling it in question, especially as such practice is on the side of the right of appeal in a criminal case, which I consider ought always, if possible, to be favoured.

In the present case the appeal is dismissed and the conviction and sentence affirmed.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

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APPELLATE CIVIL.

HAMID ALI (*Plaintiff*) *v.* IMTIAZAN AND OTHERS (*Defendants*).

[1st November 1878.]

2 A. 71.

1. *Mahomedan Law—Husband and wife—Divorce—Repudiation by ambiguous expressions.*

2 A. 71.

Under Mahomedan law, ambiguous expressions, used by an angry husband intentionally, to the effect that he would regard her in any other relationship but that of a wife, amount to a divorce, and such a divorce becomes absolute if not revoked within the time allowed by law.

2. *Custody of minor daughter—Father's right thereto.*

A member of the *Sunni* sect, who has divorced his wife, cannot claim the custody of his minor daughter until she attains puberty.

[1—Appr., 12 M. 63 (67); **R.**, 106 P.R. 1891.]

Suit in which the plaintiff, a Muhammadan of the sect of *Sunnis*, claimed, amongst other things, to recover his wife and his infant daughter.

ORDER OF REMAND.

[73] TURNER, J.—The words used by the appellant to his wife appear to fall within the class of ambiguous expressions. By saying, if you go to your father's house you are my paternal uncle's daughter, the appellant intended to declare that he would regard her in no other relationship, and not receive her back as his wife. This if spoken with intention (as it doubtless was), constituted a divorce, which became final if it was not revoked within the time allowed by law (1). The appellant alleges it was so revoked. The Court of first instance found that the appellant did not recall his wife for a year, a finding which appears possibly inaccurate. The whole of the questions on the merits were raised by the very general expressions used in the memorandum of appeal, but the issue as to revocation was not determined. The lower appellate Court must try the following issue: Was the divorce revoked within the period allowed by law? On the return of the finding ten days will be allowed for objections. Regarding the custody of the daughter, if it be found that the divorce was not revoked, the daughter must remain with her mother until she has attained the age of puberty.

The lower appellate Court found on this issue that the plaintiff had not revoked the divorce.

JUDGMENT.

TURNER, J.—No objection having been taken to the finding on the issue remitted we accept it. The appeal fails and is dismissed with costs.

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(1) Baillie's Digest of Muhammedan Law, p. 228.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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NOV. 6.
APPELLATE CIVIL.
2 A. 74.

UDA BEGAM (*Plaintiff*) *v.* IMAM-UD-DIN (*Defendant*).

[6th November 1878.]

2 A. 74.

Execution of decree—Appeal from order in execution—C.P.C. (1859)—Act I of 1868 (General Clauses Act), S. 6.

Per PEARSON, J.—An order of a District Judge, passed on appeal from an order in execution proceedings amounts to a decree within the meaning of S. 2, C.P.C. (1877), and is, therefore, appealable under S. 584 of the C.P.C. (1877), as well as under the C.P.C. (1859) though repealed, with reference to S. 6 of the General Clauses Act. 1 A. 668 (**F. B.**), *F.*

Per STUART, C.J., *contra* (1 A. 668 (**F.B.**) criticised).

In execution of a decree for the removal of certain buildings passed by the High Court in special appeal, the Court executing the decree ordered, on the 11th December, 1876, that the plaster on the walls of a "*sidhari*" numbered 6 in a map of the premises should be removed. The lower appellate Court having set aside the order on the 22nd September, 1877, the decree-holder appealed to the High Court.

JUDGMENTS.

[75] PEARSON, J.—The admissibility of this appeal has been virtually determined by a recent Full Bench judgment (1) which, until overruled, is binding on us. In my opinion the appeal is admissible, the lower appellate Court's order being a decree within the scope of the definition contained in S. 2, and consequently appealable under S. 584 of Act X of 1877, as well as under Act VIII of 1859, notwithstanding its repeal, in reference to S. 6 of Act I of 1868. On the merits the appeal, in my opinion, fails entirely. The first Court dismissed the claim to No. 6. The High Court certainly did not decree that claim expressly; and there is nothing in its decree or its judgment, or in the judgment of the first Court relating to the plaster on the "*sidhari.*" The appeal appears to be frivolous and vexatious as well as groundless, and I would dismiss it with costs.

This opinion was recorded by me at the time of the hearing of this appeal on the 19th August last, and I have to-day for the first time been made acquainted with the views entertained by the Chief Justice, who in the judgment just now delivered by him, not only expresses his reasons for dissenting from the Full Bench ruling to which reference was made in the first part of my judgment, but sets aside that ruling and dismisses the appeal as inadmissible. Under the circumstances the proper course would have been, I conceive, to refer the point in question again for the consideration of the Full Bench; and in order that such course may be taken, if deemed advisable, I feel it to be my duty to require a reference of this appeal to another or other Judges of the Court under S. 575 of Act X of 1877.

STUART, C.J.—If I could regard this appeal as before me on its merits, I would probably concur in the opinion of my colleague Mr. Justice Pearson, that it is frivolous and groundless and ought to be dismissed. But there is a preliminary question for myself which this case affords me the

(1) 1 A. 668.

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first judicial opportunity I have had of considering, *viz.*, whether this appeal should have been admitted to a hearing at all. In other words, whether such an appeal lies. And with whatever result or consequence, I feel it my duty to record the opinion I have formed on that question.

[76] It is suggested that the admissibility of this appeal has been virtually determined by a recent Full Bench judgment of this Court (1). That judgment was delivered during my short absence from the Court on privilege leave and at once carried into practice, without any previous consultation or communication with myself; and, had the circumstances not been so exceptional, it might have been considered to be binding on me, although I was precluded from hearing the argument and judicially considering the reasons on which the judgment is founded. I would have preferred that so important a question, and raised for the first time under the new Code of Procedure, had been delayed till my return to the Court. When I left on short leave, on account of the state of my health, I had no reason to believe that any such question would have been brought forward in my absence; and from the nature of the case I could not have anticipated, and I did not anticipate, that any such proceeding would have been entertained: for the question came up before the Full Bench on a reference made by Mr. Justice Turner, dated the 13th November, 1877, and a number of other appeals of the same kind having in the meantime been presented, it was felt by the Court generally that owing to difficulties of interpretation arising out of the peculiarities of the provisions of the new Code, some action should be taken by the Court, and it was proposed by one of the Judges that the Legislative Department of the Government of India should be addressed on the subject, and a letter going fully into the difficulties of construction to which I have referred was proposed for adoption by the Court. That mode of proceeding was, however, ultimately abandoned, and the question was allowed to await judicial determination on a suitable opportunity. Such was the state of things when I left the Court on leave at the end of April last, and I very much regret that that opportunity was found almost immediately after my departure, and now all the more from my having formed a deliberate opinion contrary to the conclusion of the Full Bench ruling, for it is possible that, if my colleagues had been made acquainted with the reasons on which my opinion has been formed, they, or some of them, might not ultimately have concurred in the decision which they were induced to accept.

[77] The reference by Mr. Justice Turner, which gave rise to the case before the Full Bench, records an admission directly opposed to the subsequent Full Bench ruling, for the reference is in these terms: "It is admitted that no second appeal lies in this case under the new law, and it appears to me that the application is governed by the new law. I refer the point to the Full Bench at the request of the pleader, and because I am told that there is a difference of opinion in the Court on the point." The Court was then full, and the difference of opinion correctly referred to in this reference did, so far as the question had then been considered, undoubtedly exist; and if there was to be a judicial determination on the question, which had given rise to this difference of opinion, it was to the last degree expedient and desirable that that determination should have been arrived at by deliberation among all the Judges and not in the absence of, or to the exclusion of, the Chief Justice.

I may also here observe that the difficulties of construction, which had been anticipated in relation to certain of the provisions of the new

(1) 1 A. 668.

Code of Procedure, have to some extent been recognised by the Government of India; and a Bill to amend the Code has for the purposes been introduced into the Legislative Council, and by the kindness of His Excellency the Viceroy, I have been favored with a copy of that Bill, and of the statement of the objects and reasons in support of it. But, excepting in so far as we have the opinion of the Member of Council, who prepared that statement, the Bill so introduced does not appear to me to touch the question of the competency of such an appeal as that now under consideration. By S. 31 of this Bill it is proposed, among other things, to enact that from Cl. *(j)* the following words shall be omitted, *viz.*, "of the same nature with appealable orders made in the course of a suit;" and from the statement of the objects and reasons of the Bill, the opinion would appear to be entertained that "the result will be to restore the first of the two appeals given in effect by Act XXIII of 1861, S. 11, against all orders determining any question relating to the execution of a decree;" and if it had been proposed so expressly to provide in the Bill, no doubt the effect would be to allow a special or second appeal in such a case as that determined by the Full Bench ruling, and also in such a case as [78] that now before me. But the correctness of such an opinion depends on another question, no doubt expounded by that ruling, but as to which I have myself entertained serious doubts, *viz.*, whether the effect of S. 6 of Act I of 1868, the General Clauses Act, is, notwithstanding the repeal of Acts VIII of 1859 and XXIII of 1861, and the express provisions of the new Code of Procedure, to keep alive the law provided by S. 11 of this latter Act, and to apply the remedy of special appeal in the case of orders passed in execution of a decree. I have said that I have entertained serious doubts whether such is the effect of S. 6 of Act I of 1868. Indeed, I may at once say that the opinion I have formed is that that Act cannot have any such effect, and I shall presently explain my reasons for holding that opinion, and that therefore the Bill which has been introduced to amend the new Code of Procedure will fail in effecting the object apparently intended by it in this respect. But that Bill has not yet been passed, and we cannot anticipate in what form or to what effect it may ultimately be adopted as an Act of the Legislature. But to put an end to all such doubts and difficulties, it would be far better to provide *expressly* that the law of S. 11 of Act XXIII of 1861, as interpreted and applied previous to the passing of the present law of procedure, shall, notwithstanding any provisions to the contrary in the new Code, continue to be the law of procedure to be observed by the Courts, than to leave it to the uncertainty implied in the statement of the objects and reasons. The former course would put an end to all controversy, while the latter would leave the matter open to dispute; and it is to be remembered that all the four High Courts have not yet pronounced an opinion on the question of the validity or otherwise of these appeals from orders.

With these general remarks I now proceed to consider the question of the admissibility of the present appeal, and therein the argument for and against such a proceeding.

The order appealed against was one made in a suit to obtain possession of a house, and to demolish another which, as alleged by the plaintiff, had been improperly built on her land. The judgments of the lower Courts were both against the plaintiff's claim, and she preferred a special appeal to this Court, which reversed [79] the judgment of the lower Courts and decreed the plaintiff's claim in full. In the proceedings in execution of this Court's decree, the Munsif, under a misapprehension as to its full meaning and effect, made an erroneous order dated the 11th

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December 1876, but which on appeal to the Judge was corrected by an order dated the 22nd September 1877, and the execution of the decree so corrected was ordered by the Judge.

From that order of the Judge an appeal, in the nature of a special or second appeal, has been presented to this Court, and the question is whether such a proceeding is valid and admissible. According to the Full Bench ruling, delivered under the circumstances which I have explained, such an appeal is valid, and no doubt if the legal effect of S. 3 of the new Code and of S. 6 of the General Clauses Act (to both of which provisions I shall presently advert) is, in a case like the present, still to keep alive the entire procedure allowable under the old Code, such a ruling would be correct. But the opinion which I myself have formed, after having carefully and studiously considered the question, and the sound principles of legal construction which have ever been recognised by the Courts in England, and applied by them to the interpretation of statutory laws, is that no such appeal lies.

By S. 3 of the present Procedure Code, Act X of 1877, it is provided that "nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before the Code came into force." In this provision the meaning of the word "herein" has to be considered. Does it mean the whole Code or merely the particular section of which it forms part? If the former, I would then be disposed to hold that the Full Bench ruling was right in its conclusion, although on different reasoning from that on which the judgment is based, for then there would be nothing to qualify or limit the application of this S. 3 or of S. 6 of the General Clauses Act, the entire new Code being thus simply exempted from any operation in the cases contemplated by S. 3; and, as another consequence, the application of S. 6 of the General Clauses Act would be left unimpeded by any legal considerations arising out of the new Code. But the Full Bench ruling by my colleagues appears to assume that, in the portion of S. 3 which I have quoted, the word "herein" applies [80] only to the particular section, S. 3, of which it forms part, and in this respect I concur in the ruling. I think it could never have been intended that the word "*herein*" should have the sweeping effect involved in the other view I have referred to, and that it was not contemplated that the other sections of the new Code relating to appeals should be excluded from consideration in connection with S. 3. The more sound construction therefore would appear to be that the repeal of the enactments, as provided by that section, should not affect the procedure prior to decree, so far as that procedure itself is concerned; and that to such extent the old procedure, notwithstanding its repeal in other respects, is still *pro tanto* saved as regards procedure prior to decree in suits instituted or appeals presented before the new Code came into force. In the present case the date of the Judge's order in appeal to him which is now sought to be the subject of a special or second appeal to this Court is the 22nd September, 1877; and being an appeal undoubtedly contemplated by S. 3, and having been presented before the new Code came into force, the whole procedure, that is the *whole* procedure *which led up to it*, is saved and unaffected by the new procedure.

The question, however, whether the saving of the old procedure in such a case as this of necessity includes and carries with it the right to a second appeal to this Court is, in my opinion, a very different one. I am aware that it has been considered that an appeal is a mere stage or step in one course of procedure till final disposal of the suit. But that opinion I do not hold, nor do my colleagues apparently, for in one part of

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their judgment they state—"The Code following the usage in this country does not treat appeals as mere stages in a suit," although in a previous part of the same judgment they affirm that "an appeal is in fact a stage of a proceeding." My own opinion is that an appeal is not a necessary part of procedure. It is under the control of the parties after decree in the original suit. It is not therefore a necessary stage, but may be availed of or not, according as the original decree is regarded by the party against whom it is given. Irrespective of any such appeal, the procedure in an original suit, not only prior to but inclusive of a decree thereon, is not only complete, but a completed proceeding in itself, carrying with it a [81] final result within its own limits, in the shape of an operative decree capable of full execution and final satisfaction, and there is thus a *finis litis*. But if the unsuccessful party is dissatisfied with a decree so given against him, there are rules and regulations for an appeal to a higher tribunal, and of these he may take advantage; but such a proceeding is no *necessary* part of the original suit, but a separate and independent proceeding to be availed of, not at the mere bidding of the law or of the appellate Court, but as he himself, the defeated party, may in his discretion deem prudent, or as he may be advised. This view of the distinction between the procedure in an original suit, whether prior to or terminating in a decree, and an appeal therefrom, I shall further illustrate and support by authorities in a subsequent part of this judgment.

As to the procedure mentioned in S. 3 of the new Code, I understand by it the *complete* "procedure prior to decree," and that therefore after such decree the procedure provided by the new Code was to determine all that was to follow. Therefore if it be found in such cases that the new Code did not provide for a second appeal, no such second appeal should be allowed. Now, remembering that S. 3 of the new Code has the limited meaning given to it by the Full Bench judgment of my colleagues, concurring, as I repeat I do, in that view, and that only the repealed enactments mentioned in the first part of S. 3 and not the whole Code, are excluded from consideration, it appears to me that we are bound in the first place to read and apply S. 3 as limited and controlled by other provisions of the Code relating to appeals, that is, to read them *together*, and not against each other, allowing effect to the old Code excepting in so far as it appears to be controlled by the new Code.

On the same principle I would read S. 6 of the General Clauses Act *with* and not against the new Code. It is, indeed, not a little remarkable that the new Code of Procedure from beginning to end makes no allusion to this Act; it is not referred to in any express provisions of the Code, nor is it to be found in the schedule of repealed Acts. My respect for the Legislature forbids me assuming that it was overlooked or disregarded by the framer or framers of the Code, but that the intention was to allow it, not unqualified [82] operation, but such legal effect as it might have consistently with the provisionsof the new law; and it appears to me that a construction which makes two separate laws consistent, that is, capable of being read together, is to be favoured rather than one which makes them contradictory of each other. This view of the relative operation of these two laws I shall also presently illustrate and support by authority.

But, before proceeding further with the explanation of my own views on the subject of these appeals from orders, I would advert to the judgment adopted by my colleagues during my recent brief absence from the Court. After stating the case on the reference before them, and alluding to S. 3 of the new Code and S. 6 of the General Clauses Act, the judgment refers to a Full Bench decision of the High Court of Bombay, *In the*

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matters of Ratnasi Kalianji (1), in support of the opinion expressed by the learned Chief Justice, Sir Michael Westropp, that the chapter of the Code which deals with the execution of decree is prospective, and does not affect proceedings already commenced. The Court consisted of the Chief Justice and four other Judges, and of these, two Judges, Mr. Justice Green and Mr. Justice West, concurred with the Chief Justice, while the other two Judges, Sir Charles Sargent and Mr. Justice Bayley, dissented. But the opinion of the Chief Justice, referred to in the judgment of my colleagues, was expressed in a totally different case from the present, for it was whether the imprisonment of a debtor in execution of a decree under the old Code should be determined by that Code or by the new Code, there being a considerable difference between the two in this respect. The Court held, and very reasonably, that the law under which the decree had been made must determine its execution, and that the new Code could not have adversely retrospective effect, and that the execution of the decree and the incarceration of the debtor under it was clearly "a proceeding commenced" within the meaning of S. 6 of the General Clauses Act. But that is a totally different question from that relating to an *appeal* from an order of this kind; it was simply a question which of two laws, generically of the same nature, should have opertion, the law under which the decree was made or the new law? the letter plainly [83] intending decrees made under its own provisions. I have read the whole of this judgment by my learned and esteemed friend the present Chief Justice of Bombay with the greatest respect and with much sympathy, and, I may add, with admiration of its legal reasoning and the judicial language in which it is expressed. One of the other Judges, Mr. Justice Green, who concurred in the conclusion arrived at by the Chief Justice on the question before the Court, referred to a previous Full Bench ruling of the same Court in the case of *Ratanchand Srichand* v. *Hanmantrav Shivbakas* (2), by which it was decided that, under the words "proceedings commenced" in S. 6 of the General Clauses Act, the right of appeal to the District Court from a decree made before the Bombay Civil Courts Act, 1869, came into operation by a Principal Sadar Amin, was not taken away by that Act. This case was argued before a Full Bench consisting of the then Chief Justice, and Warden, Gibbs, and Melvill, JJ. But judging from the report of this case, it does not appear to have been very fully argued, and the judgment itself is comparatively brief, and it does not appear to me to examine the question before it in a comprehensive manner. It would have been more satisfactory if the judgment had contained a more searching examination of the legal principles applicable to the question and of the rules of construction of Statutes adopted and applied by the Courts in England. For myself I cannot regard it as an authority binding on me, and I consider myself free to form my opinion on the case before me in my own Court irrespective of it.

The Full Bench judgment of my colleagues then proceeds to deduce an argument by analogy with regard to the prospective operation of laws from certain sections of the Code, Ss. 311, 312, 283, and others. But such an argument I am quite unable to appreciate. At best it is far-fetched and fails in affording any material assistance in the solution of the question I am at present considering. The judgment then proceeds to allude to S. 588 of the new Code, and to state, for the reasons it gives, that it is not unreasonable to conclude that, in leaving the enactments of the new Code as they stand, the Legislature had in view the provisions [84] of the

(1) 2 B. 148.

(2) 6 Bom. H. C. R., A. C. J., 166.

General Clauses Act. In this conclusion, as will be seen, I concur, although not for the reasons assigned, nor to the extent argued for, by the judgment. I may be permitted here to observe (if the allusion may be allowed in a judicial exposition), that such a general conclusion, equally entertained by my colleagues and myself, although on different grounds and to a different extent, is curiously at variance with a recent official announcement publicly made in another place by the Hon'ble Member of Council who is primarily responsible for the language of the new Code, that, in its preparation, there had been "a strange forgetfulness of the General Clauses Act." Now, although it might fairly be contended that this remark goes to show that a second appeal from orders was never intended or contemplated by the Legislature, I quite agree that we are not bound to consider that there was any such forgetfulness, but on the contrary, to assume that the same Legislature which passed both laws must be taken, when preparing the new Code of Procedure, to have had at the time in its mind the General Clauses Act; and it appears to me sufficient for this purpose to point out, as I have already done, that this same General Clauses Act, I of 1868, is passed over in silence in the new Code, and is not to be found in the schedule of repealed Acts.

The decision of the Bombay Court, as adverted to by Mr. Justice Green, is then referred to by my colleagues and in connection with it the opinion is expressed "that an appeal is in fact a stage of a proceeding," which, however, as I have shown, is at variance with another opinion shortly after stated in the same judgment, that "the Code following the usage in this country does not treat appeals as mere stages in a suit."

The rest of the judgment is occupied with the exposition of views in which I am unable to concur for reasons I shall now proceed to explain.

[85] The section of the new Code chiefly, if not solely, to be considered in the case now before me is S. 588, which forms the commencement of Ch. xliii, and is headed "of appeals from orders;" but before any further reference to that section I would notice an opinion expressed by one of my colleagues, who, although he concurred in the conclusion approved by the other members of the Court who formed the Full Bench during my absence, simply recorded a brief judgment to that effect, and refrained from adopting the reasoning accepted by the others. The opinion in question was to the effect that, not only was there an appeal to this Court from such an order as he was then considering (and which was of the same nature as that now before me) under the old Code, Act VIII of 1859, as in his opinion kept alive by S. 6 of the General Clauses Act, but that the order was also appealable as an order falling within the definition of "decree" in S. 2 of the new Procedure Code, and that it was therefore appealable under S. 584. But with the greatest deference to my hon'ble colleague such a view of that section has surprised me not a little, for that section, forming the beginning of Ch. xlii, and headed "of appeals from appellate decrees," plainly contemplates a decree determining the *merits* of the suit in which it is made, and has no application whatever to an order of this kind passed merely in execution of such a decree. And this to my mind is sufficiently shown by the express and peculiar provision made respecting appeals from orders by the subsequent S. 588. But as I have stated, my hon'ble colleague justifies his opinion that such an order as this is appealable under S. 584, by referring to the definition of "decree" in S. 2 of the new Code, where that term is defined to mean "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding

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is embodied;" and then, as an illustration of what is meant by this determination, it is added,—"an order on appeal remanding a suit for re-trial is not within this definition," so that, according to the intention of the definition, a remanding order directing a re-trial of a suit on its merits is not within its meaning, although an order merely directing the execution of the decree, and not touching the merits of the suit, is within the definition! This surely is a little startling, and possibly on reconsideration my hon'ble colleague may hesitate [86] before adhering to such a view. But further it is well known to lawyers and the Courts at home that legislative definitions or interpretations of this kind, being necessarily of a very general nature, not only do not control, but are controlled by, subsequent and express provisions on the subject-matter of the same definition, and that we cannot therefore apply this definition of decree to an order of the kind now before me, seeing that it belongs to a class of orders which, with reference to the remedy of appeal, are expressly and specially dealt with in a subsequent chapter and section, *viz.*, S. 588, to the provisions of which I hold the definition in question must yield. In Sir F. Dwarris' well-known Treatise on Statutes, second Ed., 1848, page 509, there is the following observation:—"Interpretation clauses are by no means to be strictly construed, and convenience seems likely to lead to their being practically disregarded," and then in support of such opinion he quotes from a judgment of Lord Chief Justice Denman, reported in 7 A. and E., page 480, in which, with reference to the contention for the strict application of a legislative definition, I find the following remarks:—"But we apprehend that an interpretation clause is not to receive so rigid a construction, that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances:" and again in the same judgment—"We cannot refrain from expressing a serious doubt whether interpretation clauses of so extensive a range will not rather embarrass the Court in their decision, than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy, and the application of them to particular cases may give rise to endless doubts." And there are other illustrations of the same kind in Dwarris all going to show that a legislative definition or interpretation clause must yield to enactments of a special and precise nature, and like words in schedules, they are received rather as general examples than as overruling provisions. Applying these views, the demonstration is obvious that the kind of "order" that was before the Full Bench, and is now considered by me in the present case, is in no way appealable under S. 584.

The argument founded on S. 6 of the General Clauses Act, as modifying if not preventing the application of S. 588 to such a [87] case as this, is more pertinent, but as I shall show equally fallacious.

S. 588 provides that "an appeal shall lie from the following orders under this Code, and from no other such orders." These orders are then enumerated from *a* to *w* inclusive, and at the end of such enumeration there is the very distinct provision that "the orders passed in appeal under this section shall be final," and it is under (*j*) that the present case has to be considered. The orders therein described are "orders under S. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit." For the order sought to be appealed against is clearly one falling under *c* of S. 244, being a question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree. As to the words "of the same nature as appealable orders made in the course of a suit,"

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I concur in the remark publicly made in another place, that it is not very easy to understand them; and it is satisfactory to know they have been left out in the Bill brought in to amend the Code, and I trust if the Bill passes into law that it will be allowed to stand with this omission. The order then, being thus plainly one falling within not only the meaning but the express terms of *j* in S. 588, is on the face of that section not further appealable. But it is said that, because the decree for the execution of which the order was made was a decree passed under the old Code, it was a "proceeding commenced" within the meaning of S. 6 of Act I of 1868, the General Clauses Act. That is an opinion, however, which can only be maintained by holding that that Act, unless expressly repealed *in toto*, must be understood to override in their entirety the whole provisions of a subsequent Act dealing with the same subject-matter, no matter how carefully or specially such provisions may be expressed. Such a view of the law appears to me to be only stated in order to be at once rejected as an incongruity in the highest degree unreasonable. A reading of the law on the contrary, which would make the two Acts consistent, by allowing a subsequent one to modify the previous Act, is surely to be preferred. Nor do I find in S. 6 of Act I of 1868 anything to interfere with, much less exclude, such a principle of construction, **[88]** while it is strongly supported by the very clear and unmistakeable language of the new Code. Of the literal meaning of S. 588 on the face of it, there can be no doubt whatever. It is expressed in terms which, of themselves, are applicable to all possible cases, and it is not to be contradicted in this respect, in the sense of being abrogated, unless that intention appears, not by way of doubtful implication or inference, but by precise and express language; and the new Act and not the old should have the benefit of any such doubt. S. 6 of Act I of 1868 is in these terms:—"The repeal of any Statute, Act, or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred or any proceedings commenced, before the repaling Act shall have come into operation." There is nothing here said about *appeals*, and the force of the application of this section to the present case turns on the word "shall not affect any proceedings commenced;" and the argument appears to be that the expression "shall not affect" saves the right of appeal given by the old Code of Procedure, Act VIII of 1859, notwithstanding the express provisions of the new Code. But this section is clearly and literally capable of a construction which does not necessarily include an appeal, for the words "shall not affect any proceedings commenced" may be read with or without a limitation, that is, either to admit of its application to the full extent allowed by the law of procedure existing at the time of the passing of the General Clauses Act, or as limited by a subsequent Act, the provisions of which are in the face of them complete in themselves, although inconsistent with, because controlling, the full application of the former. On this principle of construction the expression "proceedings commenced" will have effect given to them up to the point where the new Act comes into operation, and then stop. And this is a reading of both Codes which is quite consistent with the ruling of the Bombay Court with respect to the period of imprisonment to be applied to judgment-debtors against whom process issued under the old Code, and in particular with the judgment of the Chief Justice, Sir Michael Westropp. For the warrant had issued under the old Code and execution of it had gone on for a considerable period, and there was therefore clearly a "proceeding commenced," if not something more. But an appeal is a different matter. In the present case the "proceedings commenced" **[89]** ended with the order dated the 22nd September, 1877, and nothing

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in the new Act could invalidate them; but the appeal from that order was not taken till the 30th May, 1878, and the opinion I hold under these circumstances is that such appeal must be determined by the new and not by the old Code: in other words, that the appeal is inadmissible. This it is obvious is the only construction that can make the two Acts consistent, but I think that for that reason, if for no other, it ought to be favoured and allowed by legal interpretation to supply the law.

I have pointed out that there is nothing in S. 6 of the General Clauses Act about an appeal, and I have before shown that an appeal is not necessarily a mere stage in a suit, but a separate and independent proceeding, under the control of the parties, the original suit with the decree made in it being complete in itself and *pro tanto* finally operative. In the absence of express language, therefore, such a right of appeal is not, as an available stage in a suit, to be assumed, but ought to be expressly kept alive or expressly given. In the case of *Rex* v. *The Justices of Surrey* (1) Ashurst, J., said :—"The power of appealing from the judgment of the justices seems to be of this kind" (*i.e.*, by special provision), "and does not attach without being expressly given." In another case, *Reg.* v. *The Recorder of Bath* (2), Lord Denman said:—"As it seems to us hardly possible to suppose it to have been the intention of the Legislature that an individual interested and aggrieved should not have the power of questioning the validity of a vote at the sessions, we cannot avoid noticing with regret that recourse should have been had to the method of giving an appeal by reference to another statute, instead of giving it plainly and directly by the statue itself." And so also in *Reg* v. *Stock* (3) it was held that a right of appeal cannot be implied, but must be given by express words. These considerations appear to me to acquire even increased force when the principle of interpretation so applied is used, not for the mere purpose of taking away a right which previously existed, but for reconciling and making consistent two separate Acts of the same Legislature, instead of making them opposed to and contradictory of each other. **[90]** Nor are we entitled to assume that the more recent Legislative measure, expressed as it is in language complete in itself, and capable of universal application, is of less weight and significance than a previous Act, the terms of which are loose and inexact. Any such assumption, indeed, would be opposed to every rule of construction that has ever been applied by the Courts to the combined interpretation of successive laws.

Such is the view I feel compelled to take of S. 588 of the new Code in relation to S. 6 of Act I of 1868, and it is a view which appears to me to be fully borne out by the general character and objects of the new Code. That Code is Act X of 1877 entitled "An Act to consolidate and amend the Laws relating to the Procedure of the Courts of Civil Judicature;" and the preamble is: "Whereas it is expedient to consolidate and amend *the Laws* relating to the Courts of Civil Judicature." By the expression "the Laws" in these two quotations I understand *all* the Laws, and there is thus afforded, as it appears to me, a key to the solution, to a considerable extent, of the legal question now raised. As I have stated, there can, I imagine, be no question that it means all the Laws in operation at the time of the passing of the new Code, and, therefore, not only the old Code, Act VIII of 1859, and the supplementary Act, XXIII of 1861, but the General Clauses Act, I of 1868, are here meant for it could not have been intended that these laws were to be "amended" by being allowed to stand in their original condition, and in that condition to contradict, if

(1) 2 Term Reports, 504. (2) 9 A. & E. 871. (3) 8 A. & E. 405.

not to abrogate, the provisions of the new law which purports to amend them. And this meaning and effect of the title and preamble, and especially of the preamble, of the Code, must be understood to overlie the whole Act, giving colour to and controlling its provisions, and by showing the intention of the Legislature supplying *pro tanto* the rule for the interpretation of these provisions. For if one thing is more clear than another and beyond all doubt, it is the distinct intention of the Legislature by this Code to abolish these second appeals from orders; and that intention being clear, it ought not to be defeated by the strained application of general expressions of a loose and doubtful nature contained in a previous law, such as the General Clauses Act.

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For these reasons I am of opinion that a second appeal in the case before me does not lie, and I must refuse to admit it.

FULL BENCH.

PRESENT:

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

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PARTAB SINGH (*Decree-holder*) *v.* BENI RAM (*Judgment-debtor*).

[14th November 1878.]

2 A. 61 = 3 Ind. Jur. 321.

Execution of decree—C. P. C. (1877), S. 244—Excess money collected in execution—Separate suit.

Excess money unduly collected, as due under a decree, is recoverable by application to the Court executing the decree and not by separate suit. (Opinion of Stuart, C. J. in 1 A. 388, *Diss.*—1 B. L. R., (A. C) 138, and 4 B. L. R., (A. C.) 111, *D.*)

[F., 1 A.W.N. 79, 2 O.C. 315 (317), 24 A. 291 (294) = 22 A.W.N. 67; **D.**, 5 A. 94 (97) = 2 A.W.N. 188, 7 A. 170 (174) (**F.B.**) = 4 A.W.N. 319.**]**

REFERENCE TO THE FULL BENCH.

PEARSON, J., and OLDFIELD, J., referred to the Full Bench the question "whether moneys realised as due under a decree can be recovered, as having been unduly realised, in the execution department."

JUDGMENT OF THE FULL BENCH.

[62] TURNER, O. C. J.—We are asked whether moneys realised as due under a decree can be recovered if unduly realised by application to the Court in the execution of decree. The language of the Codes, both the repealed and the existing Code, appears to us express on this point. The question whether moneys have been duly or unduly levied under a decree is clearly a question relating to the execution of the decree, and, if it arises between the parties to the suit or their representatives, the Code expressly declares it shall be determined by order of the Court executing the decree and not by separate suit. It has frequently happened that orders for the restitution of moneys unduly levied under a decree have come before this Court in appeal, and with the exception of one instance in no case has it been held that such orders could not properly be passed. We refer to the numerous cases heard by this Court on appeal from the Judge of Bareilly known as Husaini Begam's cases. In these cases the decree-holder, by executing the decree of an Original Court instead of the modified decree of the Appellate Court, had recovered sums largely in excess of

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the sums she was entitled to recover and was compelled to make restitution by orders passed in the execution of the decree. In *The Agra Savings Bank* v. *Sri Ram Mitter* (1) the learned Chief Justice advanced in support of the opinion pronounced by him two cases decided by the Calcutta High Court. In *Haromohini Chowdhrain* v. *Dhanmani Chowdhrain* (2) no more was decided than this, that mesne-profits which were neither decreed nor claimed in a suit for possession after the date of the institution of the suit could be claimed in a separate suit. In *Ekowri Singh* v. *Bijaynath Chattopadhya* (3) it was held that mesne-profits which were not awarded by the decree could not be obtained by an order of the Court executing the decree. It appears to us that these cases, of which the authority is not impugned in this Court, and indeed there are decisions of this Court in accordance with them, do not bear on the question before us. In the cases cited there was no question whether the amount claimed was or was not decreed, for the decrees had admittedly awarded no mesne-profits for the period for which they were claimed by separate suit.

[63] In the case before us the applicant complains that he has been compelled to pay what he was not bound to pay under the decree. We are of opinion that he adopted not only the proper course, but the only course open to him, in presenting his application to the Court executing the decree.

PRIVY COUNCIL.

PRESENT:

Sir James William Colvile, Sir Barnes Peacock, Sir Montague Edward Smith and Sir Robert Porrett Collier.

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3 Saraswati's P.C.J. 865=4 C. 727=6 I.A. 76.

On Appeal from the Court of the Commissioner of Lucknow Division, Oudh.

PRINCE MIRZA JEHAN KADR BAHADUR *v.* NAWAB AFSUR BAHU BEGUM. [15th and 16th November 1878.]

3 Saraswati's P.C.J. 865=4 C. 727=6 I.A. 76.

1. *Confiscation and release of property by Government—Limitation.*

Where Government confiscates property (as an act of State) and then releases its rights thereto, the question of limitation, in suits for the possession of such property between parties, must be decided, as if there never had been any confiscation.

2. *Settlement of property after confiscation—Suit within 12 years therefrom—Limitation.*

Where certain lands, which had been previously confiscated by Government, were settled with certain persons, by an order of Government, no question of limitation could arise in a suit for such lands, brought within 12 years from the date of such settlement, which alone could confer any title to such lands.

[R., 9 O.C. 249 (252).]

JUDGMENT.

[865] The Right Hon. Sir Barnes Peacock :—

Their Lordships are of opinion that the decisions of both the lower Courts on the question of limitation must be reversed, and that this

(1) 1 A. 388. (2) 1 B. L. R. A. C. 138. (3) 4 B. L. R., A. C. 111.

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case must be remanded to be re-tried and determined in the lower Courts upon certain issues which will be directed by their Lordships.

The action is brought by Prince *Mirza Jehan Kadr Bahadur* against *Nawab Afsur Bahu Begum*. The property in respect of which the action is brought consists of two portions, the one of certain houses in the city of *Lucknow*, and the other of *Mouzah Sahrawan* situate in the District of *Unao* in the province of *Oudh*. The defendant obtained possession of both properties, and the plaintiff brought this suit claiming two-thirds of the property. His claim is now reduced to two-thirds of two-fifths. He claimed two-thirds of the property upon the following grounds: He said that the property originally belonged to *Nawab Malkar Kishwar*, who may be called, as she has been called in the argument, the Queen-Mother. He said: "After the Mutiny the said estate was taken possession of by the British Government, and the Government retained its possession, pending an inquiry into the conduct of the owner and other matters connected with the State, till 1864. In 1864 the Government, after inquiry, ordered the property to be released in favour of the heirs of *Nawab Malkar Kishwar Sahiba* and the defendant obtained possession of the same on her own part and on the part of the other heirs of *Nawab Malkar Kishwar Sahiba*. Thus it was that on the 16th of November, 1863, the Settlement Court ordered the Settlement of *Mouza Sahrawan* to be made with the heirs of *Nawab Malkar Kishwar Sahiba*, and in accordance with that order the defendant got possession of the village on her own part and on the part of the other heirs of *Nawab Malkar Kishwar Sahiba*." With reference to that allegation the defendant says, "In the settlement papers of *Mouza Sahrawan* the defendant's name only has been recorded; and this being a claim for an amendment of the settlement, cannot be entertained in this province." No issue appears to have been raised in the lower Courts with reference to that contention of the parties.

[866] By Lord Canning's Proclamation of the 15 March, 1858 (1) all the proprietary rights in the soil of the province were confiscated; and

(1) Lord Canning's Proclamation of 15th March, 1858.

"Proclamation."

"The army of His Excellency the Commander-in-Chief is in possession of *Lucknow*, and the city lies at the mercy of the British Government, whose authority it has for nine months rebelliously defied and resisted.

"This resistance, begun by a mutinous soldiery, has found support from the inhabitants of the city, and of the province of *Oudh* at large. Many who owed their prosperity to the British Government, as well as those who believed themselves aggrieved by it, have joined in this bad cause, and have ranged themselves with the enemies of the State.

"They have been guilty of a great crime, and have subjected themselves to a just retribution.

"The capital of their country is now once more in the hands of the British troops.

"From this day it will be held by force which nothing can withstand, and the authority of the Government will be carried into every corner of the province.

"The time, then, has come at which the Right Honourable the Governor-General of *India* deems it right to make known the mode in which the British Government will deal with the *talookdars*, chiefs, landholders, of *Oudh* and their followers.

"The first care of the Governor-General will be to reward those who have been steadfast in their allegiance at a time when the authority of the Government was partially overborne, and who have proved this by the support and assistance which they have given to British officers.

"Therefore the Right Honourable the Governor-General hereby declares that *Drig Bijjai Singh, Rajah of Bulrampur, Kulwant Singh, Rajah of Padnaba, Rao Hurdeo Bux Singh, of Katiori, Kashiprasad, Talookdar of Sissendi, Jahar Singh, Zemindar of Gopal Khan, and Chande Lal, Zemindar of Maurawan (Baiswara)* are, henceforward the sole hereditary proprietors of the land which they held when *Oudh* came under British rule, subject only to such moderate assessment as may be imposed upon them, and that these loyal men will be further rewarded in such manner and to such extent

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by a proclamation of Sir *James Outram*, it was notified that "for those who have fled from the city"—speaking of the city of *Lucknow*—"having locked up their houses, that if they would not return within ten days and re-occupy their houses, the property, with their houses, will be confiscated."

Their Lordships think it unnecessary to determine what was the effect of Lord *Canning's* Proclamation with reference to the houses, or what was the effect of Sir *James Outram's* Proclamation of the 22nd of March, 1858, because, with reference to all the houses in *Lucknow*, which are the subject of the present suit, the Government **[867]** gave up altogether their rights under the confiscation. Paragraph 4 of the letter of the 6th of July, 1863 from the Secretary of the Chief Commissioner to the Officiating Commissioner is as follows: "The Chief Commissioner understands from the Deputy Commissioner that the value of the property lies almost entirely in the buildings, which consist of shops, mosques, tombs, and *mehal serais*. The value of the land is so trifling in comparison that the principle of treating the buildings as having become by accretion part of the land, and having lapsed with the latter, as was ruled in the case of the *Khas Mahal's* claim to the *Alambagh*, should not, in the Chief Commissioner's opinion, though incontestably sound, be enforced in this case. The property, as the Chief Commissioner learns from the Deputy Commissioner, yields a rent of no more than Rs. 2,000 a year, as few of the shops hold tenants. It is therefore of no great value to Government, nor is it likely to become of greater, whereas it may improve under private management. For these reasons, the Chief Commissioner thinks the right of Government to the property should be abandoned, and possession relinquished, but not in favor of *Afsur Bahu* or anyone else. Claimants must agree among themselves or apply to the Civil Court to decide their pretensions."

Their Lordships, taking this letter into consideration, are of opinion that it was the intention of the Government to abandon altogether the confiscation as regards the houses and property in the city of *Lucknow*, and to leave the former owners to their rights in the same way as if there had never been any confiscation. If the Defendant in the suit had been in possession, as she alleges, of the houses and other property in the city of *Lucknow* before the Proclamation, the question of limitation might arise

as upon consideration of their merits and their position the Governor-General shall determine.

"A proportionate measure of reward and honour, according to their deserts, will be conferred upon others in whose favour like claims may be established to the satisfaction of the Government.

"The Governor-General further proclaims to the people of *Oudh*, that with above-mentioned exceptions the proprietary right in the soil of the province is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting.

"To those *talookdars*, chiefs, landholders, with their followers, who shall make immediate submission to the Chief Commissioner of *Oudh*, surrendering their arms, and obeying his orders, the Right Honourable the Governor-General promises that their lives and honour shall be safe, provided that their hands are not stained with English blood murderously shed. But as regards any further indulgence which may be extended to them and the condition in which they may hereafter be placed, they must throw themselves upon the justice and mercy of the British Government.

"To those amongst them who shall promptly come forward and give to the Chief Commissioner their support in the restoration of peace and order, this indulgence will be large, and the Governor-General will be ready to view liberally the claims which they may thus acquire to a restitution of their former rights.

"As participation in the murder of English men or English women will exclude those who are guilty of it from all mercy, so will those who have protected English lives be specially entitled to consideration and leniency."

as against the Plaintiff with regard to these houses and other property. But this question has not been tried in the cause, and upon the evidence before them their Lordships have not the means of determining it. All they can do is to express their opinion with regard to these houses and other property, that if the defendant was in possession before the Proclamation, the question must be determined in the same manner as if there had never been any confiscation at all.

With regard to the *Mouza*, it appears to their Lordships to be clear that the question of limitation does not arise. Their Lordships are of opinion that the effect of Lord Canning's Proclamation of 1858 was to put an end to all previous titles. Whatever title, then, either party has to the *Mouza* must have been acquired by some grant or some proceeding of the Government subsequent to that Proclamation, and any grant or proceeding under which he can have acquired a title must have been within the period of twelve years prior to the commencement of the suit. Therefore, with regard to the *Mouza*, the question of limitation will not apply, but the question of title must be determined, and the Defendant being in possession, the Plaintiff must recover on his own title.

From a Minute of the Chief Commissioner, dated the 25th of October, 1863, it appears that in a suit between *Bhyroon Singh* and others, and the present Defendant *Afsur Bahu Begum*, *Bhyroon Singh* and others claimed that, having mortgaged the *Mouzah* to the Queen-Mother, they were entitled to have the revenue settlement made with them. The Settlement Commissioner decided that the settlement ought not (for certain reasons which were given) to be made with the then plaintiffs, but that it ought to be made with *Afsur Bahu*, the present Defendant. Upon an appeal which came before the Chief Commissioner, he says: "I agree with the Commissioner in holding that the mortgagee was really the Queen-Mother, though the deed was drawn up in the name of *Agha Ahmed*, and the *Zemindars* in their appeal plainly indicate her as the party who acquired possession of the village by the mortgage. But in the meantime the Commissioner's orders must be so far modified as to make his decree run in the name of the heirs of *Malkar Kishwar*, and not of her daughter *Afsur Bahu* alone; for it has been shewn in another case that there is no proof of the alleged gift by the deceased Queen of all her property, **[868]** *Afsur Bahu* and her other children can claim to share in it."

It has been contended that the words "the heirs of *Malkah Kishwar*" did not include the present plaintiff, inasmuch as he was not an heir of his grandmother. But it may be a question whether by the words the "heirs of *Malkah Kishwar*" the Chief Commissioner did not intend to include the plaintiff to the extent of the share which but for the confiscation he would have inherited from his father, the General *Sahib*, who was one of the heirs of the Queen-Mother, and was living at the time of her death. That is a question which will have to be considered in determining whether the Plaintiff by reason of the Chief Commissioner's decree, was not entitled to two-thirds of the share of his father, that being the only portion which he now claims.

The question, however, does not depend merely upon the order of the Chief Commissioner, which does not appear to have been ever carried into effect. It was not a decision between the present Plaintiff and *Afsur Bahu*, the present Defendant, but it was in a proceeding between certain Hindu gentlemen, who are not now parties, and the present Defendant. The Chief Commissioner said that the decision of the Commissioner ought to be that the settlement should be made with the heirs of the Queen-mother. We have not got the proceedings which took place subsequently to the

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order of the Chief Commissioner. The order was sent by the Secretary to the Chief Commissioner to the Settlement Department and the document was filed in that department. The settlement, however, does not appear to have been made in accordance with the direction of the Chief Commissioner. As far as can be ascertained from the record, it seems to have been made with the present Defendant alone, for there is a proceeding in which a person, evidently the agent of the Plaintiff, says, "At the regular Settlement"—that is, the proceeding in 1864 after the date of the Chief Commissioner's ruling—"the village has been assessed at Rs. 2,973, which I, the agent, will, under the terms entered in my application, continue to pay by instalments detailed below for thirty years from *Rabi* 1271 F., to *Kharif* 1301 *Fusli* (corresponding with 1894), and thereafter, pending the wishes of the Government." So that then he offers, as the agent of the present Defendant, to take the settlement of this *Mouza* for thirty years at the revenue of Rs. 2,973. We have not the *Kubulyat* which was entered into at the time when the regular settlement was effected. Possibly it was a *kubulyat* executed by the agent on behalf of his client, the present Defendant; and it appears, as far as one can judge from a document which is set out in the record,—though that document has not any date attached to it,—that the settlement was actually made with the present Defendant alone, and that she was recorded as the person who had taken the settlement from the Government. The document is No. 4. Under the head "name of *lambardar*" is the name of the present Defendant. Then the property is mentioned, and in the column headed "names of sharers" the Defendnt is mentioned as the only person, "*Nawab Afsur Bahu Begum Sahibah*, daughter of the King *Amjad Ali Shah*," and then the amount of the revenue assessment is Rs. 2,973; that is, the revenue which was stated in the offer made by the agent. Without seeing these documents it is impossible to say whether the plaintiff did or did not acquire a title to this property, or to a share in it, from the Government after the confiscation; and it appears to their Lordships that the case must be remanded in order that the question may be tried whether the Plaintiff, after the confiscation, acquired a title to any share in this *Mouza*. One issue should be raised, whether, after the Chief Commissioner's order that a settlement was to be made with the heirs, a settlement was made with the heirs, or whether it was made with any other and what person, and under what circumstances, and what was the effect of the settlement. It also appears to their Lordships that if any *kubulyat* was executed, that *kubulyat* ought to be called for and examined by the Court, in order that it may be ascertained whether the Defendant took the settlement on her own behalf adversely to **[869]** the other heirs, or whether she took it as a trustee for herself and the other heirs.

Upon the whole their Lordships are of opinion that, as regards the *Mouza*, there is no question of limitation, but only a question of title which must be tried. With regard to the houses, the question of limitation may arise in the manner which their Lordships have already indicated.

Several issues were raised in the Lower Court which now appear to be irrelevant, and their Lordships think that the cause ought not to go down upon those irrelevant issues; on the other hand, there are fresh issues which ought to be settled and tried; and their Lordships are of opinion that the proper course will be that the learned Counsel for both parties should submit to their Lordships any issues which they think ought to be tried in the Court below. Their Lordships will then finally settle the issues upon which the record is to be remanded.

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3 Saraswati's P.C.J. 865 = 4 C. 727 = 6 I.A. 6.

On the 14th December, 1878.

AT THE COUNCIL CHAMBER.

As to the Mouza.

Minutes having been prepared by Counsel, in obedience to the foregoing directions of their Lordships, their Lordships considered and approved the same, and agreed thereupon humbly to advise Her Majesty that the decisions of the Civil Judge of *Lucknow* and of the Commissioner of the *Lucknow* Division, bearing date respectively the 16th August, 1875, and the 22nd of January, 1876, be reversed, and that the case be remanded to the Court of the Commissioner of the *Lucknow* Division to direct the cause to be tried and determined by the Civil Judge of *Lucknow* upon the following issues, *viz* :—

1st. Whether the Plaintiff, after the confiscation of the *Mouza Sahrawan* under Lord *Canning's* Proclamation, acquired by any and what means any and what right or title to any and what share of and in the said *Mouza* ?

2nd. Whether, after the Chief Commissioner's order of the 25th of October, 1863, directing that a settlement should be made in the names of the heirs of *Malkah Kishwar* (the Queen-Mother), the settlement was so made ; or whether a settlement was made with the Defendant, or with any other and what person or persons, and under what circumstances, and what was the effect thereof ?

3rd. Whether, at the time of such settlement, and if any, what *kubulyat* was executed by any and what person or persons ?

4th. Whether the plaintiff was, according to Mahomedan law, one of the heirs of the said *Malkah kishwar* ; or whether the Commissioner intended by the word " heirs " to include the Plaintiff to the share, or any portion of the share, which his father would have been entitled to if he had been then alive ?

As to the houses and other property in the City of Lucknow.

1st. Whether, considering that the confiscation of some of the above houses and property was abandoned by the Government, leaving all the former owners to their rights by law, the Plaintiff was entitled to any and what share thereof at the time when he brought his suit ?

2nd. Whether the defendant was in possession of the said houses and property, or of any and what portion thereof, and, if so, under what circumstances, before the Proclamation of Lord *Canning*, and, if so, whether the suit of the Plaintiff in respect thereof was barred by *the Act of Limitation* ?

As to all the property in suit.

3rd. Whether the late *Malkah Kishwar* (the Queen-Mother) did in her life-time make some and what gift in respect of the said properties, or any and what portion thereof, in favour of the Defendant, and, if so, whether the same was valid in law?

The costs of this appeal on both sides will be taxed here, and the respective amounts will be costs in the cause, and abide the event of the final decision of the lower Court.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

1878
NOV. 18.

APPEL-LATE CIVIL.

NUR AHMAD (*Defendant*). *v.* ALTAF ALI (*Plaintiff*).

[18th November 1878.]

2 A. 58.

Attachment of land—Private alienation after attachment—C.P.C. (1859), Ss. 239 and 240.

2 A. 58.

Under S. 240 of the C.P.C. (1859), a private alienation of property, made after its attachment had been duly intimated and made known in the manner prescribed by the Act, is declared null and void. Where, therefore, the attachment is not so made known, a private alienation, made after such attachment, is not null and void.

[F., 1 A.W.N. 65; R., 83 P.R. 1898, 137 P.L.R. 1905, 1 C.L.J. 565.]

JUDGMENT.

[60] Under the provisions of S. 240 of Act VIII of 1859, a private alienation of property made after its attachment had been duly intimated and made known in the manner prescribed by the Act is declared null and void. It is not shown that the attachment in this case was made known as by the Act directed. It is not proved that a copy of the order was pasted in a conspicuous part, or in any part, of the Court-house, nor that it was sent to or pasted in the office of the Collector. We are therefore unable to find that the alienation was made after the attachment had been made known as by the Act prescribed, and consequently the provisions of S. 240 do not apply,—*Indra Chandra* v. *The Agra and Masterman's Bank* (1).

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1878
NOV. 18.

APPEL-LATE CIVIL.

GULZARIMAL (*Defendant*) *v.* JADAUV RAI (*Plaintiff*).

[18th November 1878].

2 A. 63.

Suit for declaration of right—Suit to set aside order under S. 246, C.P.C., disallowing claim to property attached—Court-fees Act, S. 7, iii, and Sch. II, 17—Consequential relief.

2 A. 63.

A suit for a declaration of plaintiff's proprietary right to certain moveable property in his possession, which has been attached in execution of a decree, and for setting aside the order of the Court disallowing his claim thereto, can be brought on a stamp of 20 Rupees. and need not be stamped according to the value of the property attached. (1 A. 360, *F*—15 B.L.R. Ap. 1=22 W.R. 422. *Diss.*—11 B.H.C. Rep. (A.C. J.), 186 and 1 M. 40, *D*.

[Not F., 13 C. 162; F., 6 A. 341 (344)=4 A.W.N. 113, 1 L.B.R. 1 (2); R., 5 A.W.N. 48, 7 A. 528 (532), 12 A. 129 (162), 31 C. 511 (512).]

In a suit wherein the plaintiff claimed a declaration of his proprietary right to certain grain, valued at Rs. 1,200, and the cancelment of an order

(1) 10 W.R. 264=I.B.L.R.S.N. xx.

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APPELLATE CIVIL.

2 A. 63.

made by the Munsif of the city of Moradabad on the 17th May, 1876, disallowing his claim to the same, the grain having been attached by the defendant, when in the possession of the plaintiff, in the execution of a decree for money held by the defendant, as the property of the defendant's judgment-debtor, the plaintiff paid on his plaint an aggregate amount of Court-fees, *viz.*, a fee of Rs. 10 on his claim for a declaration of his proprietary right to the property in suit and a similar fee on his claim for the cancelment of the Munsif's order. The first Court, though holding that the plaint was sufficiently stamped, dismissed the suit. The lower appellate Court reversing the decree of the first Court, remanded the case for a new trial. The defendant in his appeal to the High Court, contended, amongst other things, that the plaintiff should have paid a fee on his plaint according to the value of the property in suit.

JUDGMENT.

[64] SPANKIE, J.—We are of opinion that the plaintiff was at liberty to sue for a declaratory decree to establish his right to the property attached: a stamp of Rs. 10 was sufficient for this purpose. But the plaintiff also paid Rs. 10 besides, *i.e.*, Rs. 20 on the whole plaint inasmuch as he sued also to set aside the miscellaneous order against him. In each of the two claims a ten rupee stamp is sufficient under the Court Fees Act. The Bombay case cited *Motichand Jaichand* v. *Dadabhai Pestanji* (1), does not apply, as there the plaint included a claim for possession. Nor does the ruling of the Madras Court in *Chakalingapeshana Naicker* v. *Achiyar* (2) apply, for there the main object of the suit was held to be recovery of possession of certain lands of which the plaintiff had been out of possession for years. We are not prepared to follow the decision of the Calcutta Court in *Mufti Jalaluddin Mahomed* v. *Shohorullah* (3). We do not think that in a suit like the one before us it is imperative that the Court-fee should be according to the value of the property. When the suit was brought the property was under attachment, and as it is part of the claim of the plaintiff that it was in his possession when attached, he was not under any necessity of asking for more relief **[65]** than the circumstances of the case required. That relief was confined to a simple declaration of title and the setting aside of the order of the Munsif in the execution department by removal of the attachment, both requirements being included in Sch. II, Art. 17 of the Court Fees Act. No ruling of this Court antagonistic to the view now taken has been cited; we therefore overrule appellant's objection on this point.

(1) 11 B.H.C.R. A.C.J. 186. (2) 1 M. 40. (3) 15 B.L.R. Ap. 1; 22 W.R. 422.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

1878
NOV. 19.

PRIVY COUNCIL.

On appeal from the Court of the Judicial Commissioner of Oudh.

THE MAHARAJAH OF BULRAMPORE *v.* UMAN PAL SINGH AND GANESH SINGH [19th November 1878.]

3 Suth.P.C.J. 566=5 I.A. 225=3 Saraswati's P.C.J. 870 =Bal. 180.

3 Suth. P.C.J. 566=5 I. A. 225=3 Saraswati's P.C.J. 870=Bal. 180.

Act XXVI of 1866 (Oudh Sub-Settlement)—"Holding under contract," Construction of—

The terms "holding under contract" embrace any holding under arrangements from which a contract may be inferred. Under-tenures held, under contract or under any arrangements from which a contract may be inferred, are within the definition of sub-proprietary rights given in the rules annexed to Act XXVI of 1866, and their holders are entitled to a sub-settlement.

JUDGMENT.

[566] *Sir Montague E. Smith*:—In this case the Settlement Officer has found that the respondents are entitled to a sub-settlement for certain villages in respect of under-proprietary rights held under the Maharajah of Bulrampore. The Commissioner of Fyzabad has confirmed that finding; and upon appeal to the Judicial Commissioner, he saw no reason to disturb it.

The question turns upon the construction of Act XXVI of 1866, and the rules, which have the effect of legislative rules, scheduled in that Act.

It appears that the Raj of Bulrampore is a large and ancient estate, and that these respondents have held the villages—a part of that large Raj—for a very considerable period of time. The documentary evidence shows that they have been in possession from at least as early as the year 1771. Mr. Cowie admits that they held as sub-tenants; that there was an under-tenure under which they legally held the villages; and the only question is whether they held so as to bring their under-tenures within the definition of sub-proprietary rights given in the rules annexed to Act XXVI of 1866.

The rules are not very clearly worded, but they seem sufficiently clear to enable a plain decision to be given in this case. Rule 2 says, "To entitle a claimant to obtain a sub-settlement, he must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." It is not necessary to enquire what "the period of limitation" means, for no question of limitation arises. The important part of rule No. 2 is, "He must also show that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favor of the talookdar, held such lands under contract (pucka) with some degree of continuousness since the village came into the talooka." "Some degree of continuousness" is a vague **[567]** phrase, but No. 3 supplies a definition of it. Rule No. 3 is, "The words 'with some degree of continuousness,' will be interpreted as follows: If the village was included in the talooka before the 13th February 1836"—and this village falls within that category—"the lease must have been held for not less than twelve

years between that date and the annexation of the province." Undoubtedly, if there was a holding under contract in this case, the necessary degree of continuousness has been satisfied; and the only question is, whether or no there was sufficient evidence that these lands were held "under contract (pucka)."

Mr. Cowie has referred to some of the documentary evidence which appears to show that they were held under what are called leases. The Settlement Officer has found that the holding was, within the meaning of these rules, a holding under contract. Their Lordships think, supposing the evidence supports his finding as to the lease, and being confirmed by the Commissioner. they are not disposed to look too narrowly at the facts, that in point of law the decision is correct. The terms "holding under contract" embrace any holding under arrangements from which a contract may be inferred. Then the Settlement Officer has found that the land was not granted "on account of service, or by favor of the talookdar."

Their Lordships having looked at the judgments of the Settlement Officer and of the Commissioner of Fyzabad, have observed that both those Officers took very considerable pains to arrive at a correct conclusion in this case; and their Lordships see no reason whatever to suppose that they have not come to a correct decision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss this appeal.

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PRIVY COUNCIL.
3 Suth.P.C.J. 566=5 I. A. 225=3 Saraswati's P.C.J. 870=Bal. 180.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

1878
Nov. 21.
PRIVY COUNCIL.
4 C. 839=3 Suth. P.C.J. 567=6 I.A. 1=3 Saraswati's P.C.J. 873.

On appeal from the Court of the Judicial Commissioner of Oudh.

GOURI SHUNKER *v.* THE MAHARAJAH OF BULRAMPORE.

[21st November 1878.]

3 Suth. P.C.J. 567=6 I. A.1=4 C. 839=3 Saraswati's P.C.J. 873.

1. *Modification of claim before Appellate Court.*

It is competent to the Courts to allow a plaintiff to modify his original claim for the direct settlement of a superior proprietary right in an estate into one for a sub-settlement of a sub-proprietary right.

2. *Mortgagee in possession prior to confiscation of Oudh estate—Dispossession on re-settlement with talookdar—Claim to sub-settlement.*

Where, at the date of Lord Canning's confiscation Proclamation of 1858, an estate in Oudh was in the plaintiff's possession as mortgagee "with *birt zemindari* rights" under a conditional deed of sale and was subsequently, the plaintiff being dispossessed, re-settled with the defendant as Talukdar, it was held, in a suit by the plaintiff in 1870 for possession as mortgagee. that the mortgage created only a subordinate zemindari interest and that the plaintiff's claim to a sub-settlement was valid.

Quære—(*a*) Whether the sub-settlement might not be supported even if the interest created by the mortgage was not strictly sub-proprietary?

(*b*) Whether, under Act XXVI of 1866, the defendant, as Talukdar, was entitled to malikana?

[R., 13 A. 108 (112)]

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4 C. 839=3 Suth. P.C.J. 567=6 I.A. 1=3 Saraswati's P.C.J. 873.

JUDGMENT.

[846] *Sir James Colvile*:—The broad question raised by this appeal is whether the plaintiff is entitled to any and what rights in four villages which must be taken to be parcel of the talook of Tulsipore, of which the defendant, the Maharajah of Bulrampore, is now the proprietor as talookdar within the meaning of the Oudh Estates Act, No. I of 1869.

[847] The estate of Tulsipore was formerly the property of one Dirgh Narain Singh, who, it is said, was at the time of the first capture of Lucknow during the mutiny a rebel, and imprisoned in the residency, and afterwards went, still in custody, to the Alumbagh, where he died. His heirs continued in rebellion, and the result was that in 1859 the estate of Tulsipore was created into a talook under the new system, in favor of the Maharajah of Bulrampore, who was allowed to engage for the revenue as talookdar at the summary settlement of that year. His title has since been confirmed in the fullest manner by the Oudh Estates Act, and therefore it must be taken for granted that he is talookdar of all the villages for which he then settled, as included in the talook of Tulsipore.

The title of the plaintiff arose in this way: The former Rajah of Tulsipore, on ths 4th March, 1856, a very few weeks after the first annexation of Oudh, borrowed from the plaintiff a sum of Rs. 7,001, and, as a security for that sum, executed to him the instrument in the nature of a mortgage by way of conditional sale, which is found at page 3 of the Record. That instrument, after declaring that he had borrowed this money, and that in lieu of the same he had made a conditional sale to the plaintiff of the four villages in question, with all the four boundaries, and birt zemindary rights for the period of four years, commencing from the 4th March, 1856, and ending on the 4th March, 1860, goes on to say, "The above-named creditor is allowed to take possession of the aforesaid villages, to pay the Government revenue, and to appropriate the surplus porfits, to his use in lieu of interest. Neither will I have any claim to profits, nor will the creditor have any claim to interest. I shall be entitled to get back the deed when I pay the money at the stipulated period."

At the summary settlement which the British Government proceeded to make upon the first annexation of the province, the plaintiff, the mortgagee, applied to have the settlement of these four villages made directly with him. That settlement was not completed until the 4th June, 1857,—a period very shortly antecedent to that at which British rule ceased for a time in the province of Oudh; and, when made, was made to endure only for the time during which the plaintiff would be in **[848]** possession of the villages strictly in the character of mortgagee, that is only up to the time fixed for the redemption of the mortgage. Then came the mutiny. After that came Lord Canning's Proclamation of the 15th March, 1858, the effect of which has been so often discussed here, that it is not necessary more particularly to refer to it. Early in 1859 the Government, having apparently retained during the intermediate period this estate of Tulsipore under some kind of attachment, finally determined to grant it to the respondent. The sunnud, if any, granted to him is not upon the Record, but it is established that he was admitted to engage for the revenue on the 21st January, 1859, and that the settlement was completed on the 25th of the following May. The plaintiff, who was in actual possession of the villages as mortgagee, was dispossessed on the 31st January, 1859, when, in anticipation of the final settlement, the Maharajah of Bulrampore was put in possession. The plaintiff subsequently made

various attempts to assert his rights, and to recover possession, with which we have on the present occasion no concern; and on the 15th May, 1866 he was referred to the regular settlement which was afterwards to be made, and told that he must prefer any claim which he could substantiate at that settlement. Accordingly in October, 1870, when the settlement was in progress, he filed his plaint in the present suit.

The plaintiff in terms asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him. On the 3rd March, 1873 the claim was dismissed by the Assistant Settlement Officer, who treated it apparently as one for the direct settlement of a superior proprietary right, and held that, as such, it was barred by the Oudh Estates Act, and the rights which the talookdar had acquired. There was an appeal to the Commissioner of the district, Mr. Capper; and before him the suit assumed the character of one for a sub-settlement of a sub-proprietary right, which it has ever since retained. That it is competent to the Courts to allow a plaintiff so to modify his claim was ruled by their Lordships in the case of the widow of *Shunker Sahai* v. *Rajah Kashi Pershad.* (1)

[849] Mr. Capper in his judgment of the 10th May, 1873 ruled that the mortgagee, if his title were perfected by foreclosure, would be the legal owner of birt zemindary rights subordinate to the talookdar; but that the mortgage was still redeemable. He thought, however, that the case was not ripe for decision, and remanded it for the trial of an issue whether the plaintiff had got possession of all or any of these villages prior to Phagun, 1267 Fusli. This issue was found in the affirmative; and the fact was not disputed by the respondent when the case came back to Mr. Capper. Mr. Capper on the 28th August, 1873 then made a decree in these terms; "The Court orders and decrees the appeal and cancels the decree of the 3rd March, 1873. Gouri Shunker, plaintiff, and his co-sharers, if any, are decreed an under-proprietary zemindary title in Mouzah Bairwa, Mouzah Bijwa Kalan, Mouzah Bindhwa, and Mouzah Katya Bhari, and possession under the terms of the deed of conditional sale dated Phagun, Sudi 13th, 1263 Fusli, till such time as the lien shall be redeemed, or till the title shall be perfected by foreclosure." The respondent then appealed from this decree to the Judicial Commissioner, Mr. Currie. That officer, on the hearing before him of the 31st March, 1874, seems to have objected to the decision of Mr. Capper on the ground that he had assumed what ought to have been proved. He said, "It is very material, for a proper determination of this case, that the exact nature of the title intended to be conveyed under the deed should be decided. The defendant urges that the title intended to be conveyed was the full proprietary title, and this view of the case is supported by the fact that this suit is laid for the full proprietary title. On the other hand, the plaintiff urges that the deed never intended to convey to him more than an under-proprietary title, that is, a title as birtia, the wording of the deed being 'with all the rights attaching to a birt zemindary.'" He accordingly sent the case down to the Settlement Officer, that is, the Judge of First Instance, for the investigation and determination of two issues: the first was, "What is the meaning of the term 'with all the rights appertaining to a birt zemindary' in the mortgage bond on which **[850]** the plaintiff bases his claim?" The second was as to the date and circumstances of the seizure by the Government of the villages as part of the property of the rebel Rajah of Tulsipore. Nothing, however,

(1) 4 I.A. 198=3 Suth. P.C.J. 4.

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4 C. 839=3 Suth. P.C J. 567=6 I.A. 1=3 Saraswati's P.C.J. 873.

ultimately turned upon the finding upon this issue, which was in accordance with the facts already stated.

On the first issue a number of witnesses were examined before the Lower Officer. He, upon that evidence, whilst professing that he knew very little himself about these tenures, came to the conclusion "that the deed pledged the proprietary title in these four villages; that it was intended that the mortgagee should hold independently for the four years named: and that at the end of that period, on failure to redeem, the plaintiff would have become the independent proprietor of the property." And he accordingly found on the first issue that the meaning of the words "with all the rights appertaining to a birt zemindary," did in this case signify independent proprietary possession, and not a right of property to be held in subordination of the talookdar.

The case, with these findings and the evidence on which they were based, went back to the Judicial Commissioner, who then made the decree which is the subject of the present appeal. He dismissed the suit upon the grounds stated in his judgment at page 52 of the Record.

Before considering those grounds in detail, it is desirable to observe, that the Judicial Commissioner seems to have agreed with the Commissioner, Mr. Capper, that if the effect of the mortgage was to create a tenure subordinate to that of the talookdar, the claim of the plaintiff to a sub-settlement would be valid. The question upon which the determination of the suit thus depended was that which was principally argued here, namely, what was the nature of the estate conveyed by way of conditional sale; that is, whether, supposing the mortgage-deed to have become absolute, the plaintiff would have held the villages from that time as an independent zemindar or as a zemindar, in some sense subordinate to the talookdar, the villages remaining in that way parcel of the Tulsipore estate.

It need hardly be said that if the Judges in Oudh had given a clear interpretation of the words "*birt zemindary*," their **[851]** Lordships would have been very slow to question that interpretation, or even to draw from the evidence any inference other than that which those who are acquainted with the tenures of the province had already drawn. Mr. Capper, an experienced officer, assumed that the words "birt zemindary" import a subordinate tenure. From the first part of the final judgment of the Judicial Commissioner, it seems that he would have understood the words in the same sense as if they had stood alone. He says "The conclusion at which I arrive is that had this deed been executed prior to the annexation of the province, the introduction into it of the words 'birt zemindary' would have conveyed the meaning that the mortgagee agreed to hold the property mortgaged in subordination to the mortgagor, or, in other words, that he consented to the mortgaged villages being retained in the mortgagor's kubooleut, instead of his entering into direct engagements with the Government officials for the revenue of such villages." He then goes on to consider how this construction of the words ought to be affected by a consideration of the surrounding circumstances under which the deed was executed, and the probable intention of the parties, and he proceeds: "But as the deed was executed subject to the annexation of the province by the British Government, and at a time when the policy was to do away with talookdars, and to deal with village occupants as independent proprietors, and considering also that immediately after the execution of the mortgage the plaintiff demanded and was admitted to direct engagement with Government for the land revenue due on the mortgaged villages, I can but conclude that the nature of the title intended to be conveyed under the

deed was the full proprietary title, and not merely the subordinate and dependent title of 'Birtia.'" There are therefore two reasons assigned for the conclusion to which he came, and neither of them, in their Lordships' judgment, appears to be satisfactory. The deed, no doubt, was executed subsequent to the annexation of the province, but there is no reason to suppose that, at the time it was executed, the parties were at all aware of what the future policy of the Government, when it came to change the fiscal arrangements of the Nawabee, [852] would be, for that policy at that time had not even been declared; and therefore it is unreasonable to suppose that the parties contracted with reference to a system under which the Government would make the new settlement with the village occupants as independent proprietors. Then again, their Lordships think that little, as to what the intention of the parties at the time may have been, can be inferred from the fact that after that policy had been declared, and the Government proceeded to make summary settlements with the immediate possessors of villages, and in fact adopted the policy of breaking up the great talookdary estates, the mortgagee did go in under that system to settle for the revenue of these villages. It was, after all, a mere fiscal arrangement; and the very terms of the settlement which he did make treated his interest as a defeasible interest, and confined the summary settlement made with him to the period which the mortgage had to run before it became redeemable. Their Lordships cannot attach much weight to the statement which he then made and which is not in the terms of the mortgage-deed, as to what his rights would be had not redemption taken place. The Judicial Commissioner, however, having for these insufficient reasons come to the conclusion above stated, held that the plaintiff being in possession of the villages at the date of Lord Canning's Proclamation under a title which would give him the full proprietary right in the soil, when and if his mortgage became absolute, fell within the scope of the Proclamation; and that his title was by that Proclamation swept away, and was not set up again by the subsequent explanation of the Proclamation which is contained in the two letters annexed to Act I of 1869. Everything in this decision, therefore, turns upon the correctness of the finding, that the intention of the parties was to pass the full proprietary title in the event of the mortgage not being redeemed at the proper time, and that there was therefore no sub-proprietary right in the villages as included in the talook settled in 1859 which could be the subject of a sub-settlement. Their Lordships have already intimated that they are not satisfied with the reasons which the learned Judge gives for his construction of the instrument, or rather for the qualification of that [853] which he would understand to be imported by the words "birt zemindary right," by reason of the particular circumstances of the case; and in their own opinion it is highly improbable that the intention of the parties when the contract was made was such as is imputed to them. They do not think it likely that the Maharajah (the mortgagor) at that time contemplated the impossibility of his redeeming the mortgage; or that, if he did, he intended in such an event to lose that influence and power and consideration which the great landowners of Oudh derived from the inclusion of subordinate zemindaries in their talooks; and if the words "birt zemindary," as seems to be admitted, may import the transfer of merely a sub-proprietary right, their Lordships conceive that to be in this case the more rational construction to be put on them. And it is in their opinion a strong argument in favor of this construction, that it makes all the subsequent acts of the Government and the parties which have led to the inclusion of these villages in the talook of Tulsipore

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consistent with reason and justice. It is clear that the Government did not intend to grant anything except that which was properly and legitimately part of the estate of the rebellious Rajah of Tulsipore. It is also clear that as Lord Canning's Proclamation had then been explained and was understood, the plaintiff, if he had acquired the absolute interest as Zamindar in these villages, and if the villages were thus wholly severed from the talook, would have been allowed to engage for the revenue, not as talookdar, but as independent Zamindar. Nevertheless, the villages when the settlement was made were treated as part of Tulsipore; and were accepted by the Maharajah as part of his talook. He had no other title to them except the grant of the estate of Tulsipore; and it is more reasonable to conclude that they were properly so included, than to say that by mistake the Government took property which belonged to another man, put it into an estate to which it no longer belonged, and that by reason of the Estates Act and the other proceedings which have taken place a wrong has been done which is now irremediable.

Their Lordships will now deal with an argument which was much pressed, *viz.*, that there can be no sub-proprietary right **[854]** unless there be a substantial rent or service to be rendered by the sub-proprietor to the talookdar, and that in this case all that could be paid by the mortgagee after foreclosure would be the Government revenue assessed upon these villages, without giving the Rajah any beneficial interest in the collections of the villages. This objection does not appear to have occurred either to Mr. Capper or to Mr. Currie; nor was it treated as an objection in the case already referred to in the 4 Law Reports, Privy Council Indian Appeals,* in which a sub-settlement was granted to a lady who does not appear to have paid anything to her former co-sharer in the estate (as he in fact was) in respect of the four villages of which she was found to be sole proprietor. Nor do their Lordships find, either in the letters of Lord Canning or in the rules annexed to Act XXVI of 1866, anything which necessarily imports, that it is essential to the enforcement of the rights of one who would otherwise be a subordinate zemindar, that the talookdar should have some pecuniary interest in the sub-tenure. Those rules, and some expressions in the letters, no doubt, contemplate that in the ordinary case of a sub-tenant he would pay something to the superior lord. Their Lordships, however, do not find that those provisions are exhaustive, or that there are any negative words which say that there shall not be a sub-settlement of a subordinate zemindary included in a talook, unless the zemindar is bound to pay some substantial rent to his superior.

It might be open to consideration whether, if this were not in the strict sense of the term a sub-proprietary interest, the case in the 4th Law Reports, Indian Appeals,* would not have justified a sub-settlement of it. It is not necessary however for their Lordships to go that length in the present case. It is sufficient for them to say that upon the whole they think this grant of the birt zemindary interest should be treated as the conveyance of a subordinate zemindary interest; that the villages were at the time of the settlement properly treated as still included in the talook of Tulsipore settled with the respondent, and there-**[855]**fore that the judgment of Mr. Capper declaring the right of the plaintiff is correct.

The only doubt their Lordships entertain is, whether that decision has fully and completely satisfied the terms of Act XXVI of 1866 by giving to the Maharajah the right which that Statute seemed to contemplate

* 4 I.A. 198=3 Suth. P. C. J. 4.

that the talookdar shall always have, *viz.*, that of receiving a malikhana of not less than 10 per cent. That malikhana was given in the former case to which their Lordships have already referred. It is not very clear whether Mr. Capper assumed that the amount of this malikhana would be afterwards fixed when the interest of the plaintiff should cease to be a mortgage interest, and be perfected by foreclosure.

Their Lordships think that in recommending to Her Majesty (as they propose to do) to allow the appeal and to confirm the decision of Mr. Capper, they should also recommend that the order should declare that it is without prejudice to the right, if any, of the Maharajah to malikhana at a rate not less than 10 per cent., and that he is to be at liberty to apply to the Courts below for the settlement of such malikhana as he may be advised. The costs of the appeal must follow the result.

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PRIVY COUNCIL.
4 C. 839=3 Suth. P.C.J. 567=6 I.A. 1=3 Saraswati's P.C.J. 873.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Turner.

PALAK DHARI RAI AND OTHERS (*Judgment-debtors*) *v.* RADHAPRASAD SINGH (*Decree-holder*). [21st November 1878.]

2 A. 65=3 Ind. Jur. 419.

Interlocutory order—Application for leave to appeal to Privy Council—C. P. C., Ss. 594, 595 and 596.

No leave could or ought to be granted by the High Court for appealing to the Privy Council from an interlocutory order, for instance, an order of the High Court cancelling, on the ground of want of jurisdiction, a District Judge's order in execution proceedings, transferred to his own file from that of a Subordinate Judge, and remitting the case for the disposal of the execution petition on the merits, with a direction that the record of the case should be returned to the Subordinate Judge.

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2 A. 65=3 Ind. Jur. 419.

The District Judge of Ghazipur recalled to his own file the proceedings in the execution of a decree which were pending in the Court of the Subordinate Judge of Shahabad, and disallowed an application for the execution of the decree which had been preferred to that Judge. On appeal from the order of the District Judge, the High Court (Pearson and Turner, JJ.) annulled the order of the District Judge, as void for want of jurisdiction, and remitted the case in order that the application for execution might be disposed of on the merits and directed that the record of the case should be returned to the Subordinate Judge of Shahabad. The present application was made on behalf of the judgment-debtors for leave to appeal to the Privy Council from the order of the High Court.

ORDER OF THE COURT.

[66] TURNER, J.—This Court has simply set aside an order of the Judge of Ghazipur calling on to his own file proceedings pending in the Court of the Subordinate Judge of Shahabad, and has directed that the proceedings be remitted to the Shahabad Court that the applica-**[67]**tion presented to that Court may be disposed of. When it is disposed of, the decision may be appealed, and the superior Court which finally determines the application may have power to grant leave of appeal from its decision to Her Majesty in Council. The question of the competency of the Shahabad Court to entertain the application may then be raised. The order

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before us is in our judgment in the nature of an interlocutory order, and not an order from which we can or ought to give a certificate for appeal to the Privy Council. The learned counsel's argument, based on the provisions of S. 594 of Act X of 1877, that the word "decree" embraces judgment and order, does not support the contention that the Court can or ought to give leave to appeal from any order. The certificate is refused with costs.

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2 A. 65=3 Ind. Jur. 419.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, Sir R. P. Collier.

1878
NOV. 22.

[*On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.*]

PRIVY COUNCIL.

ZAIN-UL-ABDIN KHAN (*Defendant*) *v.* AHMED RAZA KHAN AND OTHERS (*Plaintiffs*). [22nd November 1878.]

2 A. 67=5 I.A. 233=3 Saraswati's P.C.J. 879.

Ex parte *judgment—Appeal—C.P.C., (1859), S. 119.*

S. 119, C.P.C. (1859), precludes an appeal from a judgment passed *ex parte* against a defendant, who has not appeared *at all*, but not in the case of a defendant, who has once appeared, but who fails to appear on a day to which the case has been adjourned.

Ap., 23 B. 414 (424); **F.**, 11 C.L.R. 537, 21 C. 269 (274); **R.**, 8 A. 354 (360)=6 A.W.N. 110, 20 B. 380 (383), 34 C. 403 (409) (**F.B.**)=5 C.L.J. 247=11 C.W.N. 329=2 M.L.T. 123; **D.**, 7 A. 538=5 A.W.N. 144, 23 C. 738 (**F.B.**), 18 A. 241 (244), 20 A. 195 (197).

JUDGMENT OF THE HIGH COURT.

[67] "The suit was instituted on the 14th September, 1872, and after much delay, owing to the residence of both parties in foreign territory, the hearing was, at the request of the pleaders of both parties **[68]** adjourned for the 5th January, 1873. Issues were framed, and the 28th October fixed for the hearing; the suit was not called on that date, but on the 7th November, 1873. It was again adjourned at the like request to the 2nd February, and subsequently to the 8th April, 1874. On 6th April the defendant appellant submitted a petition praying for a further adjournment on the plea that his pleader had gone to Calcutta to consult the Advocate-General and could not return in time. This petition was not presented by a pleader, nor by any duly authorised agent, and was rejected. On the 7th April the defendant's pleader telegraphed to the Subordinate Judge requesting him to postpone the hearing. The Subordinate Judge refused to consider this irregular application, and on the 8th April the case was called on in due course. Although the defendant had an agent in Moradabad, no other pleader than Ganesh Prashad, who was absent in Calcutta, was appointed, and the defendant appearing neither in person nor by pleader, on the 8th April the case was heard and decided *ex parte* under the provisions of Ss. 147 and 111. The appellant subsequently took the proper step of applying to the Subordinate Judge, under S. 119, for an order to set aside the judgment, but unfortunately he did not proceed with that application, and it was struck off for default,

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the appellant being advised by his late counsel to proceed by way of appeal. He is met by the objection that the appeal does not lie, as the judgment was passed *ex-parte*. The appellant's counsel urges that the case was not heard by the Subordinate Judge *ex-parte* under S. 111; that the default of the appellant was such a default as is contemplated in S. 145, and not such a default as is contemplated in S. 147. It appears clear to us that the former section applies where the parties appear, but either of them fails to proceed with the case; while S. 147 applies to cases like the present, in which at an adjourned hearing a party failed to appear. If the Judge heard the suit at all in the absence of the appellant, he could only do so under the provisions of S. 111. Having the option of proceeding with the hearing or again adjourning the case, he proceeded to hear and determine it.

"Then it is contended that the appellant was entitled to proceed either by way of appeal or by an application under S. 119, and *Kalee Churn Dutt* v. *Modhoo Soodun Ghose*, 6 W.R. 86, is relied on; but **[69]** that ruling has not apparently been followed in *Administrator-General of Bengal* v. *Lala Dyaram Das*, 6 B. L. R. 688, and in *Purus Ram* v. *Jyunti Parshad*, H. C. R., N.-W. P. 1869, decided on the 21st May of that year, it has been held that no appeal lies.

"The omission to follow the procedure required by S. 119 has deprived the appellant of all remedy. The appeal must therefore be dismissed with costs."

JUDGMENT.

[70] SIR BARNES PEACOCK.—The question in this case is whether the first part of S. 119 of Act VIII of 1859 applies to a case which has been decided under the provisions of S. 147 of the same Act. That part of S. 119 is in the following words: "No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared." S. 119 must be read together with Ss. 109, 110, and 111. S. 109 says: "On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court." S. 110 says: "If on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear, either in person or by a pleader, when duly called upon by the Court, the suit may be dismissed." There the words are: "If on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned." Then comes S. 111, which, says: "If the plaintiff shall appear in person" —it does not say "On the day fixed, or on any subsequent day," but simply "if the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex-parte*." Ss. 109 and 111, taken by themselves, clearly relate to the appearance of parties and to their non-appearance, at the first hearing of the suit. The 146th and 147th sections are enactments relating to adjournments. S. 147 enacts that "if on any day to which the hearing of the suit may be adjourned, the parties, or either of them, shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in S. 110, S. 111, or S. 114, as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case." There is no

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2 A. 67=5 I.A. 233=3 Saraswati's P.C.J. 879.

enactment in that section that, in case the Court disposes of the suit in the manner specified in S. 111 (the section which applies to the present case), the first part of S. 119 shall apply to such a judgment. Under Act VIII of 1859 the general rule is that an appeal lies to the High Court from a [71] decision of a Civil or Subordinate Judge, and a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication. Looking at all the sections together, their Lordships are of opinion that the words "who has not appeared" as used in S. 119, mean "who has not appeared at all" and do not apply to the case of a defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.

There are several cases to that effect decided by the High Court in Calcutta: Marshall's Report, page 32; 3rd Bengal Law Reports Appendix 121, and the 6th Weekly Reporter, page 86.

Two cases were referred to by the learned Judges who decided this case,—a case in 6th Bengal Law Reports, 688, and one from the North-Western Provinces Reports of 1869, decided the 21st May of that year. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th Bengal Law Reports, 688, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, decided the 21st May of that year, is certainly in conflict with the several decisions in the High Court at Calcutta to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the appeal. The respondent must pay the costs of this appeal.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

1878
NOV. 28.

APPELLATE CIVIL.

2 A. 91.

MURLI DHAR (*Judgment-debtor*) *v.* PARSOTAM DAS AND ANOTHER (Decree-holder). [28th November 1878.]

2 A. 91.

1. *Execution of decree—Appeal from order.*

An order in execution proceedings, disallowing the objections of the judgment debtor to execution being taken out by a transferee of the decree-holder, is appealable, being the final order in a judicial proceeding, and, therefore, a decree within the meaning of S. 2 of the C.P.C. (1877). 1 A. 688, (**F.B.**), *F.*

2. *Cross-decrees—Setting-off.*

The amount of a decree, held by a judgment-debtor against the judgment creditor alone, cannot be set off against a decree held by the latter along with other persons, which did not specify the separate interests of each of them.

Murli Dhar preferred an appeal to the High Court from an original decree, which appeal the High Court dismissed, giving the respondents a decree against Murli Dhar for Rs. 682—9—0, being the amount of costs incurred by them in the High Court. Parsotam Das and Sital Prasad to whom the decree was transferred by assignment by one of the respondents, Sarju Prasad, applied for its execution as the transferees. The

objections of Murli Dhar having been disallowed by the Court of first instance, the Court executing the decree, he appealed to the High Court.

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NOV. 28.

ORDER OF REMAND.

APPELLATE CIVIL.

The High Court remanded the case for the trial of the issue set out in the order of remand, which was as follows :

[92] TURNER, J.—The opinion of the Full Bench (1) established that an appeal lies in this case, the order being the final order in a judicial proceeding, and therefore a decree as defined in S. 2.

Sarju Prasad was competent to sell his title to the costs which he anticipated he would recover, and there can be no objection to the validity of the substitution of the names of the repondents for that of Sarju Prasad. Of course the respondents took the decree for costs subject to any equities which may have subsisted between the decree-holder and the judgment-debtor (2). The appellant then was entitled to set off so much of any valid and subsisting decree held by him against Sarju Prasad as might amount to the decree purchased by the respondents (3). The lower Court must determine whether, as alleged by the appellant, he held a decree of which he was entitled to set off a portion of the amount against the decree acquired by the respondents, so as to satisfy the decree held by respondents. The lower Court will try this issue and return its finding to this Court, when ten days will be allowed for objections.

From the finding of the lower Court it appeared that the decree held by Murli Dhar was one for money against Sarju Prasad alone, made by the Subordinate Judge of Benares, which had been transferred to the Court of the Subordinate Judge of Azamgarh for execution.

2 A. 91.

JUDGMENT.

On the return of the finding the following judgment was delivered by the High Court (PEARSON, J. and TURNER, J.) :

TURNER, J.—The Court below has found that the decree in which the respondents purchased the interests of Sarju Prasad was a decree for costs held by Sarju Prasad and two other persons without any specification of the separate interests of each. We are compelled to hold then that the decree is not a decree between the same parties as the parties to the decree held by the appellant, inasmuch as in the latter decree Sarju Prasad is the sole judgment-debtor. We must consequently dismiss the appeal, but we order each party to bear his own costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Spankie.

1878
DEC. 9.

JIWAN BAKHSH (*Defendant*) *v.* IMTIAZ BEGAM (*Plaintiff*).

[9th December 1878.]

APPELLATE CIVIL.

2 A. 93.

2 A. 93.

Mahomedan Law—Joint and undivided property—Gift of defined share.

Under Mahomedan law, the gift of joint and undivided property is open to objection ; but a defined share in such property is separate property, and can be the subject of a valid gift. (15 B. L. R. 67=23 W. R. 208, *R.*)

[R., 13 B. 352 (356).]

(1) 1 A. 668.

(2) S. 233 of Act X of 1877.

(3) S. 246 of Act X of 1877, Explanation ii.

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DEC. 9.

APPELLATE CIVIL.

2 A. 93.

JUDGMENT.

[94] PEARSON, J.—The main question raised by this appeal is whether the gift of a defined share of landed estate is open to the objection which attaches, under Muhammadan law, to the gift of joint and undivided property. On this question our opinion is in accord with that of the Court of first instance that a defined share in a landed estate is a separate property to the gift of which that objection is inapplicable, and we conceive that the view of the matter which we take in common with the Subordinate Judge is sanctioned by the rulings of the Privy Council, as well as well-founded in reason.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

1878

DEC. 16.

APPELLATE CIVIL.

2 A. 94.

SHAFI-UD-DIN AND OTHERS (*Plaintiffs*) *v.* LOCHAN SINGH AND ANOTHER (*Defendants*). [16th December 1878.]

2 A. 94.

1. *Possession of mortgagee—C.P.C. (1859), S. 230—C.P.C. (1877) S. 332.*

The possession of the mortgagee under the mortgage is "possession on his own account" within the meaning of S. 230 of the C. P. C. (1859) and S. 332 of the C.P.C. (1877); he is therefore entitled, when dispossessed in execution of a decree against the mortgagor, to which he is not a party, to be restored to possession under S. 332 of the C. P. C. (1877).

2. *Repealing of old law—Effect of procedure under new law.*

A person, dispossessed under the above circumstances, after the C.P.C. (1877) came into force, in pursuance of an order passed under the old Code, is entitled to be restored to possession under the provisions of the new Code.

3. *Proof in such proceedings.*

A person dispossessed under the above circumstances, need not, in seeking to be restored to possession, prove his title; it is enough if he proves his possession.

[Not F., 6 O.C. 110 (112); **R.**, 21 T.L.R. 183.**]**

Mahtab Singh and his two brothers mortgaged on 17-2-1876 a certain village, which they held as joint and undivided estate, putting the mortgagees into possession of the entire village. The sons of Mahtab Singh having obtained a decree on 7-8-1877 against their father for the partition and possession of two-thirds of the estate, dispossessed the mortgagees in November, 1877, after Act X of 1877 came into force, of two-thirds of the estate under an order in the execution of the said decree made before Act X of 1877 came into force. On the mortgagees subsequently applying under S. 332 of Act X of 1877 to the Court executing the decree to be restored to the possession of the property, disputing the right of the decree-holders to dispossess them under the decree on the ground that they were in possession on their own account, and that they were not parties to the suit in which the decree was made, their application was numbered and registered as a suit between the parties in accordance with that section,— the Court of first instance granting the mortgagees an order for the possession of the property. On the lower appellate Court reversing the order of the Court of first instance, the mortgagees appealed to the High Court.

JUDGMENT.

1878
DEC. 16.
APPELLATE CIVIL.
2 A. 94.

[95] TURNER, J.—The grounds on which the Judge has dismissed the suit cannot be sustained; the mortgagees were in possession on their own account. The question then arises whether in this suit the mortgagees may rely on their possession only and claim to be restored to possession, or whether they must prove their title. Seeing that they were not actually dispossessed until November, 1877, when Act X of 1877 was in force, it appears to us that they were entitled to the benefit of S. 332 of that Act. It is true that the order under colour of which the decree-holders ousted them was passed before the Act came into operation, but until the ejectment of the mortgagees no right accrued to them to oppose the misuse of the order, and when that right accrued it is governed by the law then in force. We decree **[96]** the appeal, and reversing the decree of the lower Court restore that of the Court of first instance with costs.

The respondents are of course at liberty in a suit properly instituted to try the question of title and to apply for the ejectment of the appellants.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

1878
DEC. 19.
APPELLATE CIVIL.
2 A. 96=3 Ind. Jur. 470.

KARAM SINGH (*Defendant*) *v.* RAM LAL (*Plaintiff*).

[19th December 1878.]

Registration Act (1871) S. 17, Cl. (2)—Charge.

A bond, charging immoveable property for the payment on demand of an amount less than Rs. 100, with interest thereon, is only optionally registrable.

[F., 2 A. 216, 2 A. 688 (689).]

JUDGMENT.

[97] TURNER, J.—We see no reason to depart from the view of the law we have long held in this Court. The bond was for a sum of Rs. 83—8—0 payable on demand with interest. It did not certainly secure Rs. 100, and therefore its registration was optional. The appeal is dismissed.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Turner.

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JAN. 21.
CRIMINAL JURISDICTION.
2 A. 105.

EMPRESS OF INDIA *v.* MULA. [21st January 1879.]

Penal Code, Ss. 193, 511—Fabricating false evidence—False endorsement on a stamped paper.

Where the accused, in order to injure the complainant, who had deposed against him in a civil suit, induced another person to personate the complainant and to purchase a stamped paper, and in consequence of such personation, the stamp-vendor made the usual endorsements on the stamp paper in the name of

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JAN. 21.

the complainant, *held*, that, inasmuch as the intention of the accused was to use the falsely endorsed stamp paper in a judicial proceeding, he was guilty of the offence of fabricating false evidence, and the other person was guilty of abetting the same.

[F. 25 A. 75 (77) = 22 A.W.N. 196.]

CRIMINAL JURISDICTION.

Application to the High Court for the exercise of its powers of revision under S. 297, Act X of 1872.

JUDGMENT.

2 A. 105.

[105] TURNER, J.—The petitioner Mula is a money-lender in Shahjahanpur, with whom Chattar Singh, *thakur*, had had dealings, but prior to the date of the occurrence which led to the present charge Chattar had discharged his debt to the petitioner. In a suit instituted by Mula against Netha and Dhaunkal, Chattar gave evidence on behalf of the defendants, and thereupon Mula threatened him he **[106]** would make him pay Rs. 50. On the 28th July Zabar, a debtor of Mula, applied to Mathura Prasad for a stamp of the value of four annas. He gave his name as Chattar Singh, *thakur*, and the name of Chattar Singh's father, and also Chattar Singh's address. These details were, in accordance with the usual practice, endorsed on the back of the stamp. As Zabar was leaving the stamp-vendor's shop, it occurred to the stamp-vendor again to question him as to his name. He then made a mistake and gave a different name as the name of Chattar Singh's father. The suspicions of the stamp-vendor being excited, he further questioned Zabar, who then stated he had purchased the stamp at the request of Mula, who had given him four annas for that purpose. The stamp-vendor very properly took Zabar to the police-station and reported what had occurred. It is shown by other evidence, which the Courts below have accepted as reliable that Mula gave four annas to Zabar and requested him to purchase a stamp; that he left his place of business and accompanied Zabar on his way to the stamp-vendor's; that he remained near the stamp-vendor's shop when Zabar entered it, and ran away on perceiving that Zabar was detained. With this corroboration the Magistrate and the Sessions Judge have accepted as reliable the statement of Zabar that he was induced by Mula to personate Chattar Singh, and to procure the stamp in Chattar Singh's name. The Magistrate held that on the facts proved Mula was guilty of the offence of attempting to fabricate false evidence for the purpose of using it in judicial proceedings. The Sessions Judge more correctly held that the facts afforded proof that the fabrication was complete, and that the petitioner was liable to conviction for abetment of the offence alleged rather than of an attempt to commit it, and amended the conviction accordingly. In this Court it is argued that, although the petitioner may have made preparations to commit the offence, yet the offence had not actually been completed, and in support of this contention the petitioner's pleader has referred to *Queen* v. *Ramsaran Chowbey* (1), in which case it was held that under similar circumstances the accused could not be convicted of forgery.

It appears to me that the cases may be distinguished. The endorsement of the stamp-vendor forms no part of the document **[107]** which it may be assumed it was the intention of the person who procured the endorsement to make on the face of the stamp-paper. The offence of forgery had therefore not proceeded beyond the stage of preparation, but in the case now before the Court there had been an actual fabrication: something had been done. It is true that no judicial proceeding had

(1) H. C. R., N. W. P., 1872, p. 46.

been instituted, but the petitioner's pleader is unable to suggest any other object for which the false endorsement should have been procured. The petitioner had undoubtedly threatened Chattar Singh that he would make him pay Rs. 50. He could not have carried out his threat without the intervention of the Court. The object of the endorsement made by the vendor of a stamp is to afford proof of the person to whom it is sold, and in suits brought on documents written on stamp-paper it is the usual course, when the execution of the document is denied, to advert to the endorsement and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and therefore as evidence of the probability that the document was made by the person by whom the paper was procured. I do not say that in the case cited the accused should have been discharged. Had the point been taken the Court might have held the accused guilty of the offence of which the petitioner has been convicted, but I am of opinion that in the case before the Court the evidence for the prosecution warranted the inference that the petitioner procured the false endorsement for the purpose of thereafter using it in a judicial proceeding, and consequently that the conviction is not open to the objection taken to it. I affirm it, and dismiss the application.

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JAN. 21.
CRIMINAL JURISDICTION.
2 A. 105.

PRIVY COUNCIL.

PRESENT:

Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

1879
JAN. 23.
PRIVY COUNCIL.
3 Suth.P.C.J. 584=6 I.A. 63=Bal. 194.

On Appeal from the Court of the Judicial Commissioner of Oudh.

NAWAB MALKA JAHAN SAHIBA *v.* THE DEPUTY COMMISSIONER OF LUCKNOW IN CHARGE OF THE NAZUL DEPARTMENT.

[23rd January 1879.]

3 Suth. P.C.J. 584=6 I.A. 63=Bal. 194.

Lord Canning's Proclamation of the 15th March, 1858—Effect.

Lord Canning's well-khown Proclamation of the 15th March, 1858 had the effect of vesting the property, the subject of this suit, together with all other landed property in Oudh, in the British Government, and all who claimed title to it had to claim through the Government. Whether or not the sunnuds under which plaintiff formerly held, would, if Oudh had remained under the old dynasty, have conferred upon her a life-interest or an interest in perpetuity, it was clear that no more was granted to her subsequently by the officers of the British Government than a permission to occupy for her life the palace to which she now asserted a right in perpetuity. If the acts of the Government officers allowing her so to occupy the palace, which she sought to impugn, were nullities, it would follow that she had no interest at all, but that her property remained in the British Government to which it was confiscated.

JUDGMENT.

[584] SIR ROBERT COLLIER.—The material facts in this case may be shortly stated. The plaintiff was one of the widows of a king of Oudh, Momuddin Mahommed Ali Shah, who occupied the throne some time before the annexation of Oudh. In the years 1839 and 1840 this lady

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had four sunnuds from the king, granting to her a large tract of land within the city of Lucknow, comprising royal palaces, gardens, houses, and shops. The form of those sunnuds, which are substantially (if not in words) the same, is this:—"We have graciously been leased to grant to Malka Jahan Nawab Tajun Nissan Begum, according to the details herein given, the Baradari on the road, together with the Mehal Sarai belonging to Government, containing an area of 38,330 square yards, situated in Tilpura *alias* Dowlat-pura, a mohalla of Lucknow city, which is the seat of Government. All the civil clerks, Government officers, and darogas, present and future, are directed to transfer the said houses to the possession of the said Begum and her descendants in perpetuity generation after generation, to see that this command is durably executed, and to give no annoyance by demanding any tax. Neither shall they call for a fresh deed year after year."

On the suppression of the mutiny in Oudh the well-known Proclamation of Lord Canning was issued on the 15th March, 1858. That Proclamation, among other things, contains these words:—"The Governor-General further proclaims to the people of Oudh that, with above-mentioned exceptions" (in favor of certain loyal talookdars) "the proprietary right in the soil of the province is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." It proceeds: "To those talookdars, chiefs, landholders, with their followers, who shall make immediate submission to the Chief Commissioner of Oudh, surrendering their arms and obeying his orders, the Right Honorable the Governor-General promises that their lives and honour shall be safe, provided that their hands are not stained with English blood murderously shed. But as regards any further indulgence which may be extended to them, and the condition in which they may hereafter be placed, they must throw themselves upon the justice and mercy of the British Government. To those amongst them who shall promptly come forward and give to the Chief Commissioner their support in the restoration of peace and order, this indulgence will be large, and the Governor-General will be ready to view liberally the claims which they may thus acquire to a restitution of [585] their former rights." It does not appear either that the plaintiff took any part in the rebellion or that she promptly came forward and gave her support for the restoration of peace and order.

Their Lordships have before now had occasion to express the opinion to which they adhere, that the effect of the proclamation was to divest all the landed property from the proprietors in Oudh, and to transfer it to, and vest it in, the British Government.

There followed two proclamations of Sir James Outram, dated respectively the 22nd March, 1858 and the 25th March, 1858. The first is in these terms:—"It is hereby notified for those who have fled away from the city, having locked up their houses, that if they would not return within ten days and re-occupy their houses, the property with their houses will be confiscated." The second, addressed to the landholders, runs thus:—"The Major-General, Chief Commissioner of Oudh, in sending you this proclamation, wishes to inform you that if you at once come in ready to obey his orders, provided you have taken no part in the atrocities committed on helpless Europeans, none of your lands will be confiscated, and your claims to lands held by you prior to annexation will be heard." These proclamations of General Outram cannot be taken as changing the effect of the proclamation of Lord Canning, or having any operation, in as far as they may be inconsistent with it. Certainly they could not have the effect of divesting any property from the British

Government which had been vested in it. The object of General Outram, doubtless, was to exhibit a conciliatory policy to those who should promptly come in and tender their submission to the British Government.

The next document that it is necessary to refer to is a letter of the 8th April of the same year, addressed by the Secretary of the Chief Commissioner of Oudh to Mr. George Campbell, who was then the Judicial Commissioner of Oudh, in these terms:—"Sir,—The Chief Commissioner requests that you will consider the Nazul Department as under you, and that you will at once order lists to be made out and carefully prepared of all Nazul property." (Nazul property being State property, which had accrued to the State from forfeiture, lapse, or any other cause.) "The houses and gardens of all rebels should be *primâ facie* entered in the lists, and can be restored or not, as may hereafter appear expedient. The property of the late royal family will necessarily all come within the lists."

It has been contended on the part of the appellant that for "royal family" should be read "king," but their Lordships do not adopt that construction. The question is, what was done by the Government? And looking to this document, coupled with others which will be referred to, it appears to their Lordships that the intention of the Government, which was carried into effect, was to put upon the Nazul Register all the property which in any sense could be considered property of the royal family, or royal property, including the property in question.

The next document to be referred to is a letter of the Judicial Commissioner of Oudh to the Commissioner and Superintendent, Lucknow Division, dated the 26th July, 1858. "Sir,—In settling what buildings, etc., are to be retained as Nazul and what restored to the former possessors it will be necessary to distinguish between estates made over in full proprietary right to the proper owners, and those which are in fact Nazul as belonging to the former Government, but are held as residences by the Begums and others connected with the Court. The latter are clearly not transferable, but will in most instances eventually lapse to Government, and I trust that you will see that the distinction is maintained. For instance, the great palace hitherto held by the Begum Malka Jahan is evidently a mere jointure house in which she lived when all Lucknow was in possession of the Court, but it is in no way her private property, nor can it be said that her house has been taken from her. She is merely in the altered circumstances of Lucknow and of the royal family, the occupation by British troops and destruction of so many buildings, assigned accommodation more reasonable and moderate than [586] the enormous palace of other times. In other cases similar arrangements may be made so that those who have lost all by the demolitions may be provided for and those who happen to escape may not unreasonably monopolise the accommodation to the exclusion of others. In the Nazul list, there should be, first, statement of estates in immediate possession, and second, statement of those in which the Nazul has a reversionary interest." It would seem that the Deputy Commissioner acted upon this letter of the Judicial Commissioner, for we find this account of "Proceedings of the Collector's Office of the Lucknow District recorded by Mr. Simson Nicholas Martin, Deputy Commissioner, on the 3rd August, 1858. A letter dated 28th July, 1858, No. 212, giving cover to Judicial Commissioner's letter No. 206, dated 26th idem, has been received from the Commissioner directing a distinction to be made in the Nazul Register between those houses which are in reality Nazul, but which were given to Begums to live in; for instance, the large house which was formerly in the possession of Malka Jahan, the Judicial

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Commissioner says that this house certainly belonged to the King, and was given by the King of Oudh to the Begum merely to live in. Where such is the case a note will be entered in the column of remarks to the effect that the house will be regarded as Nazul property after the death of the party at present in possession. Ordered that an injunction be issued to the Nazul Daroga, directing him to make the required note in the column of remarks where such a large house is in the possession of any Begum." Whether or not that entry in the Nazul was immediately made is not very clear: it would perhaps be the better opinion that it was made subsequently in June, 1859, because on the 2nd June, 1859 we find the following letter from Mr. A. Abbott, the Commissioner and Superintendent to the Deputy Commissioner. "With reference to your letter No. 598, dated 23rd ultimo, I have the honor to forward for your information and guidance the annexed copy of a letter, No. 1,049, dated the 31st idem, from the Secretary to the Chief Commissioner sanctioning the grant to Mohsan-ud-dowla of that portion of the house of Malka Jahan made over to him by the Judicial Commissioner in full satisfaction of all claims on account of houses demolished, and to request that you will file an acknowledgment of the Nawab to the effect stipulated, and see that that portion of the premises in the occupation of Malka Jahan is in the Nazul list. The building was declared Nazul by the Judicial Commissioner in his letter No. 206, dated the 26th July, 1858, declaring Malka Jahan to have only a lifeinterest in it. On her death it will lapse to the Government."

Probably an entry to that effect in the Nazul list was then made. The allusion to Mohsan-ud-dowla in this letter is thus explained. The Government determined to allow the plaintiff to reside in a large portion of the great aggregation of buildings, but they thought fit to give a portion of it to Mohsan-ud-dowla, who appears to have deserved well of the Government, in lieu of certain property of his which had been taken for military purposes. Whether or not the plaintiff assented to this division between herself and Mohsan-ud-dowla may be questioned, but is not material. She does not in the present action claim that portion of the palace which was assigned to Mohsan-ud-dowla.

A good deal of correspondence was read which took place about this time, and their Lordships infer from it that although there does not appear to be any distinct and formal entry of a notification having been given to this lady that she would be allowed to remain only as an occupier for life of the premises, she must have been aware of the terms on which the permission was granted. Indeed, she appears on one occasion to have been heard by her mookhtar before the Commissioner or the Deputy Commissioner to state her case.

About this time the lady went on a pilgrimage and remained absent for several years, leaving the palace in the possession of her servants in the interim. Upon her return, some time in 1865, she made a claim for the whole of the palace, and that claim is thus dealt with by the authorities. The Under-Secretary **[587]** to the Government of India writes thus to the Chief Commissioner of Oudh, from Fort William, on the 22nd February, 1866:—"Sir,—In reply to your Junior Secretary's letter, dated 10th instant, No. 563, reporting on the claim of Malka Jahan Begum to the whole of the buildings known as 'Malka Jahan's Estate,' I am directed to intimate that the Governor-General in Council, concurring in your view of the case, declines to recognise the claim advanced by the Begum, and desires that she may be informed accordingly."

In the next year she again pressed her claim, and we have, on the

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26th July, 1867; another letter from the Secretary of the Governor-General to her attorneys, in these terms: "Gentlemen,—In reply to your letter dated 1st March last, submitting a petition from Malka Jahan, in which she lays claim to the house at Lucknow known as 'Aga Mir Ki Deorlu,' a portion of which has been made over to Nawab Mohsan-ud-dowla, I am directed to inform you that the Governor-General in Council, after careful enquiry, sees no reason to modify his previous orders respecting this claim."

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The lady appears to have taken no steps in the matter for six years after this, but on the 7th May, 1873 she presented a petition to the Commissioner of the Lucknow Division, asserting her right to the premises in perpetuity, and requesting the Government to allow it. She goes on to say: "That certain farmans, bearing the royal stamp, relating to the grant of the said houses, are in my possession, which corroborate the fact that these houses were granted to me as my permanent and transferable property for generation after generation. Notwithstanding all this a strange thing has happened, that on the arrival of a letter from your honorable Court, the said houses have been inserted to the Nazul Register under the hypothesis that the King of Oudh, my deceased husband, has granted me the houses for occupation for life only." Then she says: "As I had proceeded on pilgrimage to 'Karbala,' therefore no steps could be taken from my side to regulate this error. Whereas the groundlessness of this hypothesis will be developed to you even by a perusal of the above-mentioned farmans, in which it is specifically recorded that the proprietary and transferable right of the houses has been given to me for perpetuity." Then she goes on to say: "It is, therefore, essentially necessary and equitable to correct this mistake by striking off the words 'for occupation only'"—which are in italics and inverted commas—"from the Nazul Register, because by the existence of such a mistake a considerable loss shall be sustained by me, my heirs, and relatives, whose maintenance and protection are incumbent on Government, in compliance with the testamentary contracts of the late King, my husband. In conclusion I respectfully beg that after the perusal of the farman, and making other necessary enquiries, you will be humane enough to correct this mistake, by making known generally that this property may remain exempt from all interference after me as it now is." On the 18th September following, she seems to have sent copies of these farmans, with a petition (not set out in the Record) which the Commissioner thus deals with on the 18th October: "Read a petition dated 18th September, 1873 from Nawab Malka Jahan, submitting certain sunnuds, with a view to their genuineness being tested. Ordered that the sunnuds be returned to petitioner, with the remark that the Officiating Chief Commissioner has no power to enquire into their validity. If she has any doubts on the subject she had better apply to the Civil Court for a declaratory decree, or such other legal advice which the Officiating Chief Commissioner is not competent to give."

Thereupon she brings the present action on the 30th March, 1874. The plaint claims a declaration of plaintiff's absolute title in the premises, describing them. It states, "That the plaintiff has been in absolute proprietary possession of the above houses by virtue of the aforesaid grants for last 36 years; that in 1858 the defendant by proceedings dated the 3rd August, 1858,"—that is the memorandum which has been referred to of the proceedings in the Collector's Office in Lucknow, **[588]** acting on the letter of Sir George Campbell—"declared that the plaintiff had a lifeinterest in the houses aforesaid, which were to lapse to

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the Nazul Department on the death of the plaintiff, the present holder, as a property of the ex-king of Oudh. That the plaintiff in 1873 presented a memorial to the Local Government setting forth her legal title to the aforesaid houses, on the strength of the royal grants mentioned above, and prayed for the rectification of the mistakes committed by the Nazul Department in respect of the ownership of the aforesaid houses, whereupon she (the plaintiff) was directed to seek redress in the Civil Court, *vide* Chief Commissioner's No. 581 of 28th October, 1873, herewith enclosed. Plaintiff therefore sues for the declaration of her title in the houses aforesaid as the absolute owner thereof." She further asserts that the cause of action arose when she presented her last petition and the Government refused to act upon it.

The Deputy Commissioner pleads first that "the suit is barred by limitation. The palace having been declared to be a State building in 1858, and plaintiff having been then informed that it was in no way her private property, and that she was allowed to occupy a portion of it as a jointure house," and then he refers to the letters and proceedings which have been read. "The suit in its present form is inadmissible. Plaintiff really wants consequential relief of a most valuable nature, and hence the suit should be brought on full stamps. The sunnuds relied upon are of no force opposed to the declaration of Government after re-occupation, that the palace was State property and the fact of Government having dealt with it as such. For these reasons the suit should be dismissed with costs."

The suit was first heard by Mr. Lincoln, the Civil Judge, who gave judgment in favor of the plaintiff. An appeal was preferred to the Commissioner, who gave judgment for the defendants, on the ground that the act which was complained of, and sought to be set aside, was an act of State, and could not be taken cognizance of in a Civil Court. On further appeal to the Judicial Commissioner, he affirmed the judgment on the ground that the claim was barred by limitation, and this is the judgment now appealed against. The Commissioner appears to have supposed that Sir George Campbell and the officers who dealt with this property at Lucknow were acting under Reg. XIX of 1810, S. 7, which enacts that the general superintendence of all Nazul property is vested in the Board of Revenue. Their Lordships think it right to observe that this Regulation, which was never extended to Oudh, was clearly not the authority under which they acted; their authority was the Proclamation of Lord Canning. and the other proceedings of the Government which have been referred to.

Their Lordships are of opinion that this suit cannot be maintained. The Proclamation of Lord Canning, as has been before stated, had the effect of vesting the property, the subject of the suit, together with all other landed property in Oudh, in the British Government, and all who claim title to it must claim through the Government. The question then is, what interest, if any, has been granted or allowed to this lady by the Government? Their Lordships do not think it necessary to determine the effect of the construction of the sunnuds under which she formerly held, whether they would, if Oudh had remained under the old dynasty, have conferred upon her a lifeinterest or an interest in perpetuity. It does not distinctly appear whether or not these sunnuds were called to the attention of Sir George Campbell, acting as the Nazul Officer of the Government; but whether they were, or were not, or whether Sir George Campbell took a right or a wrong view of what the lady's rights were before the Proclamation of Lord Canning, appears to their Lordships immaterial. Those rights, whatever they were, were confiscated, and the sole question

is, what interest, if any, was re-granted to her? Looking at the whole of the proceedings which have been quoted, it appears to their Lordships abundantly clear that no more was granted to her than a permission to occupy the palace for her life. If the acts which she **[589]** seeks to impugn on the part of the officers of the Government were nullities, it would follow she has no interest at all, but that her property remains in the British Government to which it was confiscated.

Their Lordships may further observe that this being a declaratory suit, it is clearly not maintainable on the ground that no possible relief could be given. The suit thus failing on two grounds, it is not necessary to enter into the question of the Statute of Limitations. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Judicial Commissioner dismissing the suit be affirmed, and this appeal dismissed, with costs.

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APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

1879 JAN. 23. — APPELLATE CIVIL. — 2 A. 134.

SARASUTI (*Defendant*) *v.* MANNU (*Plaintiff*).

[23rd January 1879.]

2 A. 134.

1. *Objection to declaratory decree in second appeal.*

In a suit merely for a declaration of right, where the first appellate Court orders the plaintiff to pay up the full amount of Court-fees as for a suit for possession (without, however, the suit being amended) and eventually gives him a declaratory decree, an objection by the defendant to the maintainability of a merely declaratory suit, cannot be allowed in special appeal.

2. *Hindu law—Inheritance—Illegitimate son—Sudra.*

There is no distinction between the illegitimate son of a Sudra by a female slave, and one by a concubine. Such a son is entitled to inherit his father's property in preference to the daughter of his father's legitimate son, who had pre-deceased his father.

[2—Not F., 28 C. 194 (202) ; **F.**, 6 A . 329 (334)=4 A.W.N. 100, 7 M. 407 (411), 6 C.P.L.R. 144 (146) ; **Expl.**, 19 C. 91 (104 & 105) ; **R.**, 21 A. 99 (101), 5 A. L.J. 629=A.W.N. (1908) 229=30 A. 508, 10 Bom. L.R. 736=32 B. 562.]

JUDGMENT.

[135] OLDFIELD, J.—The plaintiff, who is an *ahir*, brought this suit for a declaration of his right as heir to all the property left by his father, Baldeo Prasad. The Court of first instance found the plaintiff to be an illegitimate son of Baldeo Prasad, and therefore not entitled to inherit. The appeal came before the Judge, Mr. Tyrrell, and, on an objection as to the insufficiency of the stamp, he permitted the plaintiff to make up the full amount of fees required for a suit for possession of the property, which the Judge considered was the real object of the suit. He also found plaintiff to be the illegitimate son of Baldeo Prasad by a woman of the *ahir* class, and he remanded the suit for a finding as to the custom prevailing in respect to the right of inheritance of such a son. The appeal was finally disposed of by Mr. Young, before whom the finding on the issue remitted came, which was to the effect that the issue of a concubine of the same caste inherits property equally with the children of the lawful wife. Mr. Young has held on the precepts of Hindu law, and without allowing distinctions with reference to the kind

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or degree of illegitimacy that the illegitimate offspring of a Sudra by a woman of the same caste will have a right of inheritance in default of legitimate male issue, and he has given a decree declaring the plaintiff to have established his right in the property in suit.

The first plea in appeal takes the objection that a suit for a declaration of right cannot be maintained. We consider the plea cannot now be allowed under the circumstances. There is no doubt that the claim is one for a declaration of a right only, and that the plaint has never been amended, and the decree passed is only for a declaration of a right, but the plaintiff has paid full institution fees and we are not disposed to throw out the suit at this stage.

The next plea is to the effect that it is only the son born of a female slave as distinct from a concubine who can inherit the property of a Sudra. We consider that the plaintiff's right of inheritance is one which should be determined by Hindu law, and the law of succession applicable is stated in Mitakshara, Ch. I, S. xii, vv. 1 and 2, and is to the effect that the son begotten on a **[136]** female slave takes the whole estate if there be no sons of a wedded wife or daughters of such a wife or sons of daughters; but if there be any of the above-named heirs the son of a female slave will participate for half a share only,—*Rahi* v. *Govind* (1); and *Chuoturya Runmurdun Syn* v. *Sahib Purhlad Syn* (2) and *Inderan Valungypuly Taver* v. *Ramaswamy Pandia Talavar* (3) may be referred to for authority that illegitimate sons of Sudras inherit as heirs; and there is authority for holding and there is no such distinction as is contended for between a son born of a slave and of a concubine. The question will be found very fully discussed in the decision of the Bombay High Court above cited, which held that the illegitimate offspring of a kept woman or continuous concubine (and that is what the plaintiff before us is found to be) amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra, and this view accords with the opinion expressed in a decision of the Madras High Court (4), and is in accordance with Strange's Hindu Law, 4th Ed., p. 69, West and Bubler, 2nd Ed., p. 110, and Colebrook's Dayabhaga, Ch. IX, vv. 29, 30, 31, and Digest, Bk. v. Ch. III, v. clxxiv. It is opposed to a decision of the Calcutta High Court (5) and to a note to be found in Macnaughten's Hindu Law, Vol. II, p. 15. The former is a case decided by the law of the Bengal school, and the decision proceeds very much on rejecting the hitherto accepted translation by Colebrooke of passages in the Dayabhaga, and the opinion expressed in Macnaughten's Hindu Law does not seem to accord with what was held in a case reported at p. 256 of the same volume.

The plaintiff is heir in preference to the defendant, who is the daughter of a legitimate son of Baldeo Prasad, who died in his father's lifetime; and it is not urged that there are any nearer heirs living. The other pleas in appeal have no weight. We dismiss the appeal with costs.

(1) 1 B. 97. (2) 7 M. I. A 18. (3) 3 B.L.R., P.C. 1.
(4) 1 M.H.C.R. 478. (5) 1 C. 1.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner and Mr. Justice Spankie.

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APPEL-LATE CIVIL.

INAYAT KHAN (*Plaintiff*) *v.* RAHMAT BIBI (*Defendant*).

[24th January 1879.]

2 A. 97.

Suit for rent of a Small Cause nature—Incidental determination of title therein—Res Judicata.

The incidental decision on a question of title in a suit for rent of a Small Cause nature is not *res judicata* when the same question arises in a subsequent suit on title.

2 A. 97.

[F., A.W.N. (1907), 218=4 A.L.J. 517.]

In a suit in 1872 by Digambari against Rahmat Bibi for Rs. 7-5-0, being the "*parjote*" or ground-rent of a house in Wellesley Ganj in Mirzapur city, belonging to and occupied by Rahmat Bibi who set up as a defence that the plaintiff was not entitled to the rent claimed, the land being rent-free, and "*abadi*" land in the Mirzapur city not being liable to the payment of ground-rent, the Munsif gave the plaintiff a decree. But the plaintiff's claim was thrown out by the District Judge, and the High Court rejected the appeal from it. The representative of Digambari instituted the present suit against Rahmat Bibi claiming to establish his right to receive ground-rent in respect of the same house at a certain rate, as well as arrears of rent. Both the lower Courts having decided in favour of the plaintiff, the defendant appealed to the High Court contending that the question was *res judicata* with reference to the decision of the District Judge in the previous suit. On the High Court dismissing the plaintiff's suit, the plaintiff applied for a review of its judgment contending that the question of right could not be determined finally in a suit of the nature cognizable in a Court of Small Causes.

JUDGMENT.

TURNER, J., and SPANKIE, J., delivered the following judgment in review of their former judgment.

[99] TURNER, J.—The respondent's pleader, in support of his application for a review of judgment, has adduced a precedent of this Bench, which, it must be admitted, is in his favour. On reconsideration of the point raised, we are of opinion that the application for review should be granted. The former suit between the parties was a suit for rent cognizable by a Court of Small Causes, and the special appeal presented against the decree of the lower appellate Court in that suit was rejected on the ground that the suit was of that character. In a suit for rent instituted in a Small Cause Court the question of title would only be determined incidentally. It appears to us that it would be inequitable to rule that no special appeal lies in a suit of such a nature when instituted in a Civil Court, and nevertheless to hold that the decision of the issue of title in the trial of such a suit should finally estop the parties from raising the same issue in a suit brought to try the title. For these reasons, and following the precedent quoted, we allow the review of judgment, and inasmuch as no other point arises in the special appeal than the point already argued at the hearing of the application, we proceed to dispose of the appeal.

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The only objection taken to the decrees of the Courts below proceeding on the contention that the issue respecting title was finally determined in the former proceedings, and that the parties are concluded by the former finding on that issue, we overrule the objection and dismiss the appeal with costs, including the costs of the application for review.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

1879 JAN. 24. APPELLATE CIVIL. 2 A. 99.

ZAHUR (*Defendant*) *v.* NUR ALI (*Plaintiff*). [24th January 1879.]

Mahomedan law—Pre-emption.

No right of pre-emption is claimable in respect of the sale of house-materials, or of a house capable of being, and intended to be, removed; but such right can be claimed when a house is sold as one to be inhabited on the spot, with such right of occupancy as the vendor had enjoyed, though without the right to the soil.

[R. 52 P.W.R. 1907.]

In a suit to enforce the right of pre-emption under Muhammadan Law in respect of a dwelling-house in a mohalla in the Gorakpur city, on the ground of vicinage, the vendee, the only defendant contended that the plaintiff had not asserted his right of pre-emption according to the requirements of the Muhammadan Law, and the Court of first instance dismissed the suit. On this decision being reversed by the lower appellate Court, the vendee appealed to the High Court.

JUDGMENT.

[100] TURNER, J.—The parties are Muhammadans, and under the law administered here they can claim pre-emption on all sales of property made between the members of their creed when the property is of the description to which by their law pre-emption attaches. It is contended that to the property in suit pre-emption does not attach, and passages are cited from the Hedaya and other works to show that, when a house is sold apart from land, pre-emption does not attach, and it is argued that, inasmuch as the seller had no right in the land, all he could sell was the house.

In fact and in law this contention appears erroneous. The seller not only sold the materials of the house, but such interest as [101] he possessed as an occupier of the soil. The house was sold as a house to be inhabited on the spot with the same right of occupation as the seller had enjoyed.

The text on which the appellant relies applies to the sale of the materials of a house or a house capable of and intended to be removed from its site. It is then equally moveable property as goods, boats, or trees, cut or sold to be cut and carried away, but it does not apply to a house sold with the right of occupation of the soil. The appeal fails and is dismissed with costs.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Turner.

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CRIMINAL JURISDICTION.

2 A. 101.

EMPRESS OF INDIA *v.* BUDH SINGH. [24th January 1879.]

2 A. 101.

1. *Penal Code, Ss. 425, 441—Mischief and Criminal trespass—Bonâ fide claim of right.*

If a person enters on land in the possession of another in the exercise of a *bonâ fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass, because the entry is not made with any such intent as constitutes the offence.

So, also, if a person deals injuriously with property in the *bonâ fide* belief that it is his own, he cannot be convicted of the offence of mischief, because his act is not committed with intent to cause wrongful loss or damage to any person.

But the mere assertion of a claim of right is not in itself a sufficient answer to such charge. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of the *bonâ fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

2. *Crim. Pro. Code, 1872, S. 456—Criminal trespass and mischief—Sentence—Punishment.*

Where a person trespasses with the object of committing mischief, and commits criminal trespass and mischief, the Court is not precluded from passing sentences in respect of each offence established, but the collective punishment should not be more severe than that which might be awarded for either of such offences.

[1—R., 2 A.W.N. 236, U.B.R. (1892—1896) 264, 13 P.R. 1905, Cr.=81 P.L.R. 1905=2 Cr. L.J. 83, 12 P.R. 1906, Cr.=54 P.L.R. 1907=4 Cr. L.J. 293; **2—R.**, 10 A. 58 (65), 4 Bom. L.R. 936.**]**

Application to the High Court for the exercise of its power of revision under S. 297, Act X of 1872.

JUDGMENT.

[102] TURNER, J.—It is found that the petitioner, in order to appropriate the wall of his neighbour the complainant, to which he knew he had no right whatever, caused workmen to cut niches in the wall, to lay rafters on the wall, and to put water-spouts in the wall: and that he also caused workmen to remove bricks belonging to the complainant from the yard of the complainant and to place them on the wall, in order to form a parapet for buildings he was erecting on the other side of the wall; and that he threatened the complainant with violence when he attempted to interfere to protect his property. The Magistrate on these findings convicted the petitioner of criminal trespass and of mischief, and sentenced him in respect of each offence to pay a fine of Rs. 100, and in default to undergo simple imprisonment for fifteen days. In appeal, the Sessions Judge affirmed the convictions and sentences.

Revision of the orders of the Courts below is now sought on the following grounds: It is argued that the offence of criminal trespass has not been established because the petitioner did not enter on the premises of the complainant, with the intent of insulting, intimidating, or annoying the complainant, nor with the intent to commit an offence, but with the intent of benefiting himself. It is also argued that the offence of mischief is not established because the petitioner did not cause the

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2 A. 101.

destruction of any property or any change in such property, or in the situation thereof, as destroyed or diminished its value or utility, and that, if **[103]** he did so, he did not do so with the intent of causing wrongful loss or damage to the complainant but of benefiting himself. It is argued in respect of both charges that the complainant should have been referred to the Civil Court, and that the Criminal Court should not have entertained them; and lastly it is contended that, inasmuch as it has been found it was the object of the criminal trespass to commit the offence of mischief, the petitioner could not legally receive a double punishment.

The objection that the Criminal Courts ought to have declined jurisdiction because the petitioner set up a claim to the wall and to the bricks cannot be sustained on the findings of the Magistrate.

If a person enters on land in the possession of another in the exercise of a *bonâ fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence. So also if a person deals injuriously with property in the *bonâ fide* belief that it is his own he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause *wrongful* loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bonâ fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence.

In the case before the Court the Magistrate in effect finds not only that the petitioner had no right, but that he could not have been ignorant that he had no right. The facts found by the Magistrate show that the petitioner caused a change in the property of the complainant which affected it injuriously, nor is it any answer to the charges on which the petitioner has been convicted that the petitioner's intention was to benefit himself. That benefit was to be acquired as he must have known by causing wrongful loss to the complainant. The objections taken by the petitioner's pleader to the propriety of the convictions cannot be sustained. I may, **[104]** however, observe that, inasmuch as the acts of trespass and mischief were committed not by the petitioner himself but his workmen at his instigation, he would more properly have been convicted of the abetment of the offences, but there being no difference in the punishment to which he would be liable it is unnecessary to interfere with the convictions on this ground.

It remains for me to deal with the objection to the punishment. It must be admitted that the object of the trespass was to commit the "mischief" imputed to the petitioner, and consequently under the third clause of S. 454 of the Code of Criminal Procedure, as explained by the illustrations, the petitioner must not receive a punishment more severe than might have been awarded for either of those offences. This provision of the law does not, as the petitioner's pleader suggests, prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offence collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination. Where an offence is constituted by the combination of other offences or includes another offence, sentence should ordinarily be passed on the charge relating to

that offence only, but the law does not prohibit several sentences, so that collectively they do not exceed the prescribed limit. For the offence of criminal trespass the maximum punishment sanctioned by the Penal Code is imprisonment for a term of three months and fine to the extent of Rs. 500. The imprisonment in default of payment of fine must therefore be limited to one-third of three months. The maximum punishment for the offence of mischief is imprisonment for three months and fine without limit, but the imprisonment in default of payment of fine is limited to one-third of the term of imprisonment. The Magistrate has sentenced the petitioner to pay two fines each of Rs. 100 or collectively less than the amount of fine which might be imposed for either offence, and in default of the payment of each fine to undergo imprisonment for the term of fifteen days. The Magistrate has not declared that the terms of imprisonment are to be undergone the one on the expiry of the other, and if default were made in the payment of both fines the sentences would run concurrently, so that in the whole the punishment would not exceed the punishment allowed by the law for either of [105] the offences of which the petitioner has been convicted. I therefore see no reason to interfere.

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2 A. 101.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Turner, and Mr. Justice Spankie.

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THE COURT OF WARDS ON BEHALF OF THE RAJA OF KANTIT (*Plaintiff*) *v.* GAYA PRASAD AND OTHERS (*Defendants*).*

[28th January 1879.]

APPELLATE CIVIL.
2 A. 107.

1. *Addition or substitution of parties—Powers of appellate Court.*

An appellate Court can add or substitute new appellants or respondents, even after the expiry of the period of limitation.

2. *Execution of separate decrees—Sale of the same property on the same date thereunder—Separate sales, not an irregularity.*

Where the same property is ordered to be sold on the same date, by separate orders in execution of two decrees, it may be sold once for all in execution of both the decrees ; and it is not an irregularity to sell it separately.

3. *Auction-sale—Sale not confirmed—Suit by auction-purchaser for refund of purchase-money.*

Where, under the above circumstances, the first sale is confirmed and a certificate of sale granted to the purchaser under it, and the second sale also is confirmed in spite of the objections of the second auction-purchaser, the latter is entitled to sue for refund of the purchase-money paid by him. His suit is not open to the objection of *caveat emptor*, for, what was sold to him is not that which was advertised for sale, *viz.*, the right, title, and interest of the judgment-debtor as it existed before the first sale. Nor is it open to the objection that the confirmation of sale to him, under S. 257, in spite of his objections, having become final by his failure to appeal against it, he could not seek his remedy by suit ; for, his objection to the confirmation of sale was not one contemplated by S. 256 of the C.P.C. to which alone the provisions of S. 257 apply, but it was one going to the root of the sale itself as being a nullity.

This appeal, from an appellate decree of 11—3—1878, was filed on 31—5—1878, the original respondents being Gaya Prasad and Girdhari Prasad (two of the defendants in the suit out of which the appeal arose). After the filing of a *vakalatnamah*, on 28—6—1878, appointing a

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pleader to defend the appeal on behalf of the third defendant in the suit, Ram Manorath, an application was made to the High Court on 22—8—1878 on the appellant's behalf, wherein it was stated that by an oversight Ram Manorath had not been made a party to the appeal and praying that as he had appeared to defend the appeal he might be made a respondent. The Court made an order in accordance with this application.

JUDGMENT.

2 A. 107.

[109] TURNER, J.—The first question arising in this appeal is whether or not the appeal so far as it affects Ram Manorath is barred by limitation. By some carelessness he was not at first made a respondent, and the period prescribed for appeal had expired before he was brought on the record as a respondent. By the 22nd section of the Limitation Act it is provided that when after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party. There is no analogous provision with respect to appeals, and therefore it is competent to the Court to exercise its discretion in allowing a party to be added to the record after the period prescribed for the admission of an appeal has elapsed. The lower appellate Court throughout its judgment alludes to the decree held by Gaya Prasad and Ram Manorath as "the decree of Gaya Prasad," and omits any mention of Ram Manorath, and this circumstance may have led the appellant's pleader to suppose that Ram Manorath was not a material party to the appeal, as the appeal was in other respects filed within time and prosecuted with due diligence. We are not prepared to set aside the *exparte* order for making Ram Manorath a respondent to the appeal.

The circumstances which have led to the present proceedings are as follows: The rights and interests of Girdhari Prasad Singh in mauza Tilái were attached and advertised for sale, under separate orders, in execution of a decree held by Thakur Sayal and in execution of a decree held by Gaya Prasad and Ram Manorath. The same **[110]** date, the 20th September, was fixed for the sale in execution of both decrees. On the 20th September the officer conducting the sale at first put up the property in execution of a decree of Thakur Dayal which it would appear was entitled to priority of satisfaction, and the property was purchased by the decree-holder. He then again put up the property for sale in execution of the decree of Gaya Prasad and Ram Manorath, and it was purchased by the agent of the appellant. The Court executing the decrees confirmed the sale in execution of Thakur Dayal's decree, and delivered a sale-certificate to the auction-purchaser. It also confirmed the second sale, and ordered the purchase-money to be paid to the decree-holder, but it held that, inasmuch as the sale to the purchaser in execution of Thakur Dayal's decree had already been confirmed and a certificate issued, it could not give possession to the appellant as the purchaser in execution of the decree of Gaya Prasad and Ram Manorath, and therefore refused to grant a certificate in respect of that sale.

The appellant instituted the present proceedings to obtain a refund of the purchase-money paid under the second sale. The Court of first instance decreed the claim on the ground that although the property ought to have been put up for sale once for all in execution of both decrees, yet having in fact been sold in execution of Thakur Dayal's decree and the sale confirmed, it was not competent to the Court executing the decree to confirm the second sale, as was shown by its inability to issue a certificate and deliver possession. The lower appellate Court reversed the decree

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on the ground that, when the appellant's objection to the confirmation of the second sale had been disallowed, he ought to have appealed, and that, having failed to appeal, the order confirming the sale became final under S. 257 of the Civil Procedure Code. The lower appellate Court, also adverts to cases (1) in which it has been held that, when the right, title and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title or interest, and therefore that he cannot [111] recover his purchase-money if it turn out that the judgment-debtor had no interest in the property.

It appears to us that there is a circumstance in the present case which distinguishes it from the cases in which the rule referred to by the Judge was laid down. In these cases the Court advertised for sale whatever interest the judgment-debtor had in the property, and although it did not guarantee that he had any interest in the property, it sold and confirmed to the purchaser whatever interest there was to sell. In the case before the Court the interest advertised for sale had immediately before the sale to the appellant been already sold by the order of the Court executing the decrees in execution of the decree of Thakur Dayal, and when that sale was confirmed the subsequent sale was practically disallowed and nullified. The Court had advertised for sale the interest of the judgment-debtor as it existed before the sale made in execution of Thakur Dayal's decree. When the sale had been declared absolute, the Court could not confirm to the purchaser at the second sale the interest it had advertised for sale, and although in terms it passed an order confirming the second sale, it in fact did not confirm the second sale, as the Court of first instance observes, for it found it impossible to carry out its order by the issue of a certificate and delivery of possession to the purchaser at the second sale, seeing it had already confirmed the sale of the same interest, and transferred the property to the purchaser at the first sale. The rule of *caveat emptor* does not apply, for the interest offered for sale was the interest advertised, and if the first sale had been disallowed, that interest would have passed to the purchaser at the second sale, but when the first sale was confirmed the second sale could not be carried out, for the interest advertised had been already sold.

The question remains whether the appellant is precluded from maintaining this suit because he failed to appeal from the orders confirming the sales. The lower appellate Court finds there was no irregularity in the conduct of the sales, inasmuch as the officer conducting the sale simply carried out the orders he had received, and it appears to us the lower Court has properly arrived at this conclusion. It is no doubt true that the officer conducting the sale [112] might have put up the property to sale once for all in execution of both decrees, and have left the Court executing the decrees to determine the rights of the respective decree-holders to the purchase-money realised by the sale, but we cannot go so far as to say he was bound to put up the property once for all for sale in execution of the decrees. There being separate orders for sale, the decree-holders might have called upon him to execute them separately, each desiring to dispute the right of the other. There was certainly no irregularity in the conduct of the sale in execution of the decree of Thakur Dayal; and if that sale had been set aside for any irregularity, or otherwise, it does not appear that any irregularity would have been proved to vitiate the sale in execution of the decree of Gaya Prasad and Ram Manorath, and this being so the purchaser at the

(1) 2 B. L. R. A. C. 82; 4 B. L. R., F. B., 11=12 W. R. F. B. 8.

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second sale could not have maintained an objection to either sale on any of the grounds mentioned in S. 256 of Act VIII of 1859. His objection was in fact of a different nature. His objection to the sale in execution of Thakur Dayal's decree having been overruled, he resisted the order confirming the second sale on the ground that the Court was incompetent to confirm a sale which had by its previous order been nullified. The provisions of S. 257 apply to applications made under S. 256 and to those only, and consequently the appellant is not in our judgment precluded by the terms of that section from maintaining this suit. We therefore reverse the decree of the lower appellate Court, and restore that of the Court of first instance with costs.

APPELLATE CIVIL.

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PRESENT :

Mr. Justice Turner and Mr. Justice Oldfield.

BHICHUK SINGH AND OTHERS (*Judgment-debtors*) *v.* NAGESHAR NATH AND OTHERS (*Decree-holders*). [28th January 1879.]

Special appeal—Suit of a nature cognizable by a Small Cause Court—Act XXIII of 1861, S. 27—Act XLIII of 1860, S. 1.

Under S. 1 of Act XLIII of 1860 and S. 27 of Act XXIII of 1861, a special appeal is prohibited in suits of the nature triable by Courts of Small Causes, instituted prior to the passing of the former Act. *Held*, accordingly, that there was no special appeal from an order, made on regular appeal after the passing of Act XXIII of 1861, in execution of a decree in such suit, instituted before Act XLIII of 1860 came into force. (12 B.L.R. 224=14 W.R. (**F.B.**), 30, *F.*).

On the 25th June, 1878, the decree-holders having appealed to the High Court from the order of the lower appellate Court dated 24th December, 1877, affirming the order of the Court of first instance dated 13th April, 1877, refusing an application by the decree-holders, made on 22nd December, 1876, for the execution of a decree for money dated 9th May, 1843, which had been made in a small cause suit, the High Court set aside the orders of the lower Courts, and remanded the cases to the first Court for proper orders. The judgment-debtors now applied for a review of the judgment of the High Court dated 25th June, 1878.

JUDGMENT.

[113] TURNER, J.—I cannot say that, if the point raised in this case had come before the Court in the absence of authority, I should not have been disposed to hold that the language of S. 27 of Act XXIII of 1861 prohibited a special appeal in suits of the nature triable by Courts of Small Causes instituted prior to the passing of Act XLIII of 1860. It appears to me that, on a strict construction of the terms of S. 1 of that Act and of the analogous provisions of S. 27 of Act XXIII of 1861, it would be held that the language of the Acts was prospective and applied to suits which should be thereafter instituted rather than to suits which had been already instituted and determined. But seeing that it has been ruled by **[114]** a Full Bench of the High Court of Calcutta (1) that the terms on which the appellant relies are merely words of description and do not relate to the time of institution, for such I take it is the effect of the

(1) 12 B.L.R. 224=14 W.R., **F.B.**, 30.

decision, and seeing also that the cases must be few in which the point can arise, for all doubt is removed by the language of the amended Code, I do not consider myself justified in unsettling the law as it has been settled by that decision, and consequently agree that this Court had not jurisdiction to hear the appeal, that the review of judgment must be allowed, and the appeal dismissed, but as the point was not taken at the hearing of the appeal, I would order that each party should bear his own costs in this Court.

OLDFIELD, J.—The decree which was in execution in this case is dated 9th May, 1843. The first Court disallowed execution on the ground that it was barred by limitation. On regular appeal the Judge affirmed that order. A special appeal was admitted by this Court, and we reversed the orders of the Courts below. It is now pleaded, by way of review of judgment, that there was no special appeal with reference to the provisions of S. 27 of Act XXIII of 1861. There is no doubt that the suit out of which the execution proceedings arose is a suit of the nature cognizable in Courts of Small Causes, and that there will be no special appeal if the law of S. 27 of Act XXIII of 1861 is applicable to this case, but it is urged that it does not apply since the suit was instituted before the passing of the Act.

In my opinion the Act does apply, since the order in regular appeal was passed after Act XXIII of 1861 was enacted, and the terms of S. 27 are explicit, that "no special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act in any suit of the nature cognizable in Courts of Small Causes." The order being passed after the Act was passed there is no question of giving retrospective effect to the Act. Nor can I think, as suggested, that the words in the concluding part of the section "when the debt, damage, or demand for which the original suit *shall be* instituted" were meant to imply that the Act only operates on decrees or orders made in suits to be insti-[115]tuted after the Act came into force. I cannot understand why the Legislature should have so intended, for though a suit may have been instituted before the Act was passed no right of special appeal would accrue, so the Act cannot be said to operate unjustly in taking away by retrospective action any right of appeal already accrued, when it is made to apply to decrees or orders passed after it came into force. The provisions of the new Civil Procedure Code may not be applicable for deciding this case, but it may be noticed that the provisions of S. 586 of Act X of 1877 admit of no doubt on the point, and they were presumably intended to re-enact the old law on the point, and the view I take is in accordance with a Full Bench of the Calcutta Court (1).

On the above view of the law, I am of opinion that this Court had no jurisdiction to hear the appeal, and I allow the review of judgment and dismiss the appeal. Each party should pay his own costs in this Court.

(1) 12 B.L.R. 224=14 W.R., F.B., 30.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

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APPEL-LATE CIVIL.

BHAGIRATH (*Defendant*) *v.* NAUBAT SINGH (*Plaintiff*).

[30th January 1879.]

2 A. 115.

Sale of share of mortgage-property towards mortgage-decree—Suit for accounts and redemption of such share—Contribution.

2 A. 115.

The share of one only of several joint mortgagors can be sold in execution of a decree on the mortgage; and any claim by the owner of such share, that it must be made liable only to the extent of his share of the debt, must be urged, if at all, in the execution proceedings, and not by a separate suit for the ascertainment of the amount due by him and for redemption of his share.

Where, under such circumstances, owing to other shares in the mortgaged property having been sold and purchased by the mortgagee in execution of other decrees, against the owners of such shares, the plaintiff's share alone of the mortgaged property, together with some other property of a third party also comprised in the mortgage, was purchased by the mortgagee in execution of his mortgage-decree; *held*, that a suit was not maintainable by plaintiff for the ascertainment of the amount due by him under the mortgage and for redemption of his share on payment of such amount. *Held*, also, that, if any excess amount had been realised by the sale of the plaintiff's share over and above the sum ascertained to be due by him, he was entitled to recover a contribution of his portion of such excess by the sale of the third party's property purchased by the mortgagee.

[R., 26 A. 407 (435, 439, 444) (**F.B.**), A.W.N. (1904), 74.]

JUDGMENT.

[116] Mahtab Singh, Balwant Singh, and Naubat Singh, the respondent, held mauza Darni in equal one-third shares and Mahtab Singh also held a 2½ biswa share in mauza Atwa. On the 3rd January, 1863, Mahtab Singh and Balwant Singh hypothecated their share in mauza Darni to secure a loan advanced by Ladli Begam. On the 16th March, 1870, Mahtab Singh, Balwant Singh, and **[117]** Naubat Singh hypothecated mauza Darni to the appellant to secure a loan of Rs. 600, and by another deed executed on the same date the same persons hypothecated mauza Darni, and Mahtab Singh his 2½ biswa share in mauza Atwa, to the appellant to secure a loan of Rs. 1,600. On the 8th December, 1875 Ladli Begam obtained a decree for the sale of the shares of Mahtab Singh and Balwant Singh in mauza Darni for the satisfaction of the mortgage-debt to her. These shares were accordingly sold on the 23rd October, 1876 and purchased by the appellant for Rs. 7,000. Of this sum Rs. 5,954-12-0 were applied to satisfy the decree held by Ladli Begam and the balance Rs. 1,322-4-0, after deducting Rs. 18 commission on the sale, were deposited in Court. On the 18th April, 1876 the appellant obtained a decree for the realisation of the mortgage-debts due to him by sale of mauza Darni and the 2½ biswa share in mauza Atwa. In execution of this decree he might, and it may be, should have applied to the Court to pay to him the surplus remaining in Court after the satisfaction of the decree of Ladli Begam, but instead of so doing he attached and obtained payment of the sum of Rs. 1,322-4-0 in execution of a money-decree which he held against Mahtab Singh and Balwant Singh. On the 20th June, 1877 the appellant in execution of his decree of the 18th April, 1876 brought to sale the one-third share of Naubat Singh in mauza Darni and became the purchaser of that share for the sum of Rs. 2,600, the amount

due under the decree being Rs. 5,004. On the 20th July, 1877 the appellant in execution of a money-decree against Mahtab Singh brought to sale the 2½ biswa share belonging to Mahtab Singh in mauza Atwa, and although the property was knocked down to one Daya Ram was himself registered as the purchaser.

The respondent Naubat Singh filed the suit now before the Court in appeal, praying that the sum due by him under the mortgages of the 16th March, 1870 and the decree of the 18th April, 1876 may be ascertained, and that on payment of the amount so ascertained the sale of his one-third share in mauza Darni may be set aside and the share declared redeemed.

The Subordinate Judge held that on the facts above stated the sale could not be set aside and dismissed the suit. The District **[118]** Judge has reversed the decree of the Court of first instance, and decreed that on payment of the respondent's share of the decree of the 18th April, 1876, which by the way is not ascertained in the judgment, nor in the decree, the sale of the respondent's one-third share in Darni shall be set aside and the mortgage-debt redeemed.

We are compelled to hold that the sale of one-third share of Naubat Singh cannot be set aside. If the respondent could have shown that there were grounds on which the sale should not have taken place, he should have resisted the order for sale, but in fact there were no grounds. He could not have shown that there was nothing due from him on the mortgages to which he was a party jointly with Mahtab Singh and Balwant Singh without any specification of their several liabilities. He might perhaps have called upon the Court executing the decree to have declared the amount outstanding on the decree reduced by the sum of Rs. 1,322-4-0, and had he brought into Court the amount found due the Court would have set aside the order for sale. The respondent would in that case also have been at liberty to make the owner of the 2½ biswa share of Atwa contribute to the payment of any sum paid by him in excess of his own share of the mortgage-debt for which that property was pledged together with mauza Darni.

The respondent's one-third share of Darni was, however, sold and realised Rs. 2,600, and if it be shown that the proportionate share of the appellant's liability on the two mortgages does not amount to so much, he is entitled to recover one moiety of the excess paid on account of the mortgage for Rs. 1,600 as a contribution from mauza Atwa. It appears that the debts of Rs. 600 and Rs. 1,600 respectively amounted, with interest, &c., at the time the decree was executed, to Rs. 5,961-10-5. The debt of Rs. 600 has been swollen to Rs. 1,625-14-5 $\frac{12}{26}$, and the debt of Rs. 1,600 to Rs. 4,335—11—11 $\frac{16}{22}$. The respondent's one-third share of the liability of Rs. 1,625—14—5 $\frac{16}{22}$ amounted to Rs. 541—15—5 $\frac{20}{22}$; the shares of his co-debtors to Rs. 1,083—14—11 $\frac{18}{22}$. The respondent's share of the liability for Rs. 1,013—11—11 $\frac{16}{22}$ amounted to Rs. 1,445—3—11 $\frac{50}{66}$. After applying the Rs. 2,600 realised by the sale of the respondent's share to the discharge of these liabilities, it will be seen that a balance of Rs. 2,058—0—6 $\frac{2}{12}$ remains, after discharging **[119]** Rs. 541—15—5 $\frac{20}{22}$ his liability under the mortgage for Rs. 600; and after discharging from this balance Rs. 1,445—3—11 $\frac{50}{66}$, his liability under the mortgage for Rs. 1,600, a surplus of Rs. 612—12—6$\frac{22}{66}$; he has a right to claim contribution from mauza Atwa to the extent of one moiety of this amount,

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viz., Rs. 306—6—3$\frac{1}{6}$. Although then we must reverse the decree of the Court below setting aside the sale, the respondent is entitled to a declaration that Rs. 306—6—3$\frac{1}{6}$ are due as a contribution from mauza Atwa, and to interest on that sum from the date of sale at the rate of 12 per cent. per annum; and in order to avoid future litigation we consider it not improper to order in this suit that, in the event of that sum with interest to the date of payment not being paid within three months from the date of decree, the respondent shall be at liberty to recover it by the sale of the 2$\frac{1}{2}$ biswa share in Atwa or so much thereof as may be necessary to satisfy the debt. We order that the respondent bear his own costs and pay two-thirds of the costs of the appellant in all Courts, the costs so awarded are to be set off against so much of the amount declared due to the respondent under the decree.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Turner and Mr. Justice Oldfield.

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APPELLATE CIVIL.
2 A. 129.

BINDA PRASAD (*Plaintiff*) *v.* MADHO PRASAD AND OTHERS (*Defendants*). [31st January 1879.]

1. *Decree payable by instalments—C.P.C. (1859), S. 194—C.P.C. (1877), S. 210.*

Quære—Whether a "decree for money," within the meaning of S. 194 C.P.C (1859) and S. 210, C.P.C. (1877), is merely one for payment of money, or also included one in which a sale is ordered of immoveable property hypothecated.

2 A. 129.

2. *Decree directing payment by instalments--Discretion.*

That the defendant is "hard-pressed" is no sufficient reason for a Court directing payment of a decree by instalments extending over a long period, and reducing the ordinary rate of interest.

[F., 2 N.L.R. 179 (187).]

JUDGMENT.

[131] TURNER, J.—The appellant, being the holder of a mortgage for Rs. 4,800 and interest, brought this suit to recover the debt by the sale of the mortgaged property, and also by the ordinary process of execution against the person and property other than that mortgaged by the debtor. The term of the mortgage had expired, and the defendant made no defence save that interest was not payable after the expiry of the term, but he prayed the Court would order the payment of the debt by instalments of Rs. 700 per annum, and without interest. The Court below held that, even if the terms of the mortgage-deed did not distinctly provide for the payment of interest after the expiry of the term, the plaintiff was entitled to recover interest as damages, and to this finding no objection has been taken on appeal, but it has also considered that, inasmuch as the defendant was hard pressed, it might fairly award that the debt should be payable by instalments of Rs. 800, and should bear interest at the rate of 6 per cent. The plaintiff has contended in appeal that the decree varies the contract specifically affecting the security, and that the Court was incompetent to direct payment of the mortgage-debt by instalments, that if it had the power to do so it has not properly exercised its discretion in so doing, in that there were no sufficient reasons for ordering payment by instalments, that the instalments ordered defer the complete payment of the debt for a longer period than is equitable, *viz.*, ten years, and that on deferring the satisfaction of the debt for so long a period the Court ought to have allowed the usual rate of interest, *viz.*, 12 per cent. per annum.

The Code recognises the distinction which is well known in our Courts between money-decrees and decrees for the recovery of a debt by the sale of property mortgaged for its satisfaction. I may refer to the provisions of Ss. 322 and 323, and I therefore incline to the opinion that the provisions of S. 210 were intended to apply to what are commonly known as money-decrees and not to decrees **[132]** in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting the property.

There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by instalments, the Court may be well entrusted with a discretion to arrange the payment of a debt by instalments, but when a contract is distinctly made for payment on a date certain for the purpose of enabling the creditor to obtain punctual payment, the circumstance that the payment is secured by an hypothecation of property ought not to deprive him of that right. We have, moreover, to interpret the law without examining its policy, and it would, in my judgment, probably be held that the provisions of S. 210 apply, as in terms they appear to apply, only to decrees for the payment of money.

In the case before the Court the plaintiff sought not only a money-decree but a decree for the sale of the property in pursuance of the contract by which it was specifically affected, and therefore, if the construction I incline to put on the terms of S. 210 be right, in the absence of consent on the part of the plaintiff the Court had no power to vary the contract and direct payment by instalments, but if it had that power, I am of the same mind with my honorable colleague, that there was no sufficient reason for its exercise in this case, and that it has exercised it injuriously to the plaintiff by the length of the period over which the instalments are extended, and by allowing a rate of interest less than the ordinary market-rate on mortgages of land when the payment is so long deferred. On this ground I also concur in the result of the judgment of my honorable colleague.

The proceeding to which the Subordinate Judge adverts as containing a consent on the part of the appellant to take payment by instalments has been considered. The appellant's pleader no doubt stated his client was willing to take payment by instalments spread over three years, but his offer was not accepted, and he was therefore at liberty to insist on the payment of the debt forthwith. I concur then in the decree proposed by my honorable colleague.

[133] OLDFIELD, J.—The plaintiff sued for the recovery of a sum of money with interest secured by the mortgage of immoveable property. The lower Court found in favor of the plaintiff as to the amount due, but made a decree to the effect that the whole sum and the costs of the suit should be paid by instalments of Rs. 800, the first instalment being payable by the end of the year, and interest at the rate of 6 per cent. per annum should be paid on each instalment from date of decree, and if any instalment with interest on it be not paid by the due date, the plaintiff will have the right to realise at once the amount due from the hypothecated property in the first instance, and then from other properties of the defendants as well as their persons.

The question in the appeal preferred by the plaintiff is whether the order directing the payment by instalments can be set aside, and an order made for enforcement of the hypothecation by sale of the property in the event of the immediate non-payment of the debt.

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The lower Court's order has been made under S. 194 of Act VIII of 1859, and a question has been raised whether that section is applicable to decrees for the payment of money by sale of immoveable property. I should hesitate to hold that the section contemplates a distinction of the kind suggested, and I incline to think that, whether the decree decrees the payment of money simply, or proceeds to direct its realisation by sale of particular property mortgaged as security in the event of non-payment, it is still a "decree for the payment of money" in the words of the section, when the Court may order the amount to be paid by instalments. There seems no reason why a simple debt should, when decreed, be payable at the discretion of the Court by instalments, and not a debt secured by the mortgage of immoveable property. On the contrary when there is such security there is all the less risk to the creditor from delay in payment incident to payment by instalments.

But it is only on sufficient reason being shown that a Court can exercise the power allowed, and no sufficient ground is disclosed here. All that the Subordinate Judge says on the point is that the defendants are hard pressed, and he holds it not unfair that the instalments should be paid at the rate of Rs. 800 per annum. The reason [134] assigned amounts to nothing more than an inability to pay. but that is no sufficient reason why execution should not at once proceed. It is denied that the plaintiffs were willing to allow the defendants to pay the debt by instalments, but at any rate any offer made was not accepted, and there is no reason why the claim should not be decreed. The decree should be modified and the claim decreed, with costs and interest at 6 per cent. from date of the institution of the suit, by sale of the property hypothecated, and this appeal decreed with costs.

FULL BENCH.

PRESENT :

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

GOSHAIN GIRDHARIJI (*Defendant*) *v.* DURGA DEVI (*Plaintiff*).

[31st January 1879.]

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Arbitration—Act XVIII of 1873 (N. W. P. Rent Act)—Act XIX of 1873 (N. W. P. Land Rev. Act.

The general law, which allows parties to suits, if they are so minded, before issue joined, to refer the matter in dispute to arbitration, and after issue joined, with the leave of the Court, applies also to suits under Act XVIII of 1873, which does not prohibit such reference.

Per Stuart, C. J., *contra.*

JUDGMENTS OF THE DIVISION BENCH.

[120] SPANKIE, J.—The Assistant Collector in this case referred a rent suit under S. 93 of Act XVIII of 1873, to arbitration by consent of parties. He determined the suit and made his decree in accordance with the award. In appeal the Judge maintained the decree. It is contended in second appeal that, in the absence of any provision in the rent law permitting reference to arbitration, the Assistant Collector had no authority to act as he did act, and that his decree and the decision of the Judge supporting it are bad.

It is argued that S. 96 of the Rent Act expressly authorises reference to arbitration by consent of parties on *applications* made under S. 95 of the Act, but the law is silent as regards arbitration in suits. This is so, and I feel the weight of the argument.

It might perhaps be answered that Revenue Courts, as defined in S. 3 of Act XIX of 1873, published simultaneously with Act XVIII, have general authority under S. 220 of Act XIX of 1873 (which amends and consolidates the law as to land revenue and the jurisdiction of revenue officers), with consent of parties, to refer any dispute before them to arbitration. But the revenue officers who can do so are the Commissioner of a Division, the Collector of a District, an Assistant Collector of the first class, and an Officer in charge of a Settlement, or an Assistant Settlement Officer.

Now Assistant Collectors of the second class can try certain suits under Act XVIII of 1873, but they are not included in S. 220 of Act XIX of 1873. To this objection it might be said that, when the Assistant Collector of the second class tries suits under S. **[121]** 93 of Act XVIII of 1873, within the limits of S. 98, he is practically exercising the full powers of an Assistant Collector of the first class. This, however, would not be a very satisfactory solution of the objection. It is, I think, more probable that the framers of Act XVIII of 1873 either accidentally omitted to provide for reference to arbitration in suits, or overlooked altogether the necessity of doing so. At the same time it might be urged, as indeed the lower appellate Court urges, that it is difficult to "believe that it was in the intention of the Legislature, in enacting S. 96 of Act XVIII of 1873, to deprive parties of a wholesome privilege which they enjoyed before: rather it should seem their intention was to strengthen and extend the privilege by applying to applications a power which before only applied to suits." Be this as it may, I would rest my judgment in this case on the circumstance that, though there is no provision in the Act for a reference to arbitration, there is no prohibition of it. It appears to be the rule that, with few exceptions, if any, now all suits may as a matter of right be referred to arbitration by consent of parties, and it would be intolerable perhaps if litigants were not allowed full liberty to adjust their differences in the mode which, after the case has been taken into Court, might be found most convenient and most likely to lead to a friendly and final settlement of disputes.

This is not a case in which it was sought to divest the ordinary jurisdiction of the Revenue Court. There was no agreement to keep out of Court. The reference to arbitration sprung out of the introduction of the case into Court.

The suit was instituted on the 1st June, 1877: defendant filed a written statement in reply on the 9th July: witnesses were examined on behalf of both parties on the 6th and 16th August: and reference to the arbitrator was made on the 27th August: and after hearing objections against the award it was made the basis of the decree by the first Court. Under S. 144 of the Act, the Court may, from time to time, in order to the production of further evidence, *or for other sufficient reason* to be recorded by the Court, adjourn the hearing of any case to such day as to it may seem fit. In some degree this reference to arbitration was adjournment to the case for "sufficient reason," that is to say, to meet the written **[122]** wishes of both parties and to settle the dispute. But the judgment of the Court (S. 151) is in accordance with the provision of the section. With this view of the case, I cannot say, in the absence of any prohibition in the Act to the submission of the record in its final stage to a referee on the motion and by consent of parties that the suit was not heard and determined in

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the *manner* provided by the Act, which is all that is obligatory, assuming that there was no illegality, the decision being in accordance with the award.

I would not allow the appeal on the objection taken, but would affirm the judgment of the lower appellate Court.

STUART, C.J.—This is a second appeal to this Court from the judgment of the Judge of Agra, in appeal to him from a decree of the Assistant Collector of Muttra.

The suit was originally instituted in the Court of the Assistant Collector of Muttra, for the recovery of Rs. 484-8-0, principal and interest, on account of arrears of rent for the ragi crop for 1281 fasli; and in the course of the procedure before that officer the parties filed a consent to refer the matter in dispute to arbitration, upon which the Assistant Collector made an order referring the suit to arbitration accordingly, and an award was made in the plaintiff's favour by an arbitrator, with some alleged irregularities on his part which, however, need not here be referred to, as they are immaterial to the appeal now before us. The Assistant Collector upheld the award and made a decree in conformity with it, and from this decree an appeal was taken to the Judge, in which it was contended, among other things, that there was no provision in the Rent Act, XVIII of 1873, authorising such an arbitration as had taken place in this case, and that the whole proceedings therefore in the disposal of the suit were irregular. This plea the Judge disallowed, and the defendant has now preferred a second appeal to this Court on the same plea, and it is the only reason of appeal before us.

I am of opinion that the Judge is wrong, that the plea is well founded, and that therefore the present appeal must be allowed. In his judgment the Judge appears tc me to misapprehend the case before him when he says that it is "a question as to whether an [123] award willingly resorted to by the parties ought to be set aside;" and he goes on to observe that the present Rent Law, "as is notorious, is very defective in regard to procedure, having been entirely carried through the Legislature by officials who had no judicial experience." Now the material question as regards the arbitration was not whether it was willingly resorted to, but whether, willingly or not, it was a valid and competent proceeding in itself; and as to the Rent Act, it may have its defects, but I do not think it deserving of the sweeping censure passed upon it by the Judge; and in regard to the question in this appeal respecting the arbitration that was ordered and took place, the Act appears to me to be very clear indeed. In my opinion this question must be determined solely with reference to the express provisions of the Rent Act. By S. 93, which is the commencement of "Ch. V. Jurisdiction of Courts," it is provided that "except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise;" and the very first class of suits mentioned as falling under this absolute and exclusive provision are suits for arrears of rent on account of land, which is the nature of the suit in the present case, and there is not a word in this section about referring suits to arbitration, whether with or without the consent of the parties. Nor is this the less remarkable from the fact that a subsequent S. 96 provides for the reference to arbitration of "applications" as these are enumerated in S. 95. S. 96 provides that all applications under S. 95 "shall be made, &c., and may, with the consent of

the parties, be referred to arbitration under Ss. 220 to 231, both inclusive, of the North-Western Provinces Land Revenue Act, 1873." There is here not a word about the reference to arbitration of the suits mentioned in S. 93, which on the contrary provides that such suits "shall be heard and *determined* in the manner provided by the Act, and *not otherwise*." Of course there is nothing to prevent parties to such suits themselves of their own private consent referring them to arbitration, and agreeing that the award under such a private arbitration shall be binding [124] on themselves. But so far as arbitrations of such suits before or by the order and authority of the Revenue Courts are concerned, there is no procedure for, because there is no law authorising them. On the contrary, S. 93 may fairly in this respect be argued to be prohibitory by force of the absolute and exclusive language of its sanction, the suits mentioned in it being, as I have already pointed out, enacted to be heard and determined in the manner provided and not otherwise. To say the least indeed, this S. 93 is abundantly pregnant with a meaning sufficient to exclude references of such suits as the present to arbitration before the Court, and it appears to me plainly to show such an intention. But, on the other hand, such suits are not in the least inconsistent with express provisions for a reference to arbitration, if this had been intended and incorporated with the other provisions of Act XVIII of 1873. We must, however, take that Act as we find it, and a careful examination of it has satisfied me that, giving even the widest meaning to its terms, there can, under S. 93 or any other part of it, be no reference to arbitration before the Court in such a suit as the present.

But it was suggested at the hearing that, although the Rent Act does not provide for the arbitration of such suits, it does not expressly prohibit them, and that it is legitimate to argue in their favour from the provisions as to arbitrations in the contemporaneous Revenue Act, XIX of 1873. By S. 220 of that Act it is provided that a Commissioner of a Division and other Revenue officers mentioned "may, with the consent of the parties, by order, refer any dispute before him to arbitration, and that certain other Revenue officers may, by order, refer any dispute before him to arbitration without the consent of the parties." And the subsequent sections of the Revenue Act, from Ss. 221 to 231 inclusive, contain anxious provisions for the regulation of and procedure to be observed in such arbitrations and for the enforcement of awards made in them. Now there can be no doubt that, if such an attempt to supply the supposed defects of the Rent Act, by importing into it the anxious arbitration provisions of the Revenue Act, could be entertained, such an arbitration as was ordered in the present case was a reasonable and valid proceeding, as of course on the same grounds *all* the suits mentioned in S. 93 of the Rent Act could [125] be referred to arbitration, its exclusive and prohibitory language notwithstanding. But the fair argument is to my mind of a very different and indeed totally opposite nature. For it appears to me that the very fact of these arbitration provisions in the Revenue Act having been left out in the Rent Act, which was passed on the same day, may not only be fairly contended to show, but must be judicially considered by us as showing, that it was not in the mind and intention of the Legislature to allow them, and that the necessary force of the exclusive language of the Rent Act, without the use of any express prohibition on the subject, has this effect.

I must not omit to notice another argument that was used at the hearing against the validity of arbitrations before the Court of suits of the kind described in S. 93 of the Rent Act, XVIII of 1873. That argument

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was derived from the previous Rent Act, XIV of 1862, and to my mind it has considerable cogency. By S. 14 of the latter Act it is enacted that "the provisions of Ch. VI (relative to arbitration) of the Code of Civil Procedure shall apply to suits under the said Act X of 1859 (the previous Rent Act) and under this Act." So that, until the present Rent Act was passed, there was full provision for a reference to arbitration in such a suit as the present, but there is no corresponding provision in the present Act, and the very fact that it has been left out in the present Rent Act may I consider be allowed to lend no little force to the contention that the express provision of the present Act must be understood as limited in this respect.

Such is the conclusion to which I find myself driven by the language of the present Rent Act, XVIII of 1873. The question before us is not one respecting any principle of rent law, or as to who are or who are not Revenue officers in such a case, but whether Revenue Courts in administering S. 93 of that Rent Act, be the officers who they may, have power to refer the suits therein mentioned to arbitration. To this question there can be but one answer. Most clearly these Courts have no such power, and the order of reference made in the present case, with the recorded consent of the parties, was altogether *ultra vires* of the officer who made it.

At the same time it is difficult to understand why such should be the law, for there appears to be no reason in equity or policy **[126]** why such suits as are mentioned in S. 93 of Act XVIII of 1873 should not be referred to arbitration, in the same way that "applications" under S. 96 of the same Act and "disputes" as provided by the contemporaneous Revenue Act, XIX of 1873, may be. However, it is not our duty to speculate about these considerations, but to accept and apply this written law as we find it. If the intention of the Legislature was not of the nature which I have, in the way of argument, given it credit for, and there has been an accidental omission in the present Rent Act, this can be supplied by the same legislative authority which passed it; but, however that may be, we, as a Court of justice, bound to interpret and apply the law according to recognized principles of legal construction, can only look for the legislative intention to the letter of the Act itself, and behind or beyond its own terms we cannot go; and that being so, I think it must be conceded that the reasoning I have applied to the present case must be given effect to, and that our judgment should be for the appellant.

I would therefore allow this appeal, setting aside the arbitration proceedings complained of, the award therein, and the orders of both the lower Courts, and I would remand the case for re-trial on the merits under S. 562 of Act X of 1877. The costs of this remand to be costs in the suit, and to abide the result of the re-trial.

JUDGMENT.

The judgment of the Judges (PEARSON, TURNER, and OLDFIELD) to whom the appeal was referred, was delivered by

TURNER, J.—The appellant instituted in the Revenue Court a suit for rent against the respondent. The respondent denied liability to the appellant and questioned the amount. The cause came for trial before Pandit Debi Prasad, an Assistant Collector of the first grade. After evidence had been taken the parties agreed to refer the matters in dispute to the arbitration of a single arbitrator whom they named. Having executed an agreement to this effect they presented a petition to the Assistant Collector, informing him of the agreement at which they had arrived and

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praying that the record might be sent to the arbitrator. The agreement was produced in the Revenue Court, and thereupon the Assistant Collector assented to the proposed arbitration and sent the record [127] to the arbitrator, requesting him to submit his award in a week. The arbitrator ordered the parties to attend on a day named, and when no one appeared for the appellant at the time fixed for the meeting, the arbitrator first recorded a proceeding declining to enter upon the arbitration, but having received a letter from the appellant stating he would attend at 4 P.M., and that the evidence on his part was on the record, the arbitrator withdrew his refusal and proceeded to determine the matters referred to him without any objection being taken on the part of the appellant. A few days after the day named by the Court, the arbitrator submitted an award in favour of the respondent. The appellant objected that the arbitrator having once declined to act had no power to proceed with the reference without a fresh agreement executed by the parties, and that the award could not be accepted inasmuch as it was not submitted within the time appointed by the Court. The Assistant Collector overruled both these objections and passed a decree in favour of the respondent on the basis of the award.

The appellant appealed to the District Court respecting the objections he had taken to the award, and urging a new objection that the Rent Act, XVIII of 1873, contained no provision for the reference of suits to arbitration, and that the Revenue Court was not otherwise empowered to make the reference. The Judge, pointing out that the parties had willingly resorted to arbitration, considered that the Procedure Code, Act VIII of 1859, which was in force when the suit was tried, should be equitably followed in the silence of the Rent Law; that the Legislature could not have intended to deprive parties of a wholesome privilege which they had enjoyed before the Rent Law of 1873 was passed, but that it was rather the intention to extend the privilege by applying it to applications as well as to suits; the Judge also held that the Assistant Collector had rightly overruled the objections taken by the appellant in the Revenue Court, no misconduct having been proved on the part of the arbitrator.

The appellant then appealed to the High Court on the ground that, in the absence of a provision in the Rent Act, the Assistant Collector was not competent to refer the case to arbitration, and that no decree could legally pass against him on the award. The [128] appeal came for hearing before a Bench composed of His Honor the Chief Justice and Mr. Justice Spankie. * * * * * * * There is no doubt force in the reasoning of the learned Chief Justice. It is remarkable that, whereas the Legislature had previously to the passing of the Rent Act of 1873 facilitated the reference of matters in dispute to arbitration by the application of the provisions of the Procedure Code to rent suits, and whereas both in respect of applications under the Rent Act of 1873 and in respect of any dispute under the Revenue Act of the same year, special provision had been introduced to facilitate such reference, no similar provision was made in the Rent Act of 1873 regarding the suits triable under S. 93. But unless we are constrained to hold that the words "shall be heard and determined in the manner provided in this Act and not otherwise" necessitate the decision of every suit to which the provision refers after trial by the Court, we are unable to regard the arguments to which we have adverted conclusive. As we understand the general law, parties to suits may, if they are so minded, before issue joined, refer the matter in dispute to arbitration, and after issue joined with the leave of the Court. The special provisions introduced into the Procedure Code and the Land Revenue Act of 1873 did not create this right, but facilitated its exercise and

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provided for the summary adjudication of questions which might arise respecting the reference and award. Parties to suits and proceedings to which these special provisions have not been applied are not in the absence of special prohibition deprived of the liberty to submit their disputes to arbitration, but they cannot take advantage of the facilities afforded by these provisions, and questions arising out of the reference and on the award cannot be determined summarily.

It is admitted that, unless we are to find it in the terms of S. 93, there is no other provision in the Rent Act which prohibits parties to the suits mentioned in that section from referring the matters in dispute to arbitration. Do then the terms of S. 93 on which His Honor the Chief Justice has laid stress, necessarily import such a prohibition? We consider that when read with the context they do not constrain us to this conclusion. The object of [129] the whole clause was to confine the cognizance of the matters therein mentioned to Courts of Revenue, and to prohibit other Courts from taking cognizance of them, and it was declared that such suits as were mentioned in the section should be heard and determined by the Courts of Revenue in the manner provided in the Act and not otherwise, in order the more emphatically to assert the sole jurisdiction of the Courts of Revenue in such matters, and not with a view to deprive the Courts of Revenue of any ordinary power possessed by Courts of Justice, nor the parties of any liberty or privilege which are ordinarily enjoyed by parties to suits.

In the case before the Court, the parties of their own motion consented to a reference, and issues having been joined properly applied to the Court for its sanction. The Revenue Court was in our judgment competent to accord sanction, and on receiving the award to act on it. The appeal should then in our judgment be dismissed, and with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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2 A. 137.

KALIAN DAS (*Plaintiff*) *v.* TIKA RAM AND ANOTHER (*Defendants*).

[3rd February 1879.]

Act XVIII of 1873 (N. W.P. Rent Act), S. 95 (m) and (n)—Suit by dispossessed sub-tenant for possession and mesne-profits—Jurisdiction.

Where, in execution of a decree obtained by a landlord against his tenant, a sub-tenant, not a party thereto, holding under the latter, is dispossessed, and on reversal of that decree, the tenant resumes possession and refuses to give it up to his sub-tenant, a suit by the latter, against the landlord and the tenant, for possession and *mesne* profits, is cognizable by a Civil Court and not by a Revenue Court, the claim being one with respect to which an application could not have been preferred to the Collector under S. 95 of the Rent Act. (S. A. No. 1115 of 1877, Unrep. *F.*)

JUDGMENT.

[138] SPANKIE, J.—The plaintiff-appellant, is a sub-tenant, claiming under a lease for a term of twenty years. The occupancy-tenant, defendant, under whom he holds, was ejected in execution of a decree held by the zamindar, also impleaded in this suit. Though plaintiff-appellant, was no party to the suit in which a decree had been made against the occupancy-tenant, he nevertheless lost his possession when

the decree was executed. Subsequently the decree of which execution was taken out was set aside, and the defendant, the occupancy-tenant, resumed possession of his holding, but refused to give it up to the plaintiff, his sub-tenant. The suit* is one which, in our opinion, is cognizable by the Civil Court, and the claim not one regarding which application could have been preferred to the Collector under S. 95 of the Rent Act. We are fortified in this opinion by a precedent of this Court (1) [139] dated 1st March, 1878. We decree the appeal, reverse the judgment of the lower appellate Court, † and return the case to that Court for retrial on the merits. Costs will abide the result of a new trial.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1879 FEB. 7. — APPELLATE CIVIL. — 2 A. 141.

BHIKHAM DAS (*Plaintiff*) *v.* PURA AND ANOTHER (*Defendants*).

[7th February 1879.]

2 A. 141.

Hindu law—Mortgage of family dwelling-house—Sale in execution of mortgage-decree—Right of widow to reside in dwelling-house.

A mortgage, executed by a deceased Hindu, can be enforced in a suit and by sale in execution against his widow and his mother. (4 B.L.R. 72=12 W.R. 35 and 1 A. 262, *D.*)

[R., 12 M.L.J. 270 (275), 27 M. 45 (51), 118 P.W.R. 1907, 36 P.R. 1907; D., 7 A.W.N. 279.]

In a suit against the widow and the wife of one Lachmi Narain, deceased, for certain moneys charged by the deceased on, amongst other properties, the dwelling-house of the family, such dwelling-house being ancestral property, the defendants contended that they had no other place to reside in except the family dwelling-house, and that they possessed a right of residence therein, and Lachmi Narain was, therefore, not competent to mortgage the same, and the Court of first instance relying on (2) *Mangala Debi* v. *Dinanath Bose* and (3) *Gauri* v. *Chandramani*, refused to give the plaintiff a decree for the sale of the dwelling-house on the ground that the defendants possessed a right of residence therein, and Lachmi Narain was consequently not entitled to mortgage it. On this decision being affirmed by the lower appellate Court, the plaintiff preferred a second appeal to the High Court.

JUDGMENT.

[141] PEARSON, J.—The decisions to which the lower Courts have referred do not rule that an ancestral house cannot be sold in

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* by the plaintiff-appellant against the occupancy-tenant and the landholder, claiming a declaration of his right to and possession of the lands in virtue of the lease, and also certain mesne-profits.

† The lower appellate Court had dismissed the plaintiff-appellant's suit, referring him to the Revenue Courts, on the ground that the subject-matter of the suit was one on which applications of the nature mentioned in (*m*) and (*n*), S. 95, Act XVIII of 1873, might be made, and of which, therefore, no Courts other than Courts of Revenue could take cognizance under the provisions of that section.

(1) S. A. No. 1115 of 1877, unreported.

(2) 4 B.L.R.O.J., 72=12 W.R.O.J., 35.

(3) 1 A. 262.

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exe-[142]cution of a decree, if the judgment-debtor's widow be residing in it. They relate to the question, not at present raised in this case, as to whether the widow could be ousted by the auction-purchaser. In the present case the house was hypothecated before the rights of the respondents arising out of the demise of Lachmi Narain had accrued. We accept and decree the appeal with costs, and in modification of the decree of the lower Courts decree that portion of the claim which was dismissed by them.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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APPEL-LATE. CIVIL.

SAHAI PANDEY AND OTHERS (*Defendants*) *v.* SHAM NARAIN AND ANOTHER (*Plaintiffs*). [10th February 1879.]

2 A. 142.

First and second mortgagees—Rights of their assignees.

A sub-mortgagee of the rights and interests of the first mortgagee, who has purchased the same in execution of a decree obtained against the first mortgagee, is entitled to possession of the property as against the assignee of the interests of the second mortgagee.

2 A. 142.

JUDGMENT.

[144] OLDFIELD, J.—The facts found are these:—The owner of the property in suit, a four-anna share in a certain mauza, mortgaged it to Ramzan in 1272 fasli for Rs. 4,400 and put the mortgagee in possession; a condition of the mortgage being that the mortgagee should enjoy the profits in lieu of interest, and the mortgage should be redeemed on payment of the principal. After this in the same year, Ramzan sub-mortgaged the same four-anna share to the defendants (appellants) for Rs. 2,351, retaining possession of the share himself. Subsequently in 1276 fasli the owner of the property made a second mortgage of the same share to Ramzan for Rs. 1,600, on the same footing as to interest and enjoyment of rents as the first mortgage, the mortgage being redeemable on payment of the principal due on both mortgages, or a one-anna one-pie share of the estate being redeemable on payment of a proportionate amount of the debt. Ramzan in 1281 fasli sold his interest under this second mortgage to the plaintiffs for Rs. 1,800, but as has been found retained possession of the mortgage share. The defendants, in 1279 fasli (*i.e.*, 1872 A. D.) sued Ramzan on the mortgage in their favour and obtained a decree for its enforcement, and in 1877 in execution thereof, sold Ramzan's interest, which they themselves bought, and were put in possession of the share. The plaintiffs now seek to dispossess them by virtue of the right under the second mortgage made to Ramzan which they purchased.

On the facts found it appears to us that the defendants by reason of their interest as sub-mortgagees of the whole four-anna share under the first mortgage made to Ramzan, and as purchasers under the decree they obtained against him of his interest under the first mortgage, are entitled to possession of the property as [145] mortgagees in preference to the plaintiffs, who have only obtained an assignment of the interest of Ramzan under the second mortgage made to him. We therefore reverse the decrees of the lower Courts, and decree the appeal and dismiss the suit with costs in all Courts.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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APPEL-LATE CIVIL.

2 A. 162.

ABADI BEGAM (*Plaintiff*) *v.* ASA RAM (*Defendant*).

[10th February 1879.]

2 A. 162.

Allowance charged on land, enforceable against transferee.

An allowance, charged on immoveable property with a covenant not to alienate the land without stipulating for payment of such allowance, can be claimed from any transferee who is in possession of it, irrespective of any agreement between such transferee and his transferor.

[R., 9 A. 591 (599) = 7 A.W.N. 121.**]**

JUDGMENT.

[163] SPANKIE, J.—The plaintiff's husband, by a deed registered on the 29th April, 1866, settled upon her a sum of Rs. 12, in lieu of dower, to be paid monthly from the income of the rent-free land of Nagla Asadnagar, in mauzas Nurpura, Jasmai, Asmatpur, and Dhalawal, by himself, and his heirs and successors after him. If either he or any of his heirs or successors failed to make the payment monthly, the lady was at liberty to sue for the sum due in the Civil Court. The deed further provides that no transfer of the property shall be made unaccompanied by a condition providing for and securing the required monthly payment of Rs. 12 from the profits. When the plaintiff's husband, Maujad Ali Shah had subsequently mortgaged the property to Lachman Singh, one of the defendants, and to Madho Singh, on the 1st December, 1870, it was recorded in the deed of mortgage that a monthly allowance of Rs. 12 was to be paid to the plaintiff. The first mortgagee acknowledged this fact. The first mortgagee subsequently, on the 24th August, 1874, sub-mortgaged the property to Asa Ram, the other defendant. The plaintiff therefore sued him along with Lachman Singh, the first mortgagee, as being in possession of the lands from which the allowance was to be paid. The Munsif decreed against Asa Ram in favour of the plaintiff, exempting Lachman Singh. The Judge, however, held that there was no clause in the second mortgage-deed binding him to continue the payment of Rs. 12 monthly to the plaintiff, as had been the case in the first mortgage-deed with regard to the first mortgagee, and further he found that it was clearly shown by Asa Ram's witnesses that, at the time of entering into the sub-mortgage, Lachman Singh had bound himself to continue the payment, whereas the second mortgagee had never undertaken to pay it. Moreover, Lachman Singh's sons and others had purchased the proprietary rights in the property, and Lachman Singh's interest in it had never ceased. The Judge decreed Asa Ram's appeal, and gave the plaintiff a decree against Lachman Singh alone.

[164] It is contended that Asa Ram, sub-mortgagee, being in possession of the property charged with the payment of the monthly allowance of Rs. 12, is bound to pay it.

We are of opinion that the contention is right. The plaintiff is not affected by any arrangement made between Lachman Singh and Asa Ram. She looks to payment of her allowance from the income of the land charged with the burden of paying it, and therefore she has a claim upon

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the party who is in possession of the lands. In this case the sub-mortgagee, in accepting the mortgage from Lachman Singh, must have been aware of the conditions under which the latter had accepted the original mortgage, and therefore also must have been aware of the lien created by Maujad Ali Shah in favour of his wife, and which lien, with or without notice, extends to all persons claiming to hold the lands, to the extent of the amount of the profits set apart for the benefit of the plaintiff. With this view of the case we decree the appeal, reverse the decree of the lower appellate Court, and restore the decision of the first Court, with costs.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Pearson.

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CRIMINAL JURISDICTION.
2 A. 139.

EMPRESS OF INDIA *v.* RAM ADHIN AND OTHERS.

[13th February 1879.]

Penal Code, Ss. 147, 323—Rioting and causing hurt—Separate sentences.

Rioting and causing hurt in the course of rioting are distinct offences and are, therefore, separately punishable.

[R., 6 C. 718=8 C.L.R. 390, 7 A. 29 (31).]

Application to the High Court for the exercise of its powers of revision under S. 297, Act X of 1872, by the petitioners, eight in number, who, in pursuance of a common object, assaulted another party of 7 persons and consequently, were separately charged with, convicted of, and punished for offences under Ss. 147 and 323, I.P.C.

JUDGMENT.

[139] PEARSON, J.—It is contended that both sentences under Ss. 147 and 323 of the Indian Penal Code cannot stand. In support of the contention reference is made to the case of *Queen* v. *Rabiulla* (1) disposed of by Norman and Seton-Karr, JJ., on 16th January, 1867. In that case the prisoners had been convicted under Ss. **[140]** 147 and 304, and it was held that a separate charge for the former offence was not sustainable, and that the fact of his having been present as a member of the unlawful assembly should have been treated as part of the evidence of the major offence. Reference is also made to Mr. Justice Oldfield's ruling in the case of *Queen* v. *Mangroo* (2). The prisoner had been convicted of an attempt to kidnap and of wrongful confinement; and it was held that the two convictions could not be upheld. The case is postponed for a week to enable the learned counsel for the petitioners to search for more precedents in point.

PEARSON, J.—To-day it is brought to my notice that the learned Judges Norman and Seton-Karr in the case of the *Queen* v. *Kallachund* (3), disposed of by them on the 29th April, 1867, held rioting armed with deadly weapons to be a distinct offence from stabbing a person on whose premises the riot took place, and each to be separately punishable. It appears that in the case of *Queen* v. *Hargobind* (4), decided by this Court

(1) 7 W.R., Cr. 13.
(2) H.C.R., N.W.P., 1874, p. 293.
(3) 7 W.R., Cr. 60.
(4) H.C.R., N.W.P., 1871, p. 174.

on 7th July, 1871, Mr. Justice Turner held that persons found guilty of rioting may, if the circumstances warrant it, be convicted of the several offences of rioting armed with deadly weapons, culpable homicide, and grievous hurt. The learned Judge referred to the case of *Rabi-ulla* mentioned above, and expressed his dissent from the ruling therein, and observed that a different view of the law had heretofore obtained in this Court. It further appears that the learned Judges of the Calcutta Court who disposed of *Rabi-ulla's* case ruled in a different direction in the case disposed of by them in the following month of April. On the whole the precedents which have been produced are opposed to the contention in this case. It is obvious to remark that rioting and unlawful assembly are offences against the public tranquility, while assault, hurt, etc., are offences affecting the human body. Seeing no sufficient reason for interference, I reject this application.

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CRIMINAL JURISDICTION.
2 A. 139.

FULL BENCH.

PRESENT :

Mr. Justice Turner, Offg. Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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FEB. 17.
FULL BENCH.
2 A. 145.

BHAGWANTI (*Defendant*) *v.* RUDR MAN TIWARI (*Plaintiff*).

[17th February 1879.]

Tenants at fixed rates—Occupancy-tenants—Inheritance—Act XVIII of 1873 (N.W.P. Rent Act), Ss. 8 & 9.

The liberty of tenants at fixed rates to deal with their right, is absolutely without limit, and inheritance follows the usual course with regard to the devolution of property, according to the law which applies to the deceased tenant; but this law, whatever it may be, is so far controlled by S. 9 of the Rent Act, that in cases of rights of occupancy, acquired under S. 8 of the Act, no collateral relative of the deceased, who did not share in the cultivation of his holding, shall be entitled to inherit.

In a suit for the possession of certain land being the holding of one Behsa deceased (a tenant at a fixed rate), the plaintiff, the third cousin of the deceased husband of Behsa, claimed the holding by right of inheritance. The first Court decreed in favour of the plaintiff, and the lower appellate Court held that the proviso to S. 9 was applicable to tenants with a right of occupancy and not to tenants at fixed rates.

REFERENCE TO THE FULL BENCH.

On appeal to the High Court by the defendants, PEARSON AND OLDFIELD, JJ., referred to the Full Bench the question whether the proviso in the last clause of S. 9, Act XVIII of 1873, refers only to the holdings of persons having rights of occupancy or also to the holdings of tenants at fixed rates.

JUDGMENTS OF THE FULL BENCH.

[146], TURNER, O. C. J.—The ninth section of the Rent Act XVIII of 1873 declares what powers of alienation and succession attach to the rights of occupancy described in the preceding sections. It deals first with tenants at fixed rates, and declares simply that their right is heritable and transferable. It then proceeds to declare that no other

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2 A. 146.

right of occupancy is transferable by grant, will, or otherwise, except to a particular class, namely, co-sharers in such right, and then declares, in respect of such last-mentioned right, that is to say a right of occupancy other than the right of a tenant at fixed rates, that if the person entitled to it dies it shall devolve as if it were land, subject to the proviso that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this section ; that is to say, it limits the right of succession under this provision of the act to the lineal descendants of the deceased occupier, and in default of them to such of the collaterals as at the time of the death of the deceased occupier shared in the cultivation of the holding. It has been urged that the words "under this section" indicate that the right of succession is limited as well in the case of tenants at fixed rates as in the case of other tenants with a right of occupancy, and that the proviso applies to all rights of succession declared in that section. It is not necessary to determine whether the words on which reliance is placed are mere surplusage, nor whether it would have been more correct to substitute for them the words" under the preceding clause," nor whether, as has been suggested at the bar, they were introduced to show that the limitation of inheritance did not extend to rights of succession derived from custom, but to rights of succession created by the section in favour of tenants with a right of occupancy other than tenants at fixed rate, for the language of the section is of itself sufficiently clear. The proviso is limited to such of the collateral relatives of "the deceased" as "then" shared in the cultivation of the holding. These terms clearly relate to the person and the time mentioned in the preceding clause "When any person entitled to such last-mentioned right dies." The section having first mentioned and dealt with the rights of a **[147]** tenant at fixed rates, the right last-mentioned is the right of occupancy other than a right at fixed rates. Moreover, the construction contended for would leave a tenant at fixed rates at liberty to transfer his estate in his-lifetime to whomsoever he pleased, while it would place on the devolution of the right by inheritance an onerous restriction. The proviso is undoubtedly limited to the devolution by inheritance of those rights of occupancy dealt with in the preceding clause, and does not affect the succession to the rights of tenants at fixed rates.

PEARSON, J.—In my opinion the proviso does not refer to the holdings of tenants at fixed rates. The words in the third clause of the section "last-mentioned rights" clearly refer to the right mentioned in the preceding section, which is the right of occupancy-tenants other than those who hold at fixed rates; and the clause declares how, when any person entitled to such last-mentioned right dies, the right shall devolve; while the proviso immediately following that no collateral relative of *the* deceased who did not *then* share in the cultivation of his holding shall be entitled to inherit, clearly refers to the person entitled to the same *last-mentioned right* who has died, and to him alone. The use of the word "clause" instead of "section" would apparently have been more proper.

SPANKIE, J.—Under the first clause of S. 9 of the Rent Act the right of tenants at fixed rates is declared to be heritable and transferable. The words are "shall be" heritable and transferable. There is no limitation and proviso to this declaration. The clause deals with tenants having a right of occupancy defined in S. 6 of the Act as "tenants at fixed rates." The next clause deals with other tenants having a right of occupancy, but *not* at fixed rates. It declares that no other right of occupancy shall be transferable by grant, will, or otherwise, except as between co-sharers in such right. The third clause declares that, when

any person entitled to "such last-mentioned right dies, the right shall devolve as if it were land." What is "the right last-mentioned," not rights, be it observed? Clearly, that other right of occupancy that is held by tenants who are not "tenants at fixed rates." The proviso therefore that no collateral relative of the deceased who did not share at the time of his death in the cultivation of his [148] holding "shall be entitled to inherit under this section" applies only to those tenants having rights of occupancy but not at fixed rates. The words "under this section" are awkwardly expressed, but there can be little doubt, I think, that the proviso applies only to those tenants who are occupancy-tenants within the meaning of S. 8 of the Act, those persons alone possessing the "last-mentioned right" referred to in the third clause to which the proviso is attached. It is possible, perhaps probable, that the proviso was due to the somewhat uncertain wording of S. 6 of Act X of 1859, which acknowledges the right of occupancy of a ryot cultivating or holding land for 12 years. Then it is declared that the holding of "the father or other person from whom a ryot inherits" shall be deemed to be the "holding of the ryot within the meaning of this section." Under the Rent Act, XVIII of 1873, the right in such cases shall devolve as if it were land, with this proviso that "no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this section." This view of the case seems to show that the liberty of tenants at fixed rates to deal with their right is absolutely without limit, and inheritance follows the usual course with regard to the devolution of property, according to the law which applies to the deceased tenant, whereas that law, whatever it may be, is so far controlled by S. 9 of the Rent Act that, in cases of rights of occupancy acquired under S. 8 of the Act, no collateral relative of the deceased who did not share in the cultivation of his holding shall be to inherit.

OLDFIELD, J.—I concur in the view taken by Mr. Justice Spankie.

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PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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PRIVY COUNCIL.
3 Suth.P.C.J. 601 = Bal. 208.

On Appeal from the Court of the Judicial Commissioner of Oudh.

NAWAB UMAT-UZ-ZOHRA *v.* NAWAB MIRZA ALI KADR AND ANOTHER. [21st February 1879.]

3 Suth. P.C.J. 601 = Bal. 208.

Mahomedan Law—Transfer of possession.

Upon the evidence produced in the case, their Lordships were of opinion that there was no intention on the part of the donor to make an immediate transfer of the property to the donee, and that the donee must have perfectly understood that the transaction was not a real one. The deed was therefore held to be void and of no effect.

Appeal from a decree of the Judicial Commissioner of Oudh of the 21st August, 1876, confirming a decree of the local tribunals at Lucknow.

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PRIVY COUNCIL.

3 Suth.P.C.J. 601 = Bal. 208.

JUDGMENT.

[602] Their Lordships, without calling upon the Counsel for the respondents, proceeded to deliver the following judgment :—

This is a suit brought by the plaintiff, who is the daughter of a gentleman in India of great fortune and position, Sir Mansin-ud-daula, originally against her half-brother alone, the son of Sir Mansin-ud-daula by another wife. Subsequently Sir Mansin-ud-daula was by order of the Civil Judge added to the Record, first in the capacity of a plaintiff, and secondly in that of a defendant. The claim is for restitution of certain goods, elephants, horses, and plate valued at Rs. 18,000, which the lady claims under a deed executed by Sir Mansin-ud-daula on the 28th April 1874, and which she alleges that her brother converted and carried off. The brother files an answer in which he denies her title under this deed on a variety of grounds, and Sir Mansin-ud-daula also denies the validity of the deed and the title of the plaintiff under it.

The case was first tried by the Civil Judge, who framed a number of issues, comprising the question whether the donor was of sound mind, and whether the deed was obtained by undue influence, one of which raised the question whether the deed was intended to operate as a transfer of the property. He decided all of these issues in favor of the plaintiff. The case went on appeal to the Commissioner, who dismissed the suit on the ground that the deed was a mere deed of gift, and that there had been no delivery of possession. The case then came on appeal to the Judicial Commissioner, who upheld the finding of the Commissioner, and dismissed the suit, but upon other grounds. As their Lordships understand, the Judicial Commissioner held that the deed, in form at all events, was what is called a hiba-bil-ewaz, and that it would operate under the Mahomedan law, if operative at all, to transfer the property without delivery of possession; but he came to the conclusion from all the circumstances of the case, amongst others from the absence of any change of possession, that the deed was not intended to operate as an immediate transfer or conveyance of the property, and that therefore it was void and of no effect.

It becomes now necessary to state some facts in order to make the case intelligible. Their Lordships collect from the whole of the evidence, which is to some extent conflicting, that Sir Mansin-ud-daula was of somewhat weak intellect and impaired health. Two medical men state that in their opinion he was not capable of managing his affairs. In such a state of mind he might be easily influenced and persuaded by persons about him to execute documents or to take other steps which a person of strong and sound mind might not be induced to do. The deed which the plaintiff relies upon is to be found at page 12 of the Record, was executed on the 28th April, 1874, and states that while in possession of his senses, and so forth (according to the ordinary form), he (Sir Mansin-ud-daula) had made a gift of certain immoveable property, and also of a large quantity of moveable property, in lieu of a ring set with diamonds which he had received from his daughter. It further states: "I have transferred possession of all the property transferred by gift above referred to and detailed below, by putting the donee in possession thereof. The conditions of offer and acceptance, with transfer of possession, have been thoroughly completed. This is a valid and lawful gift." Then follows a schedule comprising the greater part of his property, both real and personal. On the 1st May he also executed a deed of the same description, transferring certain other property which is mentioned in the

schedule to that deed. On this same first of May his daughter, the present plaintiff, professed to give to her father's muta wife a certain house for her lifetime; and a short time afterwards leased to him a portion of what had been previously his own house. The son, the defendant, had left his father in March, 1874 in consequence of a quarrel, carrying with him a large quantity of jewellery to which he laid claim, and the father appears to have been a good deal annoyed. The son came back on the 6th May after the documents which have been referred to had been executed.

[603] Sir Mansin-ud-daula was examined as a witness in the case, and their Lordships think it as well to refer to the account which he gives of the transaction. He says, "I had a quarrel with my son, and my servants, etc., said to me that from this quarrel serious loss would accrue to me (the principal adviser being Ram Parshad)"—a man who appears to have been in his service for a number of years, and to have had great influence over him,—"and that some arrangements should be made. I consulted the people of the house, and it was recommended that a deed of gift be prepared. All the men and women of my family, and the servants, advised me to this course. All my property 'on heaven and earth' was included in the deed." That is certainly a mistake. Further on he says "I wrote the document in anger in consequence of a quarrel, and hoped from fear to keep defendant apart, then to come together, not that I intended to ruin him. I expected that there would be a reconciliation, and that everything would come right. I did it only to frighten him." If the account which is given by Sir Mansin-ud-daula is correct, it certainly would appear that he did not intend to part with the immediate control of his property to his daughter and make himself her pensioner; and having regard to the state of his mind, which has been referred to, their Lordships think this account which he gives not at all improbable. He may have supposed, or may have been persuaded by Ram Parshad, or other persons in the family who had influence over him, that by executing this deed he might possibly escape liabilities to which he might be subjected by his son or in consequence of his son's conduct, or that the execution of a deed of this sort would tend to frighten his son, to bring him home, and produce a reconciliation. Their Lordships are disposed to credit his statement that he had no immediate intention of denuding himself of his property.

This view is supported by the tenor of the evidence. With reference to the elephants and horses, and property of that description, it appears that no change took place; that he paid the expenses relating to them just as he had before. With reference to the real property, although he went through the form of taking a lease from his daughter of his own house, it does not appear that he ever paid any rent; and further, although receipts were given for the rent of the land comprised in the conveyance in the name of the daughter (which would be consistent either with a real or with a benamee transaction), it is in evidence that for ten months after the execution of the deed the rents continued to be paid as usual to the father. They both lived, as they had before, in the same house, the father occupying a portion, and the daughter and her husband another.

Their Lordships have come to the conclusion that the learned Judicial Commissioner who finally disposed of the case was right in finding, as he does, that there was no intention on the part of the Nawab to make an immediate transfer of the property to his daughter, and they think that the daughter herself must have perfectly understood that the transaction was not a real one. She was not called, nor was her husband, to

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3 Suth.P.C.J. 601 = Bal. 208.

contradict the statement of her father, who must have best known what his intention was, or to prove the transaction to have been a real one, or the manner in which the property was enjoyed as between her and her father.

Their Lordships have, therefore, come to the conclusion that the judgment appealed against was right on the ground above stated, and do not think it necessary to express their opinion on other questions adverted to in the judgments of the Commissioner and the Judicial Commissioner. They will therefore humbly advise Her Majesty to confirm that judgment and to dismiss this appeal with costs.

CIVIL JURISDICTION.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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2 A. 148.

KALI CHARAN RAI AND OTHERS (*Plaintiffs*) *v.* AJUDHIA RAI AND OTHERS (*Defendants*). [21st February 1879.]

2 A. 148.

Suit for cancellation of a document—value of subject-matter in dispute.

In a suit for the cancellation of a bond for a certain amount of money, which, the plaintiffs alleged, was executed by them under a wrong impression that it was for a lower amount with less interest, and in which they admit their liability to pay such lower amount and pay it into Court, the value of the subject-matter in dispute is the difference between such lower amount with less interest and the amount of the bond with the interest as stipulated for therein.

In a suit for the cancellation of a bond for Rs. 6,000, the plaintiffs, the obligors of the bond, alleging that, having borrowed Rs. 3,000 from the defendants, they had agreed to give them a bond for the payment of that sum together with interest at the rate of Re. 1—8—0 per cent. per mensem, and that they had executed the bond in suit under the impression that it was the bond they had agreed to give, and that they had subsequently discovered that the defendants had fraudulently caused them to execute a bond for the payment of Rs. 6,000 with interest at Rs. 4 per cent. per mensem, paid Rs. 3,000 into Court together with interest at the rate of Re. 1—8—0 per cent., and the Court of first instance decreed in favour of the plaintiff. The District Judge on appeal held that the value of the subject-matter of the suit exceeded Rs. 5,000, and that, consequently, he had no appellate jurisdiction in the matter. The defendant applied to the High Court for the exercise of its powers of revision under S. 622 of Act X of 1877.

JUDGMENT.

[149] PEARSON, J.—The value of the subject-matter in dispute in this suit appears to us to be the difference between Rs. 3,000 and **[150]** Rs. 6,000 or thereabouts. We are therefore of opinion that the appeal preferred to the Zilla Judge was cognizable by him, and we accordingly allow this application with costs, set aside the lower Court's order, and direct it to replace the appeal on its file and to dispose of it according to law.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Oldfield and Mr. Justice Brodhurst.

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FULL BENCH.

NEHALO (*Defendant*) *v.* KISHEN LAL AND OTHERS (*Plaintiffs*).

[23rd February 1879.]

2 A. 150.

Hindu law—Widow's estate—Unchastity during widow-hood—Forfeiture.

Under, the Hindu law, governed by the Mitakshara, a widow who has once succeeded to the separate estate of her deceased husband, is not liable to forfeit that estate by reason of unchastity. (13 B.L.R. 1=19 W.R. (F.B.) 367, *F.*).

[Appr., 5 C. 776 (791); **(P.C.).]**

REFERENCE TO THE FULL BENCH.

[151] PEARSON and TURNER, JJ., having regard to *Kery Kolitany* v. *Moneeram Kolita* (1) referred to the Full Bench the question whether, under the Hindu law prevailing in these Provinces, a widow who has once inherited the estate of her deceased husband is or is not liable to forfeit that estate by reason of unchastity.

JUDGMENT OF THE FULL BENCH.

STUART, C.J.—After repeated consideration of the arguments and authorities referred to in this case, I feel that I can add nothing to what is clearly laid down in the judgment of the Calcutta High Court. But in expressing this opinion I desire to confine myself to the principles and authorities of the Hindu law, for I can derive no useful analogy from any rule or principle of the law of England or from any other European system of jurisprudence.

PEARSON, J.—The question referred to the Full Bench has been exhaustively considered and discussed by the learned Judges of the Calcutta High Court. It seems unnecessary to repeat at length the arguments used by them on both sides of the question and impossible to add thereto. After full consideration, the conclusion to which I have come is that the question was rightly answered in the negative by the majority of those learned Judges, and that we **[152]** should return the same answer to the Bench which has put the question to us.

The opposite conclusion is certainly not an unavoidable inference from the text of Catayana mainly relied on in support of it: "Let the sonless widow, preserving (unsullied) her husband's bed and residing with her venerable relative, eat or enjoy moderately" not so long, be it observed, as she remains chaste or resides with her protector but "until her death." The text is in its form and may well be in substance a mere injunction. It enjoins submission to the venerable relative, purity of life, and moderation in enjoyment, and presents a marked contrast to the text under the authority of which a virtuous widow succeeds to her husband's estate "Let the wife who is not unchaste take her husband's wealth." This text, though an injunction in form, is much more in substance. It speaks of chastity as a condition of succession. On the contrary, as regards the text first quoted, the Privy Council has ruled that a widow does not forfeit the estate which has devolved upon her from her husband merely because she ceases to reside with the venerable relative who

(1) 13 B.L.R. 1=19 W.R. 367.

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represents her husband's family; or, in other words, that such residence is not a condition of her retaining that estate.

Then there is the text which says that a "woman who acts maliciously and is shameless and a destroyer of property and addicted to immorality is *unworthy* of wealth." This cannot, without violence, be construed to mean that she is to be deprived of property which has come into her possession.

Nor can the text which authorises the husband's brothers to withhold maintenance from his widow if she becomes unchaste be fairly so construed. The termination of a duty of giving food and clothing to a person is a very different thing from the commencement of a right to take away from that person property belonging to her.

The penalty of forfeiture for unchastity, if not warranted by the texts, can hardly rest firmly on other grounds. The argument that an unchaste widow can no longer perform acts beneficial to her husband's soul is met by the consideration that there is no [153] essential connection between such acts and the property, and that an appointment which has been made by reason of an existing capacity in the person appointed is not always avoided *ipso facto* by the subsequent loss of the particular capacity. The argument that she takes the estate or continues to hold it after her husband's death as half of her husband's body, and cannot be regarded as such, or as such retain it, after having become unchaste, is met by the consideration that, if the estate was still possessed by the husband after his death in the person of his widow, a son would not take it in preference to the widow. The argument that the estate does not vest in the widow because her rights in it are of a limited and qualified nature is not weighty; for a limited right may vest as well as a perfect one.

TURNER, J.—Although at the hearing I was inclined to hold otherwise, and although I have been a party to one or more rulings to the contrary, further consideration has satisfied me that there is not sufficient authority for holding that a widow who has inherited her husband's separate estate will, under the law we are bound to administer, forfeit her estate. The only arguments which can be adduced in support of the contention that the estate having once vested is forfeited by unchastity appear to me to be the following, *viz.*, (i) that she takes the estate because she is able to confer spiritual benefits on the deceased superior to those which can be conferred by any other heir, and that forfeiting the capacity by unchastity she forfeits the wealth; (ii) that from the use of the present participle "*palayanti*" in the text of Menu, "a woman *preserving* her husband's bed, etc." a condition "*dum casta fuerit*" is to be inferred; (iii) that inasmuch as the allotment made by a joint family to a widow in lieu of maintenance may be resumed if she becomes unchaste (Smriti Chandrika, Ch. XI, S. 1, vv. 47 and 48), it may be inferred that a widow who has inherited the separate property of her husband would forfeit her estate by similar misconduct; and (iv) that on re-marriage the estate is forfeited.

To these arguments I think a sufficient answer may be made. The text of Menu refers to the period at which the inheritance devolves and the succession is to be ascertained, and merely prescribes as a rule of inheritance that a chaste wife succeeds to the separate [154] estate of her husband in default of male issue, and does not attach a condition to the estate taken by the widow; and it is a strong argument in favour of this view that the commentators who are generally exhaustive in their comments on texts have omitted any mention of the condition.

Again, the allotment of property in lieu of maintenance is the voluntary act of the family, and differs in this material particular from an

estate devolving by law on the widow without the consent of the family, and while the family may be at liberty to resume their free gift, it cannot be inferred from this rule that they have power to take from her the estate which vested in her by law: and it is the more remarkable that, if they had such power, the author of Smriti Chandrika should not have adverted to it equally with the rule from which the argument is derived. Again, on re-marriage the woman becomes a member of the family into which she re-marries, but unchastity does not deprive her of membership in the family into which she married.

The argument that a widow inherits for the purpose of conferring benefits on her husband by the employment of his wealth for pious purposes, and that she consequently forfeits the estate when she is no longer able to perform the ceremonies which are incumbent on a widow, proceeds on an incomplete statement of the grounds for the widow's succession. This point was considered and determined by the Privy Council in *Katama Natchiar* v. *The Rajah of Shivagunga* (1), and it was ruled that "it is on the principle of survivorship that the qualification of the widow's right established by the Mitakshara.....must be taken to depend (2)," and the text is cited: "Of him whose wife is not deceased half the body survives, how should another take the property while half the body of the owner lives?"

The principle that the degree of benefit which may be conferred on the deceased by the employment of his wealth regulates the succession may be invoked in aid of the widow's right to succeed, but it is not the sole principle on which the right is founded, and as is **[155]** shown in the succession to a co-parcener's interest in an undivided estate it is subordinate to the principle of survivorship.

This being so, it appears to me the text of the Mitakshara, Ch. II, S. 10, v. 6, and the Viramitrodaya cited in Mr. Justice West's work are pertinent. In these texts it is declared that disqualification arising before partition deprives the disqualified of their shares, but that one already separated from his co-heirs is not by disqualification deprived of his allotment.

The same principle applies to the succession of the widow. Adultery, unrepented of and unatoned, prevents the estate from vesting in her. Should it have vested she does not lose it by subsequent immorality.

OLDFIELD, J.—The question referred has already been fully discussed by the High Court of Bengal in *Kery Kolitany* v. *Moneeram Kolita* (3). The contention that a Hindu widow who has once succeeded to her husband's estate forfeits it by reason of unchastity appears to rest on the ground that chastity is the absolute condition on which she holds the estate, and forfeiture the penalty, or that she holds the estate for certain purposes, the due fulfilment of which is dependent on her remaining chaste, and forfeiture follows as a penalty on the failure to perform them by reason of unchastity.

It is asserted that this rule of law is to be gathered from the texts which indicate the importance of chastity, the dependence of women, the limited nature of the interest held by them in the husband's estate, and on the fact that their right to the succession depends on their capacity to confer benefits on the soul of the husband; that the texts of the Hindu Law make the chastity of the widow the condition for taking and for retaining the estate, as well as for taking and retaining allowances for maintenance and *stridhan*, or a woman's particular property, all of which

(1) 9 M.I.A., 539. (2) At p. 611.
(3) 13 B.L.R. 1=19 W. R. 367.

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are alike forfeited by reason of unchastity. We have to consider this question with reference to the law prevailing in the Benares school.

It may be admitted that the widow succeeds her husband with reference to her capacity to perform certain religious rites, as in [156]the Mitakshara, Ch. II. S. 1, v. 5,—"In the first place the wife shares the estate. 'Wife' (patni) signifies a woman espoused in lawful wedlock; conformably with the etymology of the term as implying a connexion with religious rites,"—and other authorities to the same effect; but under the Mitakshara law she cannot be said to take the estate with the sole view to perform such rites or services for the benefit of the deceased: this may be gathered from Mitakshara, Ch. II, S. 1, v. 14, and the following verses, where the author is pressing the argument in favour of a wife's succession, and cites the contention made by his opponents, that the wealth of a regenerate man is designed for religious uses, and that a woman's succession to such property is unfit because she is not competent to the performance of religious rites, which he proceeds to refute by showing, first, that she is competent to perform many religious duties and then by showing that wealth is intended for other purposes besides religious uses, citing Menu and Yajnavalkya, and implying that a widow may make other and proper uses of the wealth, and does not hold it merely and entirely as a trustee for the soul of her husband, as some would contend. The argument is thus weakened which would infer that she forfeits the estate when no longer able to perform these religious services, but it may be also met by the fact that other heirs whose succession is also dependent on their capacity to perform certain services, do not admittedly forfeit the estate on failure to perform them, and that the same texts inculcate other duties, on the widow's failure to perform which do not operate as forfeiture.

It is asserted, however, that there are texts of law which absolutely make it a condition for retaining the estate that the widow remain chaste; among these texts is that from Menu: "The widow of a childless man keeping unsullied her husband's bed and persevering in religious observances shall present his funeral oblation and obtain his entire share (1)." This is the only text in the Mitakshara from which it can be inferred that the obligation of chastity is a continuing one after succession; there are other passages, but they refer to chastity as a condition prior to succession and for a claim to maintenance. Then there is the following text from Catayana: "Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the pro-[157] perty until her death: after her let the heirs take it (2);" the purport of these passages has been very fully discussed by the learned Judges of the High Court of Bengal in *Kery Kolitany* v. *Moneeram Kolita* (3).

It is noticeable and significant that these passages do not in express terms attach the penalty of forfeiture for unchastity; the first passage may, I think, refer to the succession of the widow in the first instance, and the second be in the nature of a precept inculcating chastity: and it has been urged, and I cannot but think with some force, that inasmuch as this passage contains two conditions, the last of which does not admittedly carry forfeiture for failure, there is no reason why the first should do so.

If, then, the forfeiture of the estate for subsequent unchastity is to rest on direct passages inculcating it, I think it fails to be established.

(1) Mitakshara, ch. ii, s. i, v. 6. (2) Daybhaga, ch. xi, s. i, v. 56.
(3) 13 B.L.R. 1=19 W.R. 367.

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But it is admitted that an unchaste wife cannot succeed to the estate, and it is asserted that maintenance and *Stridhan*, or her peculiar property, can be resumed by reason of unchastity, and there is some force in the argument that, if this be so, there may be an inference in favour of the resumption for the same cause of the separate estate inherited from the deceased husband; but I think it would be unsafe to deduce the law as to one state of circumstances, merely from its enactment in respect of another state. Silence on a particular point may very well have been intentional, and there are obvious reasons why this may be the case in respect of the question before us, where the estate taken is a separate estate, and the certain result of such a law as is contended for would be to give openings to constant and harassing inquiries, in the interest of persons with merely reversionary interests.

When we find also that even the disqualifications which operate as bar to succession to property, among which is being the outcaste, will not operate to divest property once it has vested (see Viramitrodaya), it is a fair question to ask why unchastity should so operate.

There are texts to show that maintenance and *Stridhan* are resumable by reason of unchastity, and it is hence inferred that the **[158]** separate estate taken by a widow must be resumable. In the Mitakshara the following passage from Narada is quoted: "Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lords: but if they behave otherwise the brethren may resume that allowance (1)," and there is another passage from Yajnavalkya: "And their childless wives, conducting themselves aright, must be supported, but such as are unchaste should be expelled, and so, indeed, should those who are perverse (2)." These are the only passages in Mitakshara from which resumption of maintenance may be inferred, and that authority is silent as to the resumption of *Stridhan*; but it should be observed that the passages are not cited in the Mitakshara expressly in support of resumption but are brought forward as the arguments sometimes used by the author's opponents against the widow's right of succession, and in favour of her right to maintenance only, a proposition which the author then proceeds to refute; and the last cited passage is stated to refer to wives of disqualified persons. There is, however, authority for asserting that maintenance may be resumed, but be this as it may, there is no analogy between the case of a widow succeeding to the separate estate of her deceased husband and that of one taking maintenance as a charge on property in an undivided family. It is easy to understand why the allowance may be resumable in the last case, while the separate estate may remain not liable to be resumed.

As to the power to resume *Stridhan*, there are some passages in the Viramitrodaya as follows: "If a husband have a second wife and do not show honor to his first wife he shall be compelled by force to restore her property though it may have been given to him out of kindness. If suitable food, raiment, and dwelling be withheld from a woman, she may exact her own property and take a share of the estate with the co-heirs;" and further on comes the text: "A wife who acts unkindly towards her husband, who is shameless, who destroys his effects, and who takes delight in being faithless to his bed, is unworthy of separate property: the separate property she may have received shall be taken from her;" **[159]** and if all the passages be read together the separate property referred to seems to be that which the husband was obliged by the previous texts to give to the wife if he neglected her, and may not refer

(1) Mitakshara, ch, ii, s. i., v. 7.

(2) Mitakshara, ch., ii, s. i., v. 13.

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to *Stridhan* generally, and the passages clearly refer to a resumption by the husband and not by other persons subsequently to his death.

It has not been urged before us that property inherited from a husband classes as *Stridhan* under the law of the Benares school and is necessarily to be forfeited under these texts.

Then we have the opinion of Mr. Colebrooke adopted by Sir T. Strange: "An unchaste woman is excluded from the inheritance of her husband, but no misconduct other than incontinency operates disinherison, nor after the property has vested by inheritance does she forfeit it, unless for loss of caste unexpiated by penance or unredeemed by atonement" and the opinion of Mr. Ellis, given at vol. 2, p. 273, that "the wife does not succeed unless she be chaste, this is a necessary condition," may refer to her succession in the first instance. The only authority distinctly opposed is Elberling, to the effect that the widow enjoys the property on two conditions,—that she may remain chaste and that she does not make waste.

The decided cases have been very fully discussed by the learned Judges of the High Court of Bengal. The first two (1) may possibly be construed to rule forfeiture, but it is open to doubt. The third (2) has reference to the forfeiture of allowance on account of maintenance, and goes on the ground that unchastity involves degradation, which prevents the widow having a right to the heritage. The case reported in the seventh volume of Selwyn's Reports (3) is one in respect of a widow's maintenance. The case of *Radamoney Raur* (4) is, however, expressly, in favour of the forfeiture, but against this there is the case of *Saummoney Dossee* (5) which rules that "though, by Hindu law, incontinence excludes a widow from succession to her husband's estate, yet if **[160]** the inheritance were once vested it is not liable to be divested unless her subsequent incontinence were accompanied by degradation, but that by Act XXI of 1850 deprivation of caste could no longer be recognised as working a forfeiture of any right or property or affecting any right of inheritance."

In the case reported in the fourth volume of the Bombay High Court Reports, p. 25 (6), it was ruled that incontinence excludes a widow from succession to her husband's estate, but nothing short of actual infidelity; if, however, the inheritance becomes vested in the widow it is not by Hindu law liable to be divested, unless her subsequent incontinence be accompanied by loss of caste unexpiated by penance and unredeemed by atonement. Of cases decided by this Court, the only ones which have been pointed out are those noted (7).

The first was a case in which a Hindu widow held a share of ancestral property in an undivided estate for her maintenance. She deserted her husband's family and lived with a paramour. The Pandit consulted by the Judge was of opinion that she forfeited the share by reason of unchastity, but was still entitled to maintenance. The Sudder Court decided that the share was forfeited, on the authority of the Pandit of the Court, that "if a wife be unfaithful to her husband whilst she lives with him, or forsakes his home, she is in no way entitled to any part of his property or to maintenance; nay, her *Stridhan* and her jewels should be taken from her, and she should be banished from her husband's house." This exposition of the law refers clearly to the case of unchastity during the husband's lifetime, though the Court held it applicable to a subsequent

(1) Macnaghten's Hindu Law, 3rd Ed., Vol. II, pp. 19 to 21, cases (iii) & (iv).
(2) Macnaghten's Hindu Law, 3rd Ed., Vol. II, p. 112, case (v).
(3) *Bussunt Koomaree* v. *Kummul Koomaree.* (4) 4 Montriou's H. L. Cas. 314.
(5) 2. T. and B., 300. (6) *Parmatikom Dhondiram* v. *Bhikukom Dhondiram.*
(7) *Doorgee* v. *Kashee Pershad*, S. D, A. N. W. P., 1862, vol. p. 506; *Dullo Ramdut*, same volume, p. 206.

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state, but the case is not precisely in point, as it refers to a share given for maintenance in an undivided family and not to the estate a widow taken in a separated family. The other case was where a widow had been put in possession, on partition, after her husband's decease, of a share of the joint ancestral property, and had subsequently become unchaste, and the question decided was in respect of her power to make a valid devise of the property; it was held she could not do so, the Court remark-[161]ing "it is not contested that, admitting the fact of misconduct, the deed of gift was altogether illegal." The decision therefore does not directly decide the point before us, and both cases have reference to shares taken by widows for maintenance in estates held by co-proprietors, and will afford no certain rule for the case under discussion.

It appears to me therefore that the rule of law which is now asserted is not one which is deducible from the Hindu law books, and that no custom to support the rule can be said to have come down to us in practice, supported by a course of decisions of the Courts, and therefore deserving consideration. On the contrary, the Hindu authorities speak with uncertainty; the highest English authorities are opposed to any such rule of law; and the few decisions of the Courts, in which the question can be said to have been unmistakably decided, give conflicting rulings, while the later decisions are opposed to the existence of such a rule of law.

My reply to the reference is that, under the Hindu law governed by the Mitakshara, a widow who has once succeeded to the separate estate of her deceased husband is not liable to forfeit that estate by reason of unchastity.

BRODHURST, J.—In this case the pleaders for Nehalo (the defendant), appellant, have relied entirely upon the judgments of the Chief Justice of the Calcutta High Court and of those his honorable and learned colleagues who concurred with him in *Kery Kolitany* v. *Moneeram Kolita* (1). On the other side nothing of any importance has, I think, been urged that has not been noticed at even greater length in the printed judgments of the case above alluded to.

From the Hindu texts referred to it is evident that it is only the chaste widow who is entitled to succeed to the estate of her childless husband, but I have not seen any passage of Hindu law pointed out which declares positively that a widow, after having duly obtained possession of the estate, can, simply on account of her subsequent incontinence, be deprived of it. I concur generally in the opinions expressed by the majority of the learned Judges in the case above alluded to, and I consider that the Full Bench ruling of the Calcutta High Court is also applicable to cases of a similar description in these Provinces.

(1) 13 B.L.R. 1=19 W. R. 367.

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PRESENT :

1879 FEB. 24. *Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.*

FULL BENCH.

HANUMAN TIWARI (*Plaintiff*) *v.* CHIRAI AND ANOTHER (*Defendants*).

[24th February 1879.]

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2 A. 164. *Hindu law—Adoption of only son.*

Held, by the Full Bench (Turner, J., *dissenting*), that the adoption of an only son is not altogether void, but that, having once been made, it is valid.

[**Not F.**, 14 B. 249 (256) (**F.B.**); **F.**, 14 A. 67 (73) (**F.B.**)=12 A.W.N. 6; **Cons.**, 12 A. 328 (337); **R.**, 9 A. 253 (293), 1 Bom. L. R. 144, 18 M. 53 (61), 19 B. 428 (431).]

REFERENCE TO THE FULL BENCH.

SPANKIE, J., and OLDFIELD, J., referred to the Full Bench the question whether the adoption of an only son is altogether void, or whether, once having been made, such an adoption is valid.

JUDGMENTS OF THE FULL BENCH:

[165] STUART, C.J.—I remain of the opinion which I formed at the hearing that the answer to this reference must be that the adoption of an only son is not altogether void, but that having once been made, the adoption is valid. Such is my conclusion on the authorities, which are, however, very conflicting, but the weight of them is clearly in favour of the validity of the adoption in question. In a Calcutta case (1) that was cited to us, the Judges being L. S. Jackson and Dwarka Nath Mitter, JJ., it was laid down (Mitter, J., being the Judge who delivered the judgment in his own name and that of his colleague), on the authority of certain passages from Dattaka Chandrika, that the adoption of an only son is forbidden by Hindu law. The judgment then proceeds: "It has been said that the prohibition contained in these passages amounts to nothing more than **[166]** a mere religious injunction, and that the violation of such an injunction cannot invalidate the adoption after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and its temporal aspects are wholly inseparable." But Mr. Justice Mitter goes on to observe: "It is true that the doctrine of *factum valet* is to a certain extent recognised by the lawyers of the Bengal school; but if we were to extend the application, every adoption, when it has once taken place, will be, as a matter of course, good and valid, however grossly the injunctions of the Hindu Shastras might have been violated by the parties concerned in it. The case of *Chinna Goundan* v. *Kumara Goundan* (2) is no doubt in favour of the appellant, but for the reasons stated above, we are unable to concur with the learned Judges who decided that case. On the other hand we find two cases in our presidency which are directly in favour of the view we have taken, and what

(1) 1 B.L.R., A.C., 221. (2) 1 M. H. C. R., 54.

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is of still greater importance, both these cases have been cited with approbation by Sir William Macnaghten himself." The cases thus referred to will be found in Macnaghtan's Hindu Law, 3rd ed., vol. ii, p. 178. They appear to have been decisions in 1806 by the late Calcutta Sudder Dewanny Adawlat, but they are not of much weight, their reasoning against the validity of such an adoption being unsatisfactory and superficial. There was also quoted to us a dictum in a judgment of the Privy Council, which will be found in p. 50 of the appendix to Munshi Hanuman Prasad's useful collection of precedents in these terms: "Again if there is, on the one hand, a presumption that Guru Prasad would perform the religious duty of adopting a son, there is, on the other hand, at least as strong a presumption that Parmanand would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dwayamushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family." This view will, among other things, be found very fairly answered and disposed of **[167]** by Sir Thomas Strange in his well known work on Hindu law (1). He states the general principle relating to adoption to be that "one with whose mother the adopter could not legally have married must not be adopted." He then remarks: "Subject to this general principle, the nearest male relation of the adopter is the proper object of adoption. This of course is the nephew, or son of a brother of the whole blood, whose pretensions were, by the old law, such, that if, among several brothers, one had a son, he was so far considered to be common to all, as to preclude in every one of them the power of adoption. But the injunction of Menu has, in more modern times, been construed as importing only an intention to forbid the adoption of others, where a brother's son is obtainable." Further on he observes: "But the result of all the authorities upon the point is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who, upon spiritual considerations, ought to have been preferred." Then on page 86 he says: "It is true that a brother's son, as such, inherits and performs obsequies to his uncle, dying without preferable heirs; but then it is as his nephew, not as his son; and the spiritual efficacy in the one and in the other case is considered to be different. To render him a substitute for a son, he must have been filiated. When, therefore, a Hindu has but one son, and it is agreed that his brother, having none, shall adopt him, the adopted in this case has vested in him accumulated rights and duties. Son by adoption to his adoptive parent, he remains so, to all intents and purposes, to his natural one, becoming *dwayamushyayana*, or son to both;" and he points out other restrictions which, however, he observes are inculcated, "but not always enforced; since, as in other instances, so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only, and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good; according to the maxim of the civil law, 'prevailing perhaps in no Code more than in that of the Hindus, *factum valet quod fieri non debuit.*" The High Courts of Calcutta, Madras, and Bombay have all ruled in favour of the doctrine of *factum valet*. In the Calcutta Court Sir Edward Ryan, C.J., in **[168]** delivering judgment in *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee* (2), said: "The adoption

(1) 4th Edition by Mayne, pp. 83-86.

(2) 1 Fulton, 75.

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of an only son is no doubt blameable by Hindu law, but when done it is valid." In Bombay the question was distinctly raised in the case of *Raje Vyyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1), before Warden and Gibbs, JJ., who were both of opinion that the adoption of an only son having once taken place, and the requisite ceremonies having been duly performed, cannot be set aside. Gibbs, J., in delivering his judgment, said: "The rulings of this Court, as shown from *2 Borr. p. 83*, downwards, as also of the Calcutta Court, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone, but the adoption must stand." In the High Court of Madras the same doctrine was approved and applied in the case of *Chinna Gaundan* v. *Kumara Gaundan* (2), before Scotland, C.J., and Frere, J. In delivering judgment, Scotland, C.J., went carefully through all the authorities, concluding thus: "On the whole the case (*i.e.*, the validity of such an adoption) is concluded by authority; but I must say, with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way." This appears to be the Madras case alluded to in the judgment of Mr. Justice Mitter in the Calcutta case I have referred to. In a subsequent Madras case, *Singamma* v. *Vinjamuri Venkatacharlu* (3), before Bittleston and Ellis, JJ., the law laid down by Scotland, C.J., was carefully considered and distinctly approved, and it appears to me to be sound and worthy of acceptance by us.

PEARSON, J.—The adoption of an only son is declared to be improper and is disapproved or prohibited by the Hindu law, but no text is shown to us declaring such an adoption to be void or voidable. The objections to such an adoption are its injurious consequences to the person who gives his son to another and these consequences would not follow were the adoption a nullity. The view taken by Sir Thomas Strange that "the prohibitions respecting an eldest and an only son, where they most strictly apply, are directory only, and an adoption of either, however blameable in the **[169]** giver, would, nevertheless, for every legal purpose, be good, according to the maxim of the civil law, prevailing perhaps in no Code more than in that of the Hindus *factum valet quod fieri non debuit*" appears to have been generally accepted, and is supported by a great weight of authority; and I am disposed to adopt it.

SPANKIE, J.—I accept this view of the case. It does not appear that more can be said.

TURNER, J.—The rulings as to the validity of the adoption of an only son are cited at length in Mr. Mayne's admirable work on Hindu law, Ss. 126-133, and I need not further refer to them. It is sufficient to say that the rulings of the Courts are conflicting. I therefore feel myself at liberty to consider the question as unsettled, and in the absence of any evidence that the law enunciated by the commentators has been varied by custom, to rest my decision on the texts and principles which are to be gathered from their works. The object of adoption is the perpetuation of lineage and the spiritual benefits which accrue to the parent of a son, and in virtue of the benefits which he can render, the adopted son succeeds not only to the estate of the person who has adopted him, but to collaterals of that person, and to constitute a valid adoption, there must be a competent giver. The Mitakshara, Ch. XI, S. xi, v. 11, expressly declares "an only son must not be given (nor accepted). For Vasishtha

(1) 4 B. H. C. R., A. C. J., 191. (2) 1 M. H.C.R. 54.
(3) 4 M.H.C.R. 165.

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ordains: Let no man give or accept an only son." The Dattaka Mimansa a work of high authority in these provinces, declares (S. iv, vv. 5, and 6) that a father is incompetent to give an only son, and (v. 4) that the offence of extinction of lineage is incurred both by the giver and the adopter; and again (S. ii, v. 38) the author recognising the force of the prohibition declares it does not apply to the case in which the son of one brother is made common to another brother also. In the Vyavahara Mayukha, Ch. IV, S. v, vv. 9, 11, the same prohibition is declared, and in the Dattaka Chandrika, S. i, vv. 27 and 29, the rule is distinctly based and supported by the text of Caunaka,—"By no man having an only son is the gift of a son to be ever made."

It is to be noticed that, although the Mitakshara, Ch. I, S. xi, v. 12, goes on to declare that "nor though numerous progeny exists should an eldest son be given, for chiefly he fulfils the office of **[170]** a son," neither in that work nor in any of the works to which I have referred is there any declaration that extinction of issue would follow the gift (as it obviously would not), nor is the limitation of the paternal power to make a gift extended to an eldest son. The Mitakshara also gives the reason for what appears to me a dissuasive rather than peremptory injunction: "By the eldest son as soon as born a man becomes the father of male issue."

On these grounds then that a father is incompetent to give an only son and that the object of adoption wholly fails if such a gift be attempted, I am of opinion that the adoption of an only son is invalid, and that the principle *fieri non debet factum valet* cannot be applied. The consequence of the contrary ruling would be according to Hindu law, to inflict a penalty not only on the giver and receiver, but on the collaterals of the receiver, whose property might descend to a person solely entitled to claim it on account of benefits he is presumed to confer, but which he could not possibly confer.

OLDFIELD, J.—There appears to be no sufficient reason for considering that the prohibitions in the text-books in respect of the adoption of an only son are more than of the nature of moral injunctions, rendering the gift and acceptance of an only son blameable, as interfering with the perpetuation of the lineage of the giver—Dattaka Mimansa, S. iv, vv. 3, 4—but not invalidating adoption when made. Balam Bhatta appears to consider the gift and acceptance as blameable, but no more. His annotation to v. 11, S. xi, Ch. I of Mitakshara is, "So an only son should not be given, nor should such a son be accepted: the blame attaches both to the giver and to the taker *if they do so.*" The act is declared blameable but not absolutely void, and the adoption would not appear to fail civilly in effecting in favour of the adopter the material object for which adoption is made, the perpetuation of lineage. This view has been taken by the chief authorities on Hindu law,—Strange, 4th Ed. by Mayne, 87; Macnaghten, 3rd. Ed., vol. i, 67 (I do not find that the cases in pages 178-179 of vol. ii go so far as to decide that the adoption once made must be set aside),—and it has been enforced by the early decisions of the superior Courts, and, so far as I am aware, been maintained until now, with few exceptions, by the superior Courts, of the three Presidencies.

PRIVY COUNCIL.

PRESENT :

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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On appeal from the Court of the Commissioner of Seetapore in Oudh.

THAKOOR HURDEO BUX *v.* THAKOOR JOWAHIR SINGH.

[1st March 1879.]

3 Suth. P. C. J. 607=6 I. A. 161=4 Saraswati's P.C.J. 10=Bal. 318.

1. *Oudh Talukdar—Implied trust for joint family—Act I of 1869—Retrospective effect.*

In a suit commenced before the passing of Act I of 1869, where their Lordships were of opinion that the circumstances of the case afforded sufficient grounds to justify them in presuming that it was the intention of the defendant that the villages included in the summary settlement and the sunnud should be held by him in trust for the joint family and as a joint family estate subject to the law of the Mitakshara, it was *held*, although the suit was not decided until after the passing of the Act, that the provisions of that Act did not operate so as to change the relative condition of the parties, and to put an end to the trust upon which the defendant had previously held the estate, and to convert it into an estate held by the defendant for his own sole use and benefit discharged from the trust. There can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the defendant. The villages granted to the defendant for loyal services rendered during the Mutiny of 1857 were held by their Lordships to have been granted to the joint family, inasmuch as the loyal services which the defendant rendered to the Government were rendered by means of the then joint family property, and in accepting the reward from the Government, he acted as the representative of the family. [3 I. A. 259=26 W. R. 55, *F.*].

2. *Transfer* pendente lite.

The Court has nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, but the decree would be without prejudice to any question that may arise in respect to the said subsequent agreement or arrangement, if any.

JUDGMENT.

[607] SIR BARNES PEACOCK.—When this case was before their Lordships on a former occasion (1) it was remanded, with a direction to the Commissioner to try or cause to be tried by the Settlement Officer the following issue, *viz.*: Whether the respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement or sunnud, or any and what part thereof, or of the rents and profits thereof, in trust for the appellant and Parbut Singh, or either and which of them.

The Commissioner very properly took upon himself the trial of the issue, and correctly disposed of the several objections which were raised in the course of the investigation.

The nature of the present suit, the circumstances under which it was instituted, the effect of the decision of the Settlement Officer, and of that of the Commissioner from which this appeal was preferred, are fully stated in the reasons expressed by their Lordships in recommending a remand of the case for the trial of the above-mentioned issue. The case is reported in 4 Law Reports, Indian Appeals, p. 178.

In those reasons their Lordships stated that they were of opinion that, up to the time of Lord Canning's proclamation, the whole of the

(1) See 3 C. 522=4 I.A. 178 reported at p. 329, *supra*.

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villages mentioned in the summary settlement were the joint family property of the appellant, the respondent, and Parbut Singh, and that they were either ancestral or purchased with the proceeds of ancestral estate. Their Lordships also referred to the case of *Thakrain Sookraj Koowar* v. *The Government and others* (14 Moore's Indian Appeals, 112), and also to the case of *Shunker Sahai* v. *Rajah Kashi Pershad*, decided in the Privy Council on the 29th July, 1873, and since reported (4 Law Reports, Indian Appeals, 198) as an authority for the proposition "that a person who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talookdary right, may, nevertheless, have made himself a trustee for another of the beneficial interest in the lands comprised within the talook, and be liable to account accordingly," and they remarked that the Lower Courts in the present case appeared to have decided the case merely upon the ground that the defendant was protected by the sunnud, without adverting to S. 15 of Act I of 1869, or enquiring whether, notwithstanding the summary settlement, the sunnud, and the statute, the plaintiffs or the appellant had either *before* or after the passing of Act I of 1869 acquired or become entitled to a beneficial interest in any part of the property. They said that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question; that on the materials before them they did not feel competent to decide it, and that they had no evidence of the circumstances under which the summary settlement was made, nor of those under which the sunnud was granted, nor of what was done with respect to it or to the property comprised in it before the registration of the [609] defendant under Act I of 1869. The issue was accordingly directed, and there can be no doubt, and indeed it has not been disputed, that the evidence adduced upon the trial fully warranted the conclusion at which the Commissioner arrived, that the actual relation of the appellant, the respondent, and Parbut Singh remained that of a joint and undivided Hindoo family from the date of Lord Canning's proclamation up to the quarrel and removal of the respondent to Kaswara in 1865. The Commissioner also found, and in their Lordships' opinion correctly found, that the evidence proved that during that period there had been a joint interest in, and common management of, the property. Such an interest could not have existed unless the defendant had consented that the villages should be held as the joint property of the family.

Their Lordships are of opinion that the facts so found, coupled with the statement of the defendant in his application for a summary settlement to the effect that Hurdeo Bux was his partner, and with his deposition of 8th July, 1859, in which he stated that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Parbut Singh, who were his partners, should claim, they could get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the defendant that the villages included in the summary settlement and sunnud should be held by him in trust for the joint family, and as a joint family estate subject to the law of the Mitacshara.

The suit was commenced long before the passing of Act (I of 1869), *viz.*, on the 28th August, 1865, and it follows from what has just been said that, if judgment had been given before the passing of the Act, it ought to have been held that the defendant was bound by the trust to be presumed as above mentioned. But in consequence of numerous delays and references, to which allusion has been made in the judgment of remand, the case was not decided by the Court of First Instance until

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after the passing of the Act. It, therefore, became necessary to determine whether Act I of 1869 operated so as to change the relative conditions of the parties, and to put an end to the trust upon which the defendant had previously held the estate.

Their Lordships are of opinion that it did not.

By S. 3 it was enacted that every talookdar with whom a summary settlement of the Government revenue was made between the 1st April, 1858 and the 10th October, 1859, or to whom, before the passing of the said Act, and subsequently to the 1st April, 1858, a talookdary sunnud had been granted, should be deemed to have thereby acquired a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kubooleut executed by such talookdar when such settlement was made, subject to all the conditions affecting the talookdar contained in the orders passed by the Governor-General of India on the 10th and 19th October, 1859, and republished in the First Schedule annexed to the said Act, and subject also to the conditions contained in the sunnud under which the estate was held.

The Commissioner very properly classified the villages in suit, and ruled that the issue directed was intended to apply to the whole of them.

The details are (*see* New Record, p. 3) :—

1st.	Villages comprised in the summary settlement ...	78
2nd.	Villages granted in reward for services during the mutiny	20
3rd.	Villages acquired from the profits of the estate after summary settlement and before the institution of the suit	15
		113

[610] It should be remarked that the 20 villages granted for loyal services have since been demarcated into 12. (*See* New Record, p. 5.)

The defendant, as well as the villages Nos. 1 and 2 in the detail, fall within the category of S. 3 of the Act.

That section, it should be observed, does not state that the talookdar shall be deemed to *have*, but that he shall be deemed *to have acquired* by the summary settlement and sunnud a permanent heritable and transferable right in the estate. The right so acquired was subject to the provisions of Ss. 11 and 15 of the Act, by the latter of which it was enacted that if any talookdar should *theretofore have transferred* or should thereafter transfer the whole or any portion of his estate to a person not being a talookdar or grantee, and if such person would not have succeeded *according to the provisions of the Act* to the estate if the transferor had died without having made the transfer and intestate, the transfer of and succession to the property so transferred should be regulated by the rules which would have governed the transfer of such property if the transferee had bought the same from a person not being a talookdar.

If, therefore, the defendant had, before the passing of Act I of 1869, and at any time after the date of the summary settlement and sunnud, and after he had thereby acquired the right which, according to the provisions of S. 3, he must be deemed to have acquired thereby, expressly declared that he held and would hold the estate in trust for the joint family as joint famly estate governed by the rules of the Mitacshara, there can be no doubt that the estate would have been subject to the trust so

declared, and that it would not have been converted by Act I of 1869 into an estate held by the defendant for his own sole use and benefit discharged from the trust. There can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the defendant.

Sections 13 and 16 of the Act provide for certain formalities as regards gifts or transfers to be made by talookdars of estates acquired or held in the manner mentioned by S. 3 of the Act; but no question can arise in the present case as to the effect of those sections, for it has been held that the formalities thereby required are not requisite to give validity to gifts or transfers executed by a talookdar before the passing of the Act (*Hurpurshad* v. *Sheo Dyal*) (1).

Their Lordships have come to the conclusion that, under the circumstances of the case there are no grounds for making any distinction as regards the rights of the parties between the 78 villages included in the summary settlement and the 20 villages, now consolidated into 12, which were granted by the sunnud for services during the mutiny, or those which were acquired from the profits of the estate. As regards those which were granted for services during the mutiny, the plaintiffs Hurdeo Bux and Parbut Singh were doubtless as loyal as the defendant Jowahir Singh, and rendered equally good services to the British Government. It is, however, stated by the Commissioner, and there seems to be no reason to doubt the correctness of his opinion, that he was fully convinced that the Government at the time they conferred the reward estate believed that they were conferring it on Jowahir Singh, the respondent, alone. He says (p. 61, New Record) :—

"I do not think they had any remembrance of the admission in the A Statement of the summary settlement, a document that would not be before them at the time, and the respondent's name appeared alone as proprietor. But if he gave loyal support to Government, it was with the means of a talooka, in which the appellant and Parbut Singh had an actual, practical, existing common right at the time, and they had carried off the family and its effects to a place of safety, and returned in time to retake their fort, and at least quicken and molest the retreat of the rebel chief Feroz Shah, who was one of the sons of the King of **[611]** Delhi, as deposed to by witnesses 8, 10, 11, and 12 for appellant, and witness 2 for Parbut Singh. I do not think that if the whole facts had then been before the Government, it would not have given the reward to the brotherhood all the same. In this matter I think the respondent was acting at the time as the representative of the family; and I do not see it any where shown that the common interest and the common management did not include these villages subsequent to their acquisition, and up to the rupture in 1865."

It appears from the evidence, as well as from the finding of the Commissioner, that the plaintiffs, Hurdeo Bux and Parbut Singh, were just as loyal as the defendant Jowahir Singh, and rendered loyal services to Government equally as valuable as those which were rendered by him; that after the rebels had defeated the defendant and he had retreated to Lucknow, Hurdeo Bux and Parbut Singh came to Bassadeh, drove the rebels away, and retook the fort; and that they also, with their followers, attacked the rebel Feroz Shah, one of the sons of the King of Delhi, after he had crossed the Sarain, took from him a gun, and hastened and molested his retreat.

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(1) 3 I.A. 278=26 W.R. 55.

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These loyal acts, if not in the remembrance of the Government or of its officers, must have been known by the defendant, and it must also have been known to him that the loyal services which he rendered to the Government were rendered by means of the then joint family property, and that in accepting the reward from Government he acted as the representative of the family. It may therefore reasonably be presumed that the knowledge of these facts induced him to treat the reward villages granted by the sunnud in the same manner as the ancestral villages which were the subject of the summary settlement, and accordingly it appears that from the time of the sunnud to the time of the quarrel in 1865, the reward villages, like all the others, were treated as part of the joint family estate, and were subject to the common management. This part of the case is similar in many respects to the case of *Hurpurshad* v. *Sheo Dyal*, to which reference has already been made. (*See* 4 Law Reports, Indian Appeals, 270.)

Upon the whole, then, their Lordships are of opinion that it is to be presumed from the acts and transactions of the defendant that there was a declaration of trust by him in favor of the joint family, and that up to the time of the quarrel in 1865 all the villages in suit were held by the defendant in trust for the family, as a joint family estate, governed by the rules of the Mitacshara: and they rejoice to find that a loyal subject of the Crown, who rendered good service to the Government in the time of the rebellion, has not been deprived of all his property by the act of confiscation, and through the want of knowledge or the absence of remembrance on the part of the officers of Government of the moral claim which he had upon the Government for the restoration of his property.

The plaint does not allege that the plaintiffs have been dispossessed of their rights, but merely that the defendant intends to dispossess them, and to put a stop to the profits enjoyed by them, and they simply pray that, after enquiry, proper orders may be passed that they be not deprived of their right.

Their Lordships must deal with the case as it stood at the time of the commencement of the suit.

At that time there does not appear to have been any complete separation or division of the family, and the plaintiffs do not pray for a partition of the estate. Hurdeo Bux was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint Hindoo family. Their Lordships cannot, therefore, do more than humbly advise Her Majesty, which they will do, to allow the appeal and to reverse the judgments and decrees of both the Lower Courts, and to declare that the defendant holds the villages in suit in trust for the joint family, and as a joint family estate, governed by the rules of the Mitacshara, and to order and decree that the defendant do cause and allow the said villages, and the **[612]** proceeds thereof, to be managed, used, dealt with, and applied accordingly; and that he do pay the costs of the plaintiff Hurdeo Bux in both the Lower Courts out of the estate.

Further, their Lordships do order that the costs of the plaintiff, Hurdeo Bux, in this appeal be paid by the respondent out of the estate.

A question has been raised on the argument of this appeal, whether, by reason of an arrangement alleged to have been entered into by Hurdeo Bux and Parbut Singh, pending the suit, the latter is entitled to the benefit of this appeal or the former to recover Parbut Singh's share as well as his own.

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25 W. R. 55.

It was also suggested that Parbut Singh had, after the arrangement with Hurdeo Bux, entered into an arrangement with the defendant.

Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit subsequent to the commecement thereof.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

BHAWANI AND ANOTHER (*Defendants*) *v.* MAHTAB KUAR AND OTHERS (*Plaintiffs*). [3rd March 1879.]

1879 MARCH 3. — APPELLATE CIVIL. — 2 A. 171.

Hindu law—Widow's estate—Forfeiture—Unchastity during widowhood.

Possession is not necessary to save a widow's estate from forfeiture for unchastity during widowhood; it would be enough if property has vested in her before her misconduct.

In a dispute that arose on the death in 1870 of Ganesh Kuar, the only recorded proprietor of the landed estate of Dariao Singh. her husband—who at his death left him surviving two widows the said Ganesh Kuar and Bhavani, and three daughters, his mother, and a sister—between Maharaj Singh who styled himself as the legitimate son of Dariao Singh on the one side and Dariao Singh's mother and Bhawani on the other as to the mutations to be made in the revenue registers, consequent on Ganesh Kuar's death, the settlement officers in Nov., 1871, had the names of each of the three contending parties recorded as the proprietor of one-third of the landed estate of Ganesh Kuar. A suit to have the whole recorded in Maharaj Singh's name was dismissed. Maharaj Singh's name was recorded as the proprietor of the share of Dariao Singh's mother on her death. In the present suit by Dariao Singh's sister against Maharaj Singh and Bhawani for the possession of the entire landed estate of her brother, the Court held that Bhawani, who had given birth to an illegitimate child in 1869, had forfeited her husband's estate by reason of her unchastity, that, assuming that, under Hindu law, a Hindu widow who has once inherited the estate of her husband does not forfeit that estate by reason of subsequent unchastity, that law did not apply, inasmuch as Bhawani did not acquire possession of her husband's estate until Ganesh Kuar's death in 1870, or after her misconduct, and that Maharaj Singh had no title to the property in his possession, not being the legitimate son of Dariao Singh, and passed a decree giving Dariao Singh's sister one moiety of his estate, with the consent of his daughters who had been added as co-plaintiffs and were given the remaining moiety. An appeal was preferred by the defendants to the High Court.

JUDGMENT.

[172] PEARSON, J.—There are no grounds for holding that Mussammat Bhawani, defendant, appellant, became unchaste during the life of

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her husband Dariao Singh. He died in 1869, and her illegitimate child would seem to have been born in or about 1869. It may be concluded therefore that the right of inheritance to her husband's estate jointly with his other wife, Musammat Ganesh, had vested in her by law long before she was guilty of misconduct. The lower appellate Court considers that nevertheless she has forfeited that right by her misconduct because she had not acquired possession of her husband's estate before the death of his elder wife in 1870. His reason for thinking that she did not acquire possession of her husband's estate until after Musammat Ganesh's death is merely that the latter's name only was recorded after Dariao Singh's death. But the reason does not seem to be a good one. Musammat Ganesh, when her name was recorded as her husband's heir, [173] acknowledged the joint heirship of Musammat Bhawani, and there is no reason to doubt that the latter continued to live in her husband's house, and to be supported out of his estate, with the other widow. Musammat Ganesh was probably the head of the house and the manager of the estate, but Musammat Bhawani cannot be regarded as having been out of possession. But, however this may be, we conceive it to be sufficient for the protection of her right that it had vested in her by law before her misconduct. In her presence none of the plaintiffs have any right to succeed to the estate of Dariao Singh aforesaid. It is unnecessary to discuss the question of the legitimacy of the defendant-appellant, Maharaj Singh. We decree the appeal with costs, and dismiss the suit by reversal of the lower Court's decree.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

1879 MARCH 8. — APPELLATE CIVIL. — 2 A. 173.

KHETA MAL (*Defendant*) *v.* CHUNI LAL (*Plaintiff*).

[8th March 1879.]

2 A. 173.

1. *Agreement between debtors and creditors—Arbitration—Validity.*

Where a debtor and his creditors agree to refer to arbitration the disputes between them regarding the payment of his debts and an award is passed compounding such debts and assigning all his property for the benefit of his creditors, every one of the creditors, who signs the award and receives a dividend in pursuance of it, is bound by it and cannot sue to recover debts compounded under the award, on the ground that several of the creditors had not signed the award, or that some of them had sued the debtor and recovered debts in spite of the award.

Under the above circumstances, a clause in the award directing that the debtor should dispose of his property for the benefit of his creditors, and that if he misappropriated any of his property, he should be personally liable for the loss sustained by the creditors, could not give them a right to rescind the award and fall back on their old debts, but could only enable them to proceed personally against the debtor in pursuance of the award.

2. *Contract Act (IX of 1872), S. 65—Applicability.*

It is only when an agreement is discovered to be void, or a contract becomes void, that a person who has received any advantage under it can make compensation for it to the person from whom he received it. In the above case, therefore, the contract not being or having become void, the creditors, who had received dividends under it, cannot claim to credit them towards their debts and claim the balance.

[F., 2 A. 474 (479, 480); R., 19 B. 12 (18).]

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JUDGMENT.

[177] SPANKIE, J.—Respondent admitted in his plaint that he agreed to the arbitration and the award made by the arbitrators, in which a composition was made between the creditors of defendant, appellant, and defendant himself. He admits that he signed the award, and it is certain that he accepted payments towards the satisfaction of his debt, due by defendant on his failing to meet two *hundis* when they fell due. But plaintiff avers that several of the creditors did not accept the award, and some had sued and recovered debts due to them in spite of the award: also the defendant had acted dishonestly, and had made away with some of the goods over which he was placed in charge by the award and the creditors who signed it: plaintiff was therefore compelled to sue, as there were not sufficient assets left to satisfy his debt and the debts of the others who were also suing defendant.

But it appears to me that the plaintiff and all persons who signed the award and were parties to and signed the agreement to refer to arbitration are bound by their acts. The arbitrators decided that there were not sufficient assets to discharge all the debts [178] due to that of the creditors, but the latter should surrender their claims to a sum Rs. 4,632-2-6, which is mentioned in the award as irrecoverable, and that the stores, &c., now in the defendant's possession should be made over to the creditors for their benefit. The award goes on to say that the creditors "have released Kheta Mal from the payment of the said (irrecoverable) balance of Rs. 4,632-2-6: now there is no claim for these debts by the creditor against Kheta Mal and Kashi Nath,(1) nor will there be any claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores, &c., now in their shops, nor will they have any claim to them hereafter. But Kheta Mal and Kashi Nath shall set these stores, &c., on the part of the creditors, and shall engage Bankey Lal, son of Kheta Mal and brother of Kashi Nath, and shall act as *gomashtas*; these three men shall manage the affairs for four months, getting a consolidated salary of Rs. 30 per mensem." Then come some other less important conditions and the award proceeds: "If these stores are not all sold in four months, Bankey Lal and Kashi Nath shall leave the shop and carry on their own work, leaving Kheta Mal alone to sell the balance on a salary of Rs. 10 per mensem."

There are certainly the following conditions: "If Kheta Mal realises any sums on account of stores sold from the shop, or if he has previously sold any, or realised any sums, or if he misappropriates any of the property, or if he acknowledges the claim of any other party, Kheta Mal and Kashi Nath will be responsible for the payment of such sums and for the defence to such claims: if Kheta Mal and Kashi Nath collusively allow a suit to be instituted against them, they shall be liable to pay the amount of the decree: the property made over by this award shall not be liable for the payment of such decrees, nor will such decree-holder be entitled to recover from this property, because up to-day's date, except those creditors to whom this property has been made over, there are no other creditors, inasmuch as their claims have not been admitted before us nor are their names entered in Kheta Mal's account-books no further claims remain between the parties and both parties agree to be bound by our award."

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(1) Kheta Mal and Kashi Nath together constituted the firm of Kheta Mal and Kashi Nath.

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Now, from these extracts it is quite apparent that there are no conditions such as those referred to by the lower appellate Court (1) [179] which rendered the agreement void or voidable. The defendant is made responsible under the award. No right is given to the plaintiff to rescind the agreement and repudiate the award and fall back upon his dishonoured *hundis*. The Judge's application of S. 65 of the Contract Act to this case altogether fails. The very fact that the plaintiff received on two occasions moneys in satisfaction of his claim under the award shows incontestibly that the award was carried out, and was in full operation when the suit was brought. The agreement entered into for the satisfaction of the claims of creditors was a new contract substituted for former contracts between creditors and defendant. This agreement was never discovered to be void, nor had it become void by any circumstances making it so. The defendant was the paid servant of the creditors as manager of the stores, and if he misappropriated them or behaved fraudulently, they could proceed against him and hold him responsible for losses, but only under the award. If creditors who had not signed the award obtained decrees, the creditors who had signed it could only protect themselves under the terms of the award. They could not rescind the award and fall back on their old debts in satisfaction of which the defendant had assigned all his property for the benefit of his creditors. As the award declares: "Now, there is no claim for these debts by the creditors of Kheta Mal and Kashi Nath, neither will there be any such claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores now in the shops."

I am clearly of opinion that the suit was not one that could be maintained, and that it should have been dismissed. I would decree the appeal and reverse the decrees of both the lower Courts with costs.

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(1) Material portion of the lower appellate Court's judgment :—

"Did the respondent (plaintiff) make with the appellant (defendant) a complete and valid contract by virtue of which his original right under the bills was foregone, and another right substituted for it to which he is now confined; or is he at liberty to treat that contract as incomplete and void and to fall back upon his original right under the bills? I have no hesitation in concluding that the contract or compromise between the parties was never carried out. The respondent has admitted that he received a sum of money under its provisions, but he has made restitution by suing for the balance due to him after crediting the amount. In so doing he has made the restitution required by S. 65 of the Contract Act, if the agreement is void. That it is so seems plain to me. It arose out of a proposed composition between the appellant and the whole of his creditors, by virtue of which they were to sign a deed releasing him from immediate liability and appointing their agent to carry on the business for their benefit. The respondent signed the deed, and the arbitrators handed him his dividend under the proposed composition. But about one-third of the creditors afterwards refused to sign and the appellant, instead of conducting his business as the common agent of all and for their common benefit as he had engaged to do, made separate arrangements with some of the others. On this the respondent was perfectly justified in regarding the contract as a lapsed and void agreement and in suing on his original right, restoring the amount received as dividend. I annex an English abstract (for which I am indebted to the pleader for the respondent) from which it will be seen that the signature of all the creditors and the *bona fide* management of the business for the joint benefit of all were essential conditions, the non-fulfilment of which affected the whole consideration of the agreement, and rendered it void and of no effect. With reference to the fourth plea, I may observe that no specific point was stated as to which the account-books would give satisfaction to the Court's doubts. There was proof on the record, and in the corroborative papers called for from the Court of Small Causes, to show that the business had not been carried on in good faith for the common benefit of all the creditors, as it ought to have been under the terms of the agreement in virtue of which the composition was allowed. I therefore uphold the award of the lower Court and dismiss the appeal with costs."

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STUART, C.J.—I agree in the conclusion arrived at by Mr. Justice Spankie. Both the lower Courts have utterly mistaken the law applicable to this case. There is no bankruptcy law in these provinces, nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present defendant appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can **[180]** only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and his creditors, the law, at least in these provinces, places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements, or conveyances without fraud, that is, honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors, but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person.

Now, applying these legal principles to the present case, there can be no doubt that the agreement between Kheta Mal and those creditors of his who joined with him in the arrangement was in effect such a transfer or conveyance as I have referred to, and the plaintiff, being one of creditors who accepted that mode of settlement, is bound by it, and cannot recover any balance that may remain over after the event of the award in the arbitration proceedings; and the fact that he had on foot of the award accepted **[181]** payments from the sale of the defendant's goods only still further weakens his contention that he has a surviving right of action against his debtor.

I must here observe that a more extraordinary misreading of a plain law than that afforded by the recorded opinion of the Judge as to the application of S. 65 of the Contract Act to the facts of the present case I never met with. That section of the Contract Act is in the following terms: "When an agreement is discovered to be void, or where a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it." So that, according to the Judge, the payments made to the plaintiff in the present case is merely an advantage for which compensation may be made by being

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credited to the debtor as against his *hundis*. Now, there was here no void contract, no contract void in any sense, but the arbitration proceedings between Kheta Mal and his other creditors who are parties thereto, including Chuni Lal, the plaintiff, constituted, together with the award made by the arbitrators, a good and sufficient contract, valid and effectual, against the plaintiff and those other creditors in the same position, and all these persons are thereby concluded against any further remedy *ultra* the arbitrators' award.

The present appeal must therefore be allowed, the decrees of both the lower Courts reversed, and the suit dismissed with costs in all the Courts.

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FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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NANAK CHAND AND ANOTHER (*Defendants*) *v.* RAM NARAYAN (*Plaintiff*). [11th March 1879.]

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C.P.C. (1859), Ss. 323 and 324—Arbitration.

Where there is no illegality apparent on the face of an award, a Court cannot remit it for reconsideration by the arbitrator, nor can it set aside the award and proceed to determine the suit itself.

[R., 3 A. 636 (640), 22 M. 202 (204), L.B.R. (1893—1900), 548 (549), 66 P.R. 1907=159 P.L.R. 1908=148 P.W.R. 1907, 5 A.L.J. 658=A.W.N. (1908), 228=30 A. 505.]

JUDGMENT OF THE DIVISION BENCH.

[183] PEARSON, J.—I concur with the lower appellate Court in the opinion that the Munsif was warranted, under the terms of S. 323 of Act VIII of 1859, in remitting the award, which was apparently illegal, for reconsideration on the point of law; and that, inasmuch as the arbitrator declined to determine the point, the award became incomplete and null; and I hold that, under the circumstances, the provisions of S. 324 are inapplicable, and that the Munsif was competent to set aside the award, so incomplete and null, and to proceed to try and decide the case himself. I further **[184]** hold that the Hindu law, if not by law expressly applicable to the case, was the law which equity, justice, and good conscience required to be applied to it. I would therefore dismiss the appeal with costs.

SPANKIE, J.—The parties to the suit of their own free will appointed Lala Sham Lal, a pleader of the Court, their arbitrator, and agreed to accept whatever might be his decision in the case. An order dated the 17th June was sent to the arbitrator to decide the case and send in his award and the papers embodying the result of his inquiries, and that copies of the papers in the case be sent to him. On the 12th July the arbitrator submitted his award. He states that he had investigated the case, and had taken down the depositions of the witnesses and the statements of the parties. He had also taken into consideration the *custom of brotherhood*, and perused the *passages in the Hindu law referred to by the parties and their pleaders*. It is admitted, he adds, by both parties

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that up to date the plaintiff, his father, and defendants carry on business in partnership, and that they are the joint owners of the firm known as Ganga Bai Chain Sukh: it is admitted by the plaintiff that nearly Rs. 1,000 were expended on his marriage from the joint firm: therefore the plaintiff cannot get back Rs. 520 which he got on marriage, and which were credited in the joint firm opposite to the debit side, no matter if he paid that amount to the defendant or to his father: this point was out of question, because the sum was credited in the account books of the joint firm; with reference to the circumstances of the case, it did not appear proper to award costs to defendants. The result of this award was to dismiss the claim, both parties bearing their own costs. No exception was taken to this award, which, indeed, the referring Court pronounced to be "admirable and excellent." But on the 22nd July the plaintiff objected to the arbitrator's law, and on the 9th August he presented to the Munsif an exposition of the law by some Hindu *pandits* at Benares. The Court, stating that the exposition of the law differed from the view of the Hindu law relied upon by the arbitrator, ordered that the award should be returned to the arbitrator in order that he might consider the law as expounded by the *pandits*, and submit his opinion in writing about it. The arbitrator stated his inability to determine the case, and declined to act any further in it. **[185]** The Munsif took up the case and decreed the plaintiff's claim, and the lower appellate Court affirmed the decree. It is contended by defendant that the Munsif had misapprehended S. 323 of Act VIII of 1859, and should not have referred the award back to the arbitrator: no award can be set aside except as provided by S. 324 of Act VIII of 1859.

I would accept the pleas in appeal. The award had not left undetermined any of the matters referred to arbitration, nor had it determined matters not referred to arbitration. It was not so indefinite as to be incapable of execution. Looking at the terms of S. 323, the only other ground on which an award could be remitted is that an objection to its legality was apparent on the face of the award. No exception to the award was taken under S. 324. But on the 22nd July the plaintiff objected that the *Shastras* were in his favour, and it was brought to the Court's notice, and nearly a month after the delivery of the award, that a *pandit* at Benares expounded the law differently from the arbitrator. Now the parties had agreed to abide by the decision of the arbitrator. His view of the law might be right or wrong, but there is no illegality apparent on the face of the award which justified the remission of the award to the arbitrator. It was as if the plaintiff had asked for a review of judgment, and produced fresh evidence in his own favour. Where parties agree to abide by the decision of an arbitrator, both are supposed to concede something, and they are, I think, bound to abide by the decision, though, perhaps, a Court might have determined the point differently. I would decree the appeal and reverse the decision of both Courts and enforce the award.

The defendants preferred an appeal to the Full Court under Cl. 10, Letters Patent, against the judgment of Pearson, J., again raising the contention that the award could not be set aside.

JUDGMENTS OF THE FULL BENCH.

[185] STUART, C. J.—The procedure before the Munsif in this case appears to me to have been most irregular. Under S. 323 of Act VIII of 1859 the Munsif could only remit the award for reconsi-**[186]**deration if an objection to its legality is apparent *on the face of it*. But instead of considering the matter in this simple light the Munsif, on the 9th August,

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1875, made the following extraordinary and anomalous order: "Apparently it appears that the principles of Hindu law relied upon were decided against the petitioner in the arbitration award: therefore it is ordered that the award may be sent to the arbitrator to consider the *bywasthas* attached to this petition, and submit his opinion in writing to the Court." Or as if he said in other words, "It appears that the principles of Hindu law *were* applied by the arbitrator, but something more is wanted, and 'therefore' the award must go back to him for reconsideration." If such is not the meaning of the order, the *therefore* should have led to the very different conclusion of the award being accepted and applied by the Munsif, especially as he had admitted in his judgment not only that "the inquiry and award made by the arbitrator are admirable and excellent," but that the award was "in conformity with the evidence on the record."

It will be seen that, instead of showing that the award is illegal "on the face of it," the Munsif expresses his order in terms that ought to have led him to the opposite conclusion, but nevertheless he, at the same time, and Ss. 323 and 324 of Act VIII of 1859 notwithstanding, entertains the complaint that the findings in the award were opposed to the authorities in Hindu law relied upon by the plaintiff, and for this reason, and for this reason alone, he orders that the award may be sent back to the arbitrator for reconsideration, but admitting notwithstanding, so far as the language of his order is concerned, that the principles of the Hindu law had evidently been considered in making the award, in other words, that the arbitrator had done his duty. Such procedure not only cannot be allowed to stand for one moment, but in my opinion is deserving of the severest censure. Nor does the arbitrator, finding himself placed in the position assigned him by this foolish order, appear to have been a whit more intelligent in the matter than the Munsif, for he submitted himself uncomplainingly to it, and only noticed it by a petition, dated the 28th of August, in which he referred to the bad state of his health and the difficulties of the case, among others, certain Sanskrit texts which he had been unable [187] to understand or to get satisfactorily translated for him. In this petition, however, the arbitrator goes chiefly upon his bad health and his consequent inability to proceed with the case. He therefore declines to act any further, and he begs the Court either to decide the case itself or to appoint another arbitrator in his stead. The Munsif adopted the former course, proceeded with the case, and decreed the plaintiff's claim, which decree was affirmed by the lower appellate Court.

All this procedure was utterly mistaken. I have carefully perused the award, and in my judgment it shows no illegality on the face of it. It recites the reference to the arbitrator for his decision, and then it states as follows: "I have investigated the case to my satisfaction, and have taken down the depositions of witnesses and the statements of the parties I have also taken into consideration the custom of the brotherhood to which the parties belong, *and perused the passages in the Hindu law referred to by the parties and their pleaders.*" Now in the face of such a statement the Munsif had no right to assume that the arbitrator had not correctly applied the Hindu law. Any error of the kind must appear on the face of the award itself, which, however, on the contrary states "he had perused the passages of the Hindu law referred to by the parties and their pleaders." This I consider was a sufficient compliance with his duty as an arbitrator under the Code of Procedure, Act VIII of 1859, and if the Munsif differed from him, and believed that he had not correctly applied the principles of the Hindu law, the award was not thereby rendered invalid, and ought not to have been remitted for reconsideration, for on

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the face of it it was right, and it is distinctly provided by S. 324 of Act VIII of 1859 that "no award shall be liable to be set aside except on the grounds of corruption or misconduct of the arbitrator or umpire. In fact, in accepting him as their arbitrator, the parties accepted his judgment and opinion, and his understanding of the Hindu law applicable to the case, and were bound by his judgment and opinion and his law, no matter how mistaken he may have been in these respects. And the Munsif who, as I have shown, admits in his judgment that the award was excellent and admirable and unimpeachable on the evidence, was bound by it too, and he ought to have given judgment [188] according to it, his judgment being final and not open to appeal to the Judge or Subordinate Judge.

Holding this opinion, and, I must add, holding it very clearly, I would, concurring with Mr. Justice Spankie, allow this appeal, and reverse the judgment of the Division Bench, and I would set aside the whole procedure before the Munsif subsequent to the filing of the arbitrator's award, and order a decree by this Court according to the award, and dismiss the suit, with costs, in all the Courts.

PEARSON, J.—The question to be determined by the Full Bench is, I presume, whether the judgment which is the subject of the present appeal rightly or wrongly disposed of the special appeal heard by the Division Bench. If reference be made to the grounds of the special appeal, it will appear that two substantial questions are raised by it, first, was the Munsif justified in remitting the award for consideration; second, was he justified in setting it aside when the arbitrator refused to consider it. The first of these questions will include the applicability of the Hindu law to the matter in dispute. The plaintiff claimed to recover from his uncles a sum which he had received from his father-in-law as a marriage present, and which, he alleged, they had appropriated to their own use. Their defence was that they had not taken it but that it had been expended on this marriage by his father. The matter being referred to arbitration, the arbitrator disallowed the claim, because the sum claimed had been entered in the accounts of the family firm, as a set-off against the plaintiff's marriage expenses. The award is obviously unsatisfactory, but on the plaintiff objecting that it was opposed to Hindu law, and filing *bywasthas* in support of the objection, it appeared to the Munsif that it was bad in law. This being so, I conceive that he was not only justified in remitting for reconsideration, but was bound to remit it. Both the lower Courts have now decided that the plaintiff's claim is valid under the Hindu law. It was not pleaded in the special appeal, and it was not pleaded in the present appeal, that the lower Court's exposition of Hindu law is erroneous. What was pleaded in the special appeal was that the Courts were not bound to apply the Hindu law to the case. I ruled that the Hindu law, if not by statute law expressly [189] applicable was the law which equity, justice, and good conscience required to be applied to the case. It is now pleaded that my ruling is incorrect. I entertain no doubt of its correctness myself, and I shall be surprised if the plea should find its acceptance.

On the other question whether, on the refusal of the arbitrator to reconsider his award, the Munsif was justified in setting it aside and proceeding to try the case himself, I do not perceive that my honorable colleague on the Division Bench in the judgment delivered by him on the 28th June, 1877, expressed an opinion different from that expressed by me. It is obvious to remark that, if the Munsif was precluded from setting aside the award in this case by the provisions of S. 324 of Act VIII of 1859, he would be precluded from so doing in a case in which an arbitrator refused to reconsider an award which left undetermined some

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of the matters referred to arbitration, and was so indefinite as to be incapable of execution; and such a contention could not probably be maintained.

In my judgment the pleas in appeal are without weight, and the appeal should be dismissed with costs.

TURNER, J.— * * * The plaintiff's pleader obtained the opinions of some *panditts* who averred as is not disputed that gifts at marriage are regarded as separate acquisitions, and petitioned the Munsif to remit the award, with these opinions, to the arbitrator. The Munsif without declaring that an objection to the legality was apparent on the face of the award remitted the award with the opinions, and requested the arbitrator to consider them, and to return his opinion in writing in a week.

In special appeal the honorable Judges of the Division Bench differed as to whether or not an objection to the legality of the award was apparent on the face of it. The Senior Judge held such an objection was apparent, and that the Munsif was therefore justified in remitting the award for the consideration of the point of law. It is to be observed that the plaintiff did not come into Court alleging that he and the defendants were members of a family. Nor did he allege that the defendants claimed to retain the money as falling into and forming part of the common stock. They were charged with having appropriated the money to their own use, and they denied **[190]** that they had received it, but admitted it had been credited in the books of the firm in which they, the plaintiff, and his father, were jointly interested against a larger sum expended on his marriage. It is to be noticed that, if there had been a question as to whether the moneys received on the plaintiff's marriage formed part of a common stock, or even of the partnership funds, the plaintiff's father should have been made a party to the suit. On the proceedings I do not see that there was an objection to the legality of the award apparent on the face of it. If one partner sues another for moneys recoverable on his account, it would surely be an answer that the moneys so received had been credited against a debt due by him to the firm.

I therefore am of opinion that the Munsif was not justified in remitting the award to the arbitrator. At the same time having perused the evidence it is apparent to me that the questions really in issue were not properly raised by the pleadings; and, moreover, that they are not disposed of by the judgment of the Court below. The parties are members of a family who, while retaining undivided the firm which has descended to them from their common ancestor, have also separate dealings, and I have no doubt that the dispute arises out of the question as to whether or not expenses relating to the plaintiff's marriage ought to be met by the separate property of his father or out of the joint firm. The questions which called for determination in this suit appear to me to be the following: Did the sums received on the occasion of the plaintiff's marriage come to the hands of the defendants: If they did have they been appropriated by the defendants to their own use: for if they have been so appropriated, the defendants are liable, and it is unnecessary to go further: but if the moneys have not been appropriated by the defendants to their own use, but have been carried into the firm, then the question arises whether the defendants were at liberty to set them off against expenses incurred by the firm on the plaintiff's marriage, and before determining this issue, the plaintiff's father should have been made a party to the suit. All proper parties being before the Court, it should then have been inquired whether the joint fund or the separate estate of each of the partners should have

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been charged with the marriage expenses of the members of the family. Had the parties been members of a Hindu family living altogether **[191]** in commensality, I admit that the plaintiff would have been entitled to claim his marriage presents as a separate acquisition, and that the Courts would be justified in applying Hindu law, and I hold further that, in determining whether the joint or separate estate should bear the expenses of the plaintiff's marriage, the Courts are justified in applying Hindu law controlled as it may be by the agreement binding on the members as to the purposes to which the property remaining undivided should be applied. In my judgment the appeal should prevail and be decreed, the claim being dismissed on the ground that the award was a good award, and that a decree should have passed in accordance with it, but if it be held that the award was open to the objection urged, and that the plaintiff was justified in trying the suit on the merits, it is in my judgment necessary for the purposes of justice that such of the issues suggested by me as are undisposed of by the judgment of the Subordinate Judge should be tried, and I would remit them for that purpose.

SPANKIE, J.—I adhere to my opinion. With regard to the nature of the claim, the statements of the parties, the reference to arbitration, and the award itself, I see no illegality apparent on the face of the award, and therefore it was not one with which the Munsif could interfere under S. 323 of Act VIII of 1859. It may be erroneous in law, but, if so, that error is not apparent on the face of the award, and therefore it cannot be set aside merely because it is erroneous in law.

OLDFIELD, J.—I am of the same opinion in this case as Mr. Justice Spankie. The award was improperly remitted to the reconsideration of the arbitrator, as there was no ground under S. 323 which justified the Munsif to remit it. There was no objection to the legality of the award apparent on the face of the award; the decision was made upon facts in connection with the partnership relations of the parties, and the Munsif in remitting the award does not point out the particular illegality apparent upon the face of the award, nor does he appear to have come to any conclusion that there was an apparent legal defect; he merely remitted it that the arbitrator should consider some objections which the plaintiff alleged against a supposed view of the Hindu law taken by the arbitrator.

[192] There were no objections taken under S. 324, and under the circumstances the Court should have given judgment according to the award.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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FAZAL MUHAMMAD (*Plaintiff*) *v.* PHUL KUAR (*Defendant*).

[11th March 1879.]

Appeal under Cl. 10 of the Letters Patent—Limitation.

Under the rules of practice of the 21st May, 1873, regarding the admission of appeals under Cl. 10 of the Letters Patent, a copy of the judgment appealed from need not accompany the memorandum of appeal; therefore, in computing

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the period of limitation for such an appeal, the time for obtaining a copy of the judgment could not be deducted.

[App., 20 M. 476 (479); R., 9 A. 115 (118)=6 A.W.N. 306, 32 B. 14 (F.B.)=9 Bom. L.R. 1138=2 M.L.T. 410.]

In an appeal to the Full Court, under Cl. 10 of the Letters Patent, preferred two days after the expiry of the period of limitation, the appellant contended that the time requisite for obtaining a copy of the judgment appealed from should be deducted in computing the period of limitation, but the respondent opposed this contention on the ground that the Rules of Practice adopted by the High Court on the 21st May, 1873, regarding the admission of appeals under Cl. 10, of the Letters Patent, did not require a copy of the judgment appealed from to be presented with the memorandum of appeal.

JUDGMENT.

[192] The Full Bench is of opinion that the appeal is beyond time and not entitled to be admitted. It is therefore dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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NIKKA MAL AND OTHERS (*Plaintiffs*) *v.* SULAIMAN SHEIKH GARDNER (*Defendant*). [18th March 1879.]

2 A. 193.

APPELLATE CIVIL.

Usufructuary mortgage—Suit for enhanced Government revenue paid by mortgagee—Cause of action.

Where, by the terms of a deed of usufructuary mortgage, the mortgagor accepts the liability for any enhanced revenue that may be paid by the mortgagee over and above the amount of such revenue entered in the mortgage-deed, and there is no provision or reservation for the adjustment of any such payments by the mortgagee to be made at the termination of the mortgage tenure, the mortgagee may sue during the currency of the mortgage for excess revenue paid by him.

[R., 13 A. 195 (197)=10 A.W.N. 228.]

JUDGMENT.

[194] PEARSON, J.—By the terms of the deed of mortgage, dated 28th May, 1869, the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. The mortgagees, averring that they have had to pay Rs. 1,907-13-3 in excess of the amount of the Government demand entered in the mortgage-deed from 1279 to 1281 fasli, sue to recover that amount with interest. The lower Courts have disallowed the suit on the ground that the mortgagees are not competent to prefer a claim of this sort in a suit during the currency of the mortgage-tenure. Such a claim, in the opinion of the lower Courts, can only be properly advanced and adjusted when a settlement of accounts between the parties takes place at the termination of the mortgage-tenure. One obvious objection to the opinion of the lower Courts on this subject is that no settlement of accounts is contemplated by or is necessary under the provisions of the deed of mortgage, which allows the mortgagees to appropriate the profits realised by them during the terms of mortgage in lieu of interest, and the

mortgagor to recover his estate at the end of that term by payment of the principal or the **[195]** amount of the loan. Another not less obvious objection is the unreasonableness of expecting the mortgagees to make large payment year after year for the mortgagor to be treated as mere supplements to the original loan. But apart from the objections aforesaid, the view of the lower Courts that a suit of the nature of the present cannot be brought year by year by the mortgagees for the recovery of any sums paid by them in excess of the amount of the Government demand at the time of execution of the deed of mortgage, merely because there is no express provision made for such suit being brought in the deed of mortgage, is quite untenable. The law authorises a man to sue for a debt whenever it becomes due to him. The mortgagees could only have been precluded from so suing, had there been an express provision in the deed reserving the adjustment of such claims to the moment when the mortgage-tenure should be brought to an end. It is admitted that a similar suit has been already once before brought by the mortgagees. It was not then pleaded that the suit was premature and could not be entertained. On the contrary it was entertained and the claim was decreed. The lower appellate Court has remarked that the deed of mortgage has been carelessly drawn up, inasmuch as the mortgagees are authorised to raise the rents, yet no provision is made for the disposal of the increased profits due to their enhancement; although it can hardly be supposed that it was the intention of the mortgagor that she should pay any increase of revenue to Government, and that the mortgagees should enjoy all the corresponding increase of profits consequent on the enhancement of the rents. We observe, however, that in the present case it is no part of the defence that the increased demand of the Government has been met by a corresponding enhancement of rent. On the contrary the plea is that although empowered to enhance the rent, the mortgagees have neglected to do so. There is nothing in the deed of mortgage binding the mortgagees to enhance the rents in the event of the *jama* being enhanced. All that is said is that "if the mortgagees wish to enhance the rent of any tenant, they may enhance it, &c." On the other hand the liability undertaken by the mortgagor to pay any additional demand made by the Government is not limited by any condition that such increased demand cannot **[196]** be met by a corresponding enhancement of rents. In the former suit to which reference has been made it was held that enhancement of rents by the mortgagees would not debar them from recovering enhanced *jama*; and the ruling was not impugned by appeal. The ground on which the suit has been disallowed by the lower Court failing, it does not appear that there is any substantial defence to the suit, or that in reference to the foregoing remarks it is necessary to remand the case for the trial of the other issues laid down for trial by the Court of first instance.

We decree the appeal and claim with costs in all the Courts, and interest at 6 per cent. per annum from the date of this decree to the date of realisation.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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APPELLATE CIVIL.

THE COLLECTOR OF MORADABAD (*Defendant*) *v.* MUHAMMAD DAIM KHAN (*Plaintiff.*) [20th March 1879.]

2 A. 196.

Execution of decree—Distribution of sale proceeds—Claim for Court-fees—Prerogative of the Crown.

2 A. 196. When the same property is attached and sold, at the instance of the Collector for recovery of Court fees in a pauper suit, and at the instance of a lien-holder, the former is entitled, as representing the Crown, to be paid first, out of the sale proceeds, the amount of Court fees due in connection with the pauper suit. The principle that the Government takes precedence of all other creditors is not liable to an exception in the case of lien-holders. (1 B. 7, *Appl.*).

[Overruled, 29 A. 537 (540) (F.B.) = A.W.N. (1907) 157 = 4 A.L.J. 720; Not F., 7 M. 434 (436); F., 33 C. 1040 (1046) = 10 C.W.N. 857; Appr., 25 M. 457 (493); R., 18 B. 237 (240).]

In order to recover the amount of Court fees which the plaintiff in a pauper-suit would have had to pay, had he not been permitted to sue as a pauper, the Collector representing Government caused certain property belonging to the defendant in such suit, who had been ordered by the decree in such suit to pay such amount, to be attached. Subsequent to this the same property was again attached in execution of a decree obtained by the plaintiff in this suit against the defendant in such suit on a bond for the payment of money, in which the same property was charged with such payment, such decree directing that the property should be sold in satisfaction of the decree, and the same was sold in the execution of this decree, and the Collector was first paid out of the sale proceeds, and the surplus remaining was paid to the plaintiff in this suit, who now sued the Collector to recover the amount paid to him. The first Court holding that the Government was entitled to be paid first out of the sale proceeds, dismissed the suit, but the lower appellate Court reversed it. The Collector appealed to the High Court.

JUDGMENT.

[197] PEARSON, J.—In our opinion the ground of appeal is valid and must be allowed. The Bombay High Court's decision in the case of *Ganpat Putaya* v. *The Collector of Kanara* (1) appears to be applicable in the present case. The principle that the Government takes precedence of all other creditors is not liable to an exception in the case of lien-holders. We decree the appeal with costs, and, reversing the lower appellate Court's decree, restore that of the Court of first instance.

(1) 1 B. 7.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colville, Sir M. E. Smith, and Sir R. P. Collier.

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On Appeal from the High Court of Judicature at Allahabad, North-Western Provinces.

STUART SKINNER *alias* NAWAB MIRZA (*Plaintiff*) *v.* WILLIAM ORDE AND OTHERS (*Defendants*). [21st March 1879].

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1. *Pauper petition—Payment of Court-fees by petitioner—Institution of suit—Limitation.*

When a person, being a pauper, petitions to sue *in forma pauperis* and afterwards, pending enquiry into his pauperism, obtains funds and pays the Court-fees required for his suit, and his petition is, on such payment, numbered and registered as a plaint, his suit must be deemed to have been instituted from the date when he filed his pauper petition, and not when he paid the Court-fees; and limitation for the suit runs against him only up to the former date. (1 A. 230, *reversed*).

[**F.**, 4 O.C. 250 (251), 74 P.R. 1903, 28 M. 493 (495)=15 M.L.J. 219, 3 L.B.R. 194, 123 P.R. 1907=82 P.W.R. 1907, 15 A. 65, 15 M. 78, 28 C. 427, 21 B. 576, 22 B. 849; **Appl.**, 4 A. 37 (39)=1 A.W.N. 129; **R.**, 1 O.C. 272 (276), 159 P.L.R. 1901, 59 P.R. 1903=129 P.L.R. 1903, 78 P.R. 1906=150 P.L.R. 1906, 1 S.L.R. 71, 5 C. 807, 19 C. 780, 20 C. 41, 26 C. 925; **Rel.**, 12 A. 129; **D.**, 18 A. 206 (208, 209)=16 A.W.N. 33, 9 Bom. L.R. 204, 24 C. 889, 20 M. 319, 20 B. 508, 13 A. 305]

2. *Transfer of suits from one Sudder Court's jurisdiction to another—C.P.C. (1859), S. 13.*

Although S. 13 of the C.P.C. (1859) empowers a Sudder Court to give authority to a Subordinate Court, with the concurrence of another Sudder Court to proceed with a suit for immoveable property, situate in districts within the jurisdiction of both, there is no power given by the Act authorizing a Sudder Court to transfer a suit brought in a Court subordinate to it, to a Court subordinate to another Sudder Court.

Quære—Have two Sudder Courts acting in concurrence power to make such a transfer?

This is an appeal from 1 A. 230, reported at p. 157, *supra*.

The question of law raised in this case was—"Whether the claim of the appellant, who had originally applied for leave to sue *in forma pauperis*, but had afterwards paid the institution fees, was barred by limitation.

JUDGMENT.

[245] SIR MONTAGUE E. SMITH.—The decision of this appeal is attended with considerable difficulty, since it presents a case which is not provided for by the Code of Civil Procedure. It becomes of importance to the parties, because the decision of the point of practice determines the question whether or no the Statute of Limitations is a bar to the claim of the plaintiff. The original petition was filed in the Court of the Subordinate Judge of Meerut on the 20th February 1873. The claim of the plaintiff was to a share of the property devised by the will of the late Colonel Skinner. His claim arose upon the death of his father, Major Skinner, which occurred on the 22nd April 1861. The petition set out all the particulars required in a plaint, and prayed that the plaintiff might be allowed to sue *in forma pauperis*. The claim embraced landed property which was situate partly within the jurisdiction of the High Court of the North-West Provinces and partly within the jurisdiction of the

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Chief Court of the Punjab. The Judge of Meerut, **[246]** apparently of his own motion, rejected the petition, on the ground that the question of the plaintiff's pauperism could be more conveniently tried in the Punjab. The plaintiff thereupon filed it in the Court of the Deputy Commissioner of Delhi, and on the 14th April 1873 an order was made by that Court, after examining witnesses, admitting the plaintiff's suit *in forma pauperis*. Before proceeding further with the suit, the Deputy Commissioner applied to the Chief Court of the Punjab for authority to proceed under S. 13 of the Code of Civil Procedure. That section enacts: "If the districts within the limits of which the property is situate are subject to different Sudder Courts, the application shall be submitted to the Sudder Court to which the district in which the suit is brought is subject, and the Sudder Court to which such application is made may, with the concurrence of the Sudder Court to which the other district is subject, give authority to proceed with the same." On the 29th of May 1873 the Chief Court of the Punjab, presumably, not without having consulted the High Court of Allahabad, directed that "the plaint should be returned to the plaintiff with instructions that he should present it to some Court in the North-West Provinces." Accordingly the plaintiff took the proceeding back to the Court of Meerut from which he had been originally driven, and on the 19th July 1873 an order of the Subordinate Judge of Meerut was made: "That the case be brought on the file, and numbered." Their Lordships think it must be assumed that this order was complied with, and that the plaint was brought upon the file, and was numbered.

The first question which arises is, whether the finding of the Deputy Commissioner of Delhi, that the plaintiff was a pauper, can be imported into the suit when it found its way upon the file of the Court at Meerut, and that depends upon the construction to be given to Ss. 11, 12 and 13 of the Code of Civil Procedure. Undoubtedly, when a suit is in the position in which the present suit stood in the Court at Delhi, it would be convenient and proper when an application had been made by the Judge of the Delhi Court to the Chief Court of the Punjab, and that Court is required, before it acts, to consult the Judges of the High Court in the jurisdiction to which the plaint is to go, that those two Courts having consulted together should have power to direct that the cause **[247]** should be transferred in its then state to the Court to which they think it right and expedient that it should go. But the legislation stops short of enacting that it should be so transferred. What it enacts is that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer. Their Lordships having come to the conclusion to decide the case in favour of the appellant upon another ground, do not desire unnecessarily to express an opinion upon this first point. There being a grave doubt, at the least, whether the two Courts have power to make the transfer, they think it would be a proper addition to be made to this section, that this power should be conferred upon them.

The other question which has been raised is as to the effect of the proceedings in the Court of Meerut, and whether the judgment of the High Court affirming that of the Subordinate Judge of Meerut is correct in holding that the suit is to be considered as instituted when the plaintiff paid the amount of the stamps into Court, and that the petition was converted into a plaint from that time only.

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In order to explain the view their Lordships have taken of this point, it will be necessary to refer to some of the proceedings. The order of the 19th July 1873 directing the case to be put on the file and numbered has been already adverted to. When that was done the defendants put in written statements objecting that the plaintiff ought to establish his position as a pauper in the Meerut Court, treating what had taken place at Delhi as irrelevant, and upon these statements, on the 10th November 1873, the Subordinate Judge of Meerut directed that the case could not be heard, and rejected the plaint. There was an appeal to the High Court from that decision, and on the 10th July 1874 the High Court held that the time of the abortive proceedings at Delhi should be deducted from the period of limitation, and "remanded the suit" to the Subordinate Judge, directing him to proceed with it. That being so, proceedings were taken by him with a view to an inquiry into the pauperism of the plaintiff. Issues were framed, and a day was fixed for the trial of those issues; the day so fixed **[248]** was the 27th November 1874. On that day the plaintiff presented a petition praying for leave to deposit the amount of the stamps, alleging that he had succeeded in negotiating a loan for a sum of money sufficient to cover the amount of the institution stamps. It appears that on the same day, having obtained the permission of the Subordinate Judge, the plaintiff paid the proper stamps into Court. That having been done, the defendants raised two objections; first, that the suit ought not to proceed, because the plaintiff had fraudulently applied to be made a pauper when he had property; and secondly, that the suit should be regarded as instituted on the date the Court-fee was paid, which was beyond the period of limitation. The Subordinate Judge went into evidence on the first issue, and found that there had been no fraud on the part of the plaintiff in filing a petition to be allowed to sue as a pauper, and therefore it must now be taken that that petition was filed *bona fide*, and without fraud. On the other point the Judge held in effect that he saw no reason why, upon payment of the fee, the suit should not be deemed to be instituted on the day "which the pauper admittance would have carried," and added: "The Court, then, would allow the case to proceed on its present basis, but at the same time would suggest to the defendants the advisability of appealing to the High Court to determine whether by the substitution of the institution fee, the case is to be deemed a plaint and deemed to be filed on the day on which the application to sue *in forma pauperis* was originally submitted." The Judge then directed that the application should be numbered and registered, and be deemed the plaint in the suit, and that a day be fixed for the settlement of issues. This was the first opinion of the Subordinate Judge, but he appears afterwards to have resiled from it, and to have framed issues, two of them raising the questions which are now before their Lordships for decision. First—"Can an 'application' to be allowed to sue *in forma pauperis* be converted into a 'suit' as between parties at any subsequent date by filing the institution fee, and in the latter instance, from what date should the institution of suit be calculated;" the second, "Is the suit barred by efflux of time?" Three other issues were settled as to the merits of the case, and the Judge, after settling these issues, examined witnesses. On the 6th July 1875 he gave judgment. Having referred to the dates of the application to sue *in forma pauperis*, and to **[249]** some of the other dates of the proceedings, he says: "The granting of the application, then, constitutes an essential ingredient to further progress, as an ordinary suit with the privilege of limitation counting from the day the petition to sue *in forma pauperis* was presented, and not

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from the date when it was registered under S. 308. But it will be seen that prior to the application to sue *in forma pauperis* being granted and whilst the question was still under inquiry and investigation, the plaintiff has converted the matter into a regular suit, the consequence of which is that he has by his own act given up the advantages or disadvantages (as the case might be) of the position he may have become possessed of. By such act the pauper application died a natural death, and by the conversion the regular suit came into operation on its own individual and inherent basis from date of such conversion, and as a consequence, in computing limitation, the computation must be made from date of such conversion, which places the plaintiff out of Court." No doubt, if the Judge is right, the plaintiff would be barred by the Statute of Limitations, and the plaint would be properly rejected. There was an appeal from that decision to the High Court, which affirmed it. The following passage of their judgment gives the view of the High Court on the question: "But there is no provision in the law which allows the application presented under S. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court-Fees Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees." The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid.

Now a petition to sue *in forma pauperis* contains all that a plaint is required to do. By S. 300 "the petition shall contain the particulars "required by S. 26 of this Act in regard to plaints, and shall have annexed "to it a schedule of any moveable or immoveable property belonging to "the petitioner, with the estimated value thereof, and shall be subscribed "and verified in the manner **[250]** hereinbefore prescribed for the "subscription and verification of plaints." Therefore it contains in itself all the particulars the statute requires in a plaint, and, *plus* these, a prayer that the plaintiff may be allowed to sue *in forma pauperis*.

The Act provides what shall happen if the prayer of the petition be granted by S. 308. It also provides by S. 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that, unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed, and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that inquiry, the plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The defendant, so far from being a sufferer by that change, is benefited, as both parties will go on with the litigation on equal terms. Is there, then, anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the plaintiff be compelled to commence *de novo*? Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical, the Court should have

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rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July, 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

[251] This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by S. 308 than that contemplated by S. 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what would have happened in this case. Their Lordships of course say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the plaintiff could have happened than that he should have been deprived, by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the consideration which would determine the judgment would then have been different.

Their Lordships have only to advert to the Statute of Limitations, Act IX of 1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in S. 4 is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The respondents must pay the costs of the appeal.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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2 A. 198.

BHOLA NATH AND ANOTHER (*Plaintiffs*) *v.* BALDEO (*Defendant*).

[24th March 1879.]

2 A. 198.

1. *Registration Act, 1871, Ss. 18 and 50—Registration Act (1877), Ss. 17, 18 and 50—Registered and unregistered instruments—Priority.*

Under the Registration Act, 1871, a subsequent registered instrument, compulsorily registered, does not take effect, with respect to the property affected by it, as against a prior unregistered instrument affecting the same property, which is optionally registrable.

[F., 7 C. 570; R., 13 B. 229.]

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APPELLATE CIVIL.

2 A. 198.

2. *Registration Act, 1877, S. 50—Retrospective effect.*

The provisions of S. 50 of the Registration Act, 1877, have no retrospective effect.

[R., 6 B. 168 (192) (F.B.).]

Certain persons who mortgaged their share in a certain village to one Baldewa by an unregistered deed dated the 15th August, 1872, the registration of the same being not compulsory, subsequently again mortgaged such share to one Bhola Nath and a certain other person, by two separate registered deeds, both dated the 3rd October, 1872.

Bhola Nath and his co-mortgagee obtained a decree on these deeds, in execution of which the share was sold on the 23rd October, 1876, the mortgagees purchasing the property. Baldewa having obtained a decree on his deed sought to bring the share to sale in execution thereof. On the day fixed for the sale Bhola Nath and his co-mortgagee satisfied Baldewa's decree, and then instituted the present suit against Baldewa and the mortgagors to recover the amount which they had paid on account of Baldewa's decree.

Both the Courts below dismissed the plaintiffs' suit. The plaintiffs preferred an appeal to the High Court.

JUDGMENT.

[199] SPANKIE, J.—Both the bonds were executed in 1872, and as far as the deed of plaintiff, appellant, is affected, the registration law in force at the time of its execution was Act VIII of 1871. By S. 50 every document of the kind mentioned in clauses (*a*) and (*b*) of S. 18 shall, if duly registered, take effect as regards the property comprised therein against every other unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. But S. 18 applies to documents of which the registration is optional. The registration of the deed of plaintiffs was compulsory. We need not interfere. Act III of 1877 does not, we think, apply. The unregistered document in that Act (S. 50) means one not registered under Act VIII of 1871 or that Act, although executed after the 1st July, 1871. But still the Act introduces for the first time clauses both of S. 17 and S. 18, by which introduction all **[200]** registered documents take effect henceforth as against unregistered documents of which under the Act the registration is optional, subject of course to the explanation in the section. Whereas S. 50 of Act VIII of 1871 gives a preference to registered documents of the kind mentioned in clauses (*a*) and (*b*) of S. 18 over the unregistered document, subject again to the explanation added to the section, so that by Act VIII of 1871 it is only the duly registered documents (though registration is only optional) which take effect against the unregistered documents. As the documents referred to in this suit were both executed after the 1st July, 1871, and before Act III of 1877 came into force, the former Act would seem to apply. We agree with the lower appellate Court that no collusion or fraud between the defendants having been established, and the decree having been passed in favour of the first mortgagee, there was nothing to prevent the sale of the property in execution of that decree. If plaintiffs chose to satisfy the decree for their own purposes, they do not thereby seem to have any legal claim upon defendant, the decree-holder, for a refund of the money so paid by them. We affirm the decree of the lower appellate Court, and dismiss the appeal with costs.

FULL BENCH.

PRESENT :

Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

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FULL BENCH.

SHIMBHU NARAIN SINGH (*Plaintiff*) *v.* BACHCHA AND ANOTHER (*Defendants*) [25th March 1879].

2 A. 200.

Act XVIII of 1873 (N.W.P. Rent Act), S. 95, Cl. (n)—Decision of title—Res Judicata.

The determination of a question of title by a Revenue Court, on an application under Cl. (*n*), S. 95 of the Rent Act, by a dispossessed tenant, for recovery of the occupancy of land, is *res judicata*, and cannot again be raised in a Civil Court, as the Revenue Court could not have disposed of the application without determining such question of title. (*Per* Pearson and Turner, JJ.)

Per SPANKIE, J., and OLDFIELD, J., *contra*. The jurisdiction of the Revenue Court in the matter of an application under Cl. (*n*), S. 95 of the Rent Act, is confined to the determination of the immediate matter of the application—the dispossession of the tenant otherwise than by law.

[F., 3 A. 81 (84); **Appr.**, 15 A. 387 (389 and 390); **R.**, 7 A. 148 (151), 18 A. 270 (272) **(F.B.).]**

JUDGMENTS OF THE DIVISION COURT.

[201] TURNER, J.—The respondent, complaining that she had been illegally ousted from an occupancy holding that had devolved on **[202]** her by inheritance, applied to the Revenue Court, under S. 95 of Act XVIII of 1873, to be restored to possession. Her application was granted. It was competent to the zamindar on the hearing of the application to contend that the respondent was a trespasser and had no title. The question was raised and decided rightly or wrongly. The zamindar now sues to be maintained in possession of the holding. The respondent pleaded the order she had obtained from the Revenue Court; that order in my judgment is a conclusive answer to the suit. The Legislature having been pleased to declare that no Civil Court shall take cognizance of any dispute or matter on which an application might be made of the nature mentioned in S. 95, we are unable to review the order passed on such an application in a civil suit; as between the landlord and tenant it is final.

The appeal therefore fails, and the decree of the lower appellate Court must be affirmed with costs.

SPANKIE, J.—Assuming that the original defendant, now represented by Bachcha and Jhingari Kuari, made an application to the Revenue Court, under Cl. (*n*), S. 95 of Act XVIII of 1873, for the recovery of the occupancy of the land from which she had been wrongfully dispossessed, I cannot hold that the order of the Revenue Court on that application would be a bar to the determination of the plaintiff's claim in this suit. I apprehend that "wrongfully dispossessed" means "wrongfully dispossessed" because the landholder had not proceeded in accordance with the provisions of the Rent Act. If that were the case, the Collector could restore her to possession. But he was not at liberty on that application to determine finally whether or not the plaintiff here, as the landholder, had the right to recover the cultivatory possession of the land, on the ground that the occupancy right had lapsed on failure of heirs to the late occupier. The landholder, who denies that defendant was his tenant, was unable to obtain relief from the Revenue Court either under S. 93 or S. 95. In my opinion therefore this was a suit of which the Civil Court

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not only could take cognizance (and this the lower Courts admit), but that the determination of the issues involved in the case was not barred by the order of the Revenue Court on the application of the original [203] defendant. The lower appellate Court should have tried the appeal on the merits.

The plaintiff appealed to the Full Bench, under Cl. 10 of the Letters Patent.

JUDGMENTS OF THE FULL BENCH.

[203] PEARSON, J.—I am not very well able to reconcile the first and last grounds of the appeal. In the first it is contended that no question of title by right of succession was directly at issue. In the last it is admitted that the point for determination was whether the last tenant had left an heir who could legally claim a right of possession of the land. The real question raised, tried and decided in the application made by Mussammat Sukhia in the Revenue Court, under Cl. *(n)*, S. 95 of Act XVIII of 1873, was whether she was Khedu Kuari's widow and heir. Such she claimed to be, and because as such she was entitled to retain his holding, she alleged her dispossession by Raja Shimbhu Narain Singh to have been wrongful. Her claim rested on no other ground, and if the Revenue Court was not competent to determine the question whether she had or had not a right to the holding by inheritance from her husband, it could not have disposed of her application. But an application such as she made can only, under the provisions of S. 95 of Act XVIII of 1873, be entertained by Courts of Revenue, and no other Courts can take cognizance of any dispute or matter on which such an application might be made. The decision is *res judicata* and is not open to re-adjudication in the present suit. The provisions of S. 95 seem to be opposed to and to preclude the view that, when questions of right are determined on applications made thereunder, the decisions of the Revenue Courts are not final and may be challenged in the Civil Courts.

I would therefore affirm the decision of the Division Bench, and dismiss the appeal with costs.

SPANKIE, J.—Since the hearing of this case, I desire to add that I retain the opinion which I expressed when the case was [204] before the Division Bench. It appears to me that the Full Bench decision of the Presidency High Court in *Guru Das Roy* v. *Ram Narain Mitter* (1) is very much in point. The same principle must apply to this case.

OLDFIELD, J.—The plaintiff sues in the suit before us to eject the defendant from the land in suit as a trespasser. The defendant alleges she is the widow of a former tenant, and has a right to succeed to the tenancy as his heir, and it appears she has already made an application in the Revenue Court to recover possession of the holding. She then alleged that the plaintiff had permitted her to take possession and recognised her tenancy and had subsequently dispossessed her. In that matter her right of succession as heir, and the fact that she had been recognised as a tenant and so succeeded to the holding, were disputed. The Assistant Collector before whom the case came inquired into and decided that she had a right of succession, and that she had taken possession of the holding on the death of her husband, and that plaintiff had given a lease of the holding to others, but he did not decide whether plaintiff had ever recognised her tenancy, and on this finding he allowed her application for recovery of possession. The question before us is whether the suit now

(1) 7 W.R. 189.

brought is cognizable by a Civil Court, and whether the decision of the Revenue Court is final.

I cannot see how the matter in dispute in this suit can be otherwise than cognizable by the Civil Court, for it is certainly not a matter on which an application could be made by the plaintiff in the Revenue Court under S. 95 of Act XVIII of 1873. This is no recognised tenancy, but the question at issue is whether defendant is a tenant or trespasser, whether she has a right or not to succeed as heir to the former tenant. This is a question peculiarly within the province of a Civil Court to determine. Nor can I consider that a decision of a Revenue Court which may have been passed on such a point in the course of deciding an application preferred under S. 95, Cl. (*n*), Act XVIII of 1873, will be binding as a final decision of a competent Court. I concur with Mr. Justice Spankie in the view he takes. The jurisdiction of the Revenue Court in the matter of an application **[205]** under Cl. (*n*), S. 95 of Act XVIII of 1873, is I think confined to the determination of the immediate matter of the application, the dispossession otherwise than by law of the tenant, —see *Khugowlee Singh* v. *Hossein Bux Khan* (1). It seems to me that it was not intended to give the Revenue Court when disposing of such applications a jurisdiction to decide finally questions of title or succession under Hindu law. The Act seems to recognise a distinction between suits and applications, for the former are alone provided by the Act with a regular procedure under chapter vi. In the former also the decisions on questions of title would come before the Civil Court by way of appeal, whereas there is no appeal to a Civil Court in the latter. These are considerations which may make one hesitate in holding that it was intended that decisions should be final on matters outside the immediate object of the application and otherwise peculiarly cognizable by Civil Courts.

The appeal should be tried by the lower appellate Court on the merits.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

RAGHU NATH DAS (*Plaintiff*) *v.* ASHRAF HUSAIN AND ANOTHER (*Defendants*). [25th March 1879.]

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Mortgage—Claim for compensation—Set off—C.P.C. (1877), S. 111.

In a suit for money on a usufructuary mortgage, the defendant cannot set-off the compensation claimed by him on account of waste committed by the plaintiff mortgagee.

[D., 15 M. 290 (291).]

On the 12th September, 1869, Ashraf Husain Khan and Sharif-un-nissa, who each owned certain shares in a garden, jointly gave a usufructuary mortgage of their shares to Hingan Lal for a term of five years, and Hingan Lal's interests under this mortgage were sold in execution of a decree, and were purchased by Raghu Nath Das who, in January, 1878, sued Ashraf Husain Khan and Sharif-un-nissa, the term of the mortgage having expired, to recover Rs. 569-4-0, the money due under the mortgage.

(1) 7 B. L. R., at p. 679.

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The defendants claimed to set-off their shares of a sum of Rs. 1,161-1-4, being the value of certain trees which they alleged had existed in the garden, and which Hingan Lal had cut down and sold. The first Court, in giving the plaintiff a decree, allowed the defendants a set-off of Rs. 275 on account of the acts of waste committed by Hingan Lal. The lower appellate Court held that the defendants were entitled to a set-off on such account, but reduced the amount to Rs. 150. The plaintiff preferred an appeal to the High Court.

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JUDGMENT.

[253] We are of opinion that the plaintiff's objection to the set-off allowed by the Courts below is valid. Under S. 111, Act X of 1877, it is only an ascertained sum of money legally recoverable that can be the subject of set-off, and it is necessary that in such claim both parties fill the same character as they fill in the plaintiff's suit, the claim must be certain and determinate and actually due and in the same right and of the same kind. The claim by the defendants in this suit, for estimated damages to property mortgaged as security for money lent, does not meet the requirements of the law, so as to be capable of being set-off against the plaintiff's claim for the money lent.

It has been held that mesne profits is in the nature of damages and is not a debt so as to form a subject of set-off (1); and it was held in a suit by a carrier for the price of the carriage of goods the defendant cannot set-off the amount of damages claimed against the plaintiff for injury to the goods, but must sue to recover the damage in a separate suit (2). We must therefore allow the plaintiff's appeal.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

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IN THE MATTER OF THE PETITION OF GUR DAYAL [27th March 1879.]

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Crim. Pro. Code, 1872, Ss. 37, 468—Subordinate Magistrates of District, to whom subordinate for purpose of S. 468.

Held by the Full Bench (Oldfield, J., dissenting).—The Court of a subordinate Magistrate is subordinate to the Court of the Magistrate of the District in the matter to which S. 468 relates. Therefore a Sessions Judge is not competent to order the prosecution of a person for giving false evidence, when the Magistrate of the first class, before whom the offence has been committed, has refused the sanction. Such powers vest in the Magistrate of the District.

JUDGMENT.

[206] STUART, C.J.—In the present case Gur Dayal, the applicant to us in revision, had been charged and tried before the Joint Magistrate of the First Class under S. 411 of the Indian Penal Code and S. 505 of the Criminal Procedure Code as an alleged receiver of stolen **[207]** property. The evidence against him consisted chiefly of statements made by four *dallals*, residents of Allahabad, but these were considered so suspicious and untrustworthy that the Magistrate dismissed the case. Gur Dayal then applied to the Sessions Judge under S. 468 of the Criminal Procedure Code for permission to prosecute the *dallals* for giving false evidence under

(1) *Ruteerummom Opadhya* v. *Grijanund Opadhya*, 7 Wym. Rep. 218.
(2) *Scanlan* v. *Herrold*, 10 W.R. 295.

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Ss. 193 and 211 of the Indian Penal Code, and such sanction the Judge gave by an order dated the 15th August, 1878. Subsequently, on a decision by a Division Bench of the High Court of Bombay, Melvill and Pinhey, JJ., being brought to his notice, by which it was ruled that the Magistrate of the District. and not the Sessions Judge, had the power to give the sanction contemplated by S. 468 of the Criminal Procedure Code, he recalled his order and cancelled the sanction he had given; and, in my opinion, he clearly had power to do this.

The same question arises in this Court in a revision case before Mr. Justice Oldfield, who has referred the matter to a Full Bench, and we are now, after argument at the Bar, to decide the question.

I generally concur in the ruling of the High Court of Bombay. To my mind it is unnecessary to make a nice examination of the Criminal Procedure Code for the purpose of ascertaining the relative position and powers of the different judicial officers in particular cases and in particular circumstances, for it is clear to me that the present case must be disposed of by the construction to be put upon S. 468 read with S. 37 of the Criminal Procedure Code; and with reference to the latter section I do not appreciate the distinction which was taken at the hearing between the Magistrate as an executive and the Magistrate as a judicial officer. No doubt S. 468 contemplates a purely judicial proceeding, but that view of the matter is, in my opinion, not only not inconsistent with S. 37, but that section helps us to interpret S. 468, by providing as it does that all Magistrates shall be subordinate to the Magistrate of the District. The word "subordinate" it will be observed is not in any way limited or qualified, but applies to the jurisdiction of the Magistrate of the District in all its plenitude, and with reference to all that officer's duties and powers, judicial as well as executive. Indeed S. 37 would have been of little value if it had **[208]** to be read as only applying to the executive functions of Magistrates. This view of the section is made still more clear by the express provision that neither the Magistrate of the District nor the subordinate Magistrate shall be subordinate to the Judge except to the extent and in the manner provided by the Act, and the power to sanction a prosecution for perjury committed before a Magistrate of any of the three classes is clearly not within such an exception. In fact it appears to me that for the purpose of applying S. 468 to such a case as that now before us, the term "Magistrate" in S. 37 and that of "Court" in S. 468 are convertible and have the same meaning: and—although I do not attach so much importance and force to interpretation clauses in Acts of the Legislature as is sometimes claimed for them, holding that they should not be read merely by themselves, but that they may be controlled and limited by other express provisions of the same law, and as a consequence, that if inconsistent with and repugnant to such other provisions they may be disregarded—yet they frequently are very useful, and in the present case we ought not to ignore the definition of "Criminal Court" in S. 4 of the Criminal Procedure Code, which considered in connection with the two other sections of the same Code I have remarked on, *viz.*, Ss. 468 and 37, places the true view of the question now to be decided beyond any reasonable doubt.

My answer therefore to the question referred to us is that the Sessions Judge had no power to sanction the prosecution of Hira Lal and others, but that such sanction should have been sought at the hands of the Magistrate of the District.

PEARSON, J.—Magistrates and Sessions Judges are included in the terms "Criminal Courts" defined in S. 4 of the Procedure Code. It is impossible to suppose that the Sessions Judge mentioned in S. 37 does not

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mean the Sessions Court, or that what is said about the Subordinate Magistrates refers to them not as Criminal Courts, but only when engaged otherwise than in judicial proceedings. The Procedure Code regulates the procedure of Courts of Criminal Judicature. S. 468 must, in my opinion, be read and interpreted with reference to S. 37; and thus it appears that the Court of a Subordinate Magistrate is subordinate to the Court of the Magistrate of the District in the matter to which S. 468 relates, unless **[209]** the Procedure Code has provided that in that matter Subordinate Magistrates shall be subordinate to the Sessions Judge. No such provision has been made. My answer to the question referred to the Full Bench is therefore in the negative.

SPANKIE, J.—We are asked by the Judge making the reference whether the Sessions Judge has power, under S. 468 of Act X of 1872, to sanction a prosecution, under Ss. 211 and 193 of the Indian Penal Code, in the particular case giving rise to the reference.

An Assistant Magistrate of the First Class refused permission to an acquitted person to prosecute the complainant against him under the sections cited above. The party desirous to proceed criminally against the original complainant applied to the Sessions Judge for sanction to do so. The Sessions Judge gave permission, but subsequently recalled it, holding that "when sanction to prosecute has been refused by a Magistrate subordinate to a Magistrate of the First Class, an application to prosecute may be made to the Magistrate of the District, but cannot be made to the Sessions Judge."

Under the terms of S. 468 of the Criminal Procedure Code, the sanction of the Court, Civil or Criminal, before or against which the offence was committed or "of some other Court to which such Court is subordinate," is necessary. A "Criminal Court" means and includes every Judge or Magistrate, or body of Judges or Magistrates, inquiring into or trying any criminal case or engaged in any judicial proceeding—S. 4 of Act X of 1872;—and there are four grades of Criminal Courts in British India, *viz.*, (i) The Court of the Magistrate of the Third Class; (ii) The Court of the Magistrate of the Second Class; (iii) The Court of the Magistrate of the First Class; (iv) The Court of Session;—S. 5 of Act X of 1872. In every District, however, there must be a Magistrate of the First Class appointed by the Local Government who is called the Magistrate of the District, and he is to exercise throughout his district all the powers of a Magistrate,—S. 35 of Act X of 1872. Besides the Magistrate of the District, the Local Government may appoint as many other persons as it thinks fit to be Magistrate of the First, Second, or Third Class in the District,—S. 37 of Act X of 1872. Thus all these Magistrates so appointed, when inquiring into or trying any criminal case or engaged in any judicial **[210]** proceeding, are presiding over a Criminal Court. But all these Magistrates are made subordinate to the Magistrate of the District, but neither the Magistrate of the District nor the Subordinate Magistrates are made subordinate to the Sessions Judge, except to the extent and in the manner provided by the Act,—S. 37 of Act X of 1872. It is contended that S. 37 of the Act refers only to the subordination of Magistrates to the District Magistrate in their executive capacity, that such subordination is not of a judicial character, and that a Magistrate of the First Class is not subordinate to the Court of the Magistrate of the District, but to the Court to which appeals from the decisions of the Magistrates of the First Class ordinarily lie, namely, the Court of Session. But S. 37 makes no provision subordinating Magistrates to the District Magistrates solely in their executive capacity, though it does limit the

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subordination both of the District Magistrate and Subordinate Magistrates to the Sessions Judge to the extent and in the manner provided by the Act. When we consider what is the extent of the subordination to the Sessions Judge provided by the Act, it appears chiefly to be limited to cases committed for trial to the Sessions Court, to cases coming regularly before the Sessions Judge in appeal, and to those instances in which, under S. 295 of Act X of 1872, he may at all times call for and examine the record of any Court subordinate to himself as a Court for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such Subordinate Court. In some other respects, however, hereafter to be mentioned, the Magistrates are subordinate to the Sessions Judge. It is, however, worthy of notice that a Magistrate of the District has the same power by S. 295 as the Court of Session has over the Courts of the Subordinate Magistrates. "Any Court of Session or Magistrate of the District may call for and examine the record of any Court subordinate to such Court or Magistrate for the purpose, &c., &c., &c." Here there is a distinct recognition of the subordination of *Courts* of Magistrates to the Magistrate of the District for a judicial purpose, that of ascertaining whether there are any grounds for revision, and for the purposes of this particular section every Magistrate in a Sessions Division is to be deemed subordinate to the Sessions Judge of the Division. This is an illustration of the subordination of the Magistrate **[211]** of the District and of subordinate Magistrates to the Sessions Judge as provided by the Act. I have used the words "judicial purpose," that of ascertaining whether there are any grounds for revision, because under S. 296 both Sessions Judge and District Magistrate, are called upon to exercise their judgment, and if they think that the judgment sent for under S. 295 is contrary to law, or that the punishment is too severe, or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court. By the second clause, in Sessions cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial. This illustrates the manner in which the Sessions Court or District Magistrate is to deal with the Subordinate Magistrate. So again by S. 298 as amended by S. 31 of Act XI of 1874, the Court of Sessions may direct the Magistrate of the District by himself, or any Magistrate subordinate to him, or the Magistrate of the District may direct any subordinate to make further inquiry into any complaint which has been dismissed under S. 147. Here the extent of subordination is clearly laid down, and it will be observed that, when the Magistrate of the District acts under this section, his authority extends to a Magistrate of the First Class. Those parts of the Code which deal with commitments to a Court of Session and to appeals sufficiently show to what extent the Courts of the Magistrates are subordinate to the Sessions Judge in respect of the cases which come before him as a Court of Session or Judge of appeals, and do not require further consideration. But the Act provides for the subordination of the Magistrates to the Sessions Judge in some other cases, as for instance the Sessions Judge can in any case, whether there be an appeal on conviction or not, direct that an accused person may be admitted to bail, or that the bail required by a Magistrate be reduced —S. 390 of Act X of 1872. He can also order or refuse a commission for the examination of a witness in cases under trial by a Magistrate—S. 330 of Act X of 1872. On the other hand S. 328 appears to give the Magistrate

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of the District considerable power over all Magistrates subordinate to him, even to the extent of ordering a new trial where a conviction has passed upon evi-[212]dence not wholly recorded by the Magistrate before whom the conviction was had, if he is of opinion that the accused person had been materially prejudiced thereby—S. 328 of Act X of 1872. Under this section a Court of Appeal, and the District Magistrate, both are superior Courts to those of the Magistrate. The District Magistrate may also hear an appeal against the order of a Magistrate of the First Class requiring security for good behaviour—S. 267 of Act X of 1872.

It will be thus seen that the Magistrates of the First Class are to some extent judicially subordinate to the Magistrate of the District, as also to the Sessions Judge. But it is nowhere laid down that the Magistrate of the First Class is to be subordinate to the Magistrate of the District only so far as is provided by the Act, whereas neither the Magistrate of the District, nor the Subordinate Magistrate, are subordinate to the Sessions Judge "except to the extent and manner provided by the Act,"—S. 37. It would seem therefore that the words "all such Magistrates shall be subordinate to the Magistrate of the District" do not point exclusively to Magistrates in their executive, but also apply to them in their judicial character, except so far as the Act makes them subordinate to the Sessions Judge. It has been contended that the test as to the nature of the subordination of a Magistrate of the First Class to the Sessions Judge or Magistrate of the District lies in the answer to the following question,—To whom does an appeal lie from the Magistrate's decision? But this is, as we have seen, not the conclusive test. The true test is to be found in the words "except to the extent and manner provided by the Act." It is not provided in S. 468 that application is to be made to the Court of Session or to the High Court, but the words used are "except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate." Nor has the Act provided in this section, or anywhere else, that in respect of an application of the nature contemplated by S. 468 the Magistrate's Court is subordinate to that of the Sessions Judge, and therefore his interference would appear to the barred under the proviso in S. 37 of the Act. The Magistrate of the First Class, it is urged, has the same powers as the Magistrate of the District has, and therefore the [213] latter acting as a Criminal Court within the terms of S. 4 is not a Criminal Court superior to that of the former, who therefore cannot be said to be subordinate to it in the sense required by S. 468. But the Magistrate of the District is specially appointed as such by the Government, and he exercises throughout his District all the powers of a Magistrate—S. 35 of Act X of 1872—and he does so although the District may have been divided into divisions—S. 40 of Act X of 1872. A Magistrate of the First or Second Class may be placed in charge of a Division of a District, and the officer so appointed exercises the powers conferred upon him under the Act, or under any law for the time being in force, "subject to the control of the Magistrate of the District"—S. 46 of Act X of 1872. The Government may also delegate its own powers of placing these Magistrates in Divisions of a District to the Magistrate of the District. Again, every Magistrate in a Division of a District is subordinate to the Magistrate of the Division of the District, subject, however, to the general control of the Magistrate of the District—S. 41 of Act X of 1872—so that throughout his District the subordination of all Magistrates to the Magistrate of the District is clearly provided for both in his executive and judicial character, except when the

Magistrates are made by the Act subordinate to the Sessions Court. Whenever then the Magistrate of the District is engaged in any judicial proceeding, although he may not have larger powers in respect to the trial of offences and to passing sentences on persons convicted of them than a Magistrate of the First Class has, his Court is a Criminal Court to which the Courts of the Magistrates, except where they are made subordinate to the Sessions Judge, under the proviso of S. 37, are subordinate. Some doubt was expressed whether the entertainment of an application under S. 468 could be regarded as part of a judicial proceeding. But a judicial proceeding as defined in S. 4 includes any proceeding in the course of which evidence is or may be taken, and it cannot be denied that any Court to whom "a complaint" (in the words of S. 468) of an offence against public justice is made, would be at liberty, if it pleased, to examine the complainant, and even take evidence if it thought that there was any necessity to do so, in order to enable the Court to determine whether or not sanction should be given. There can therefore be no doubt that any Magistrate or Sessions Judge engaged **[214]** in determining whether the complaint under the section should be entertained would be acting as a Criminal Court. Again, the application made for sanction is "the complaint." The sanction may be expressed in general terms, and, authority once given, the complaint may be entertained. That that is so seems certain from the explanation attached to S. 470, that in cases under this chapter the report or application of the public servant or Court shall be deemed sufficient complaint. If so, then the application by a private individual for sanction is a sufficient complaint under S. 468 and S. 469 of the Code, for he appears in Court personally or by pleader, and subjects himself to examination.

In conclusion, I would say, in reply to the question, that the Sessions Judge had not power, under S. 468, to sanction the prosecution of Hira Lal and others, demanded by Gur Dayal for offences punishable under Ss. 211 and 193 of the Indian Penal Code.

OLDFIELD, J.—The question is whether the Court of a Magistrate of the First Class is a Criminal Court subordinate to the Court of Session, within the meaning of S. 468 of the Criminal Procedure Code, so as to enable the Sessions Court to give sanction to entertain a complaint of an offence against public justice committed before or against the Magistrate's Court. By S. 37 of the Code Magistrates are not subordinate to Sessions Judge except to the extent and in the manner provided by the Criminal Procedure Code, and it is argued that, with reference to this section, the Magistrate's Court cannot be held to be subordinate to the Sessions Court for the purposes of S. 468, there being no provision making the Magistrate subordinate for the purposes of that section.

But it is to be noticed that the word used in S. 468 is not Magistrate but Criminal Court, the sanction is required of the Court to which the Criminal Court is subordinate before which the offence is committed, not of the Sessions Judge to whom the Magistrate is subordinate. The argument proceeds on the supposition that the term Magistrate in S. 37 and Criminal Court in S. 468 are used indiscriminately, but S. 4 of the Code contains a special definition of the term Criminal Court. It is something more than Magistrate. "Criminal Court" means and includes every Judge or Magistrate, or body **[215]** of Judges or Magistrates, inquiring into or trying any criminal case or engaged in any judicial proceeding. When we find a special definition of the term Criminal Court, I think it is putting a strained meaning on the term Magistrate in S. 37 to say that it extends so as to include Criminal Courts. A Criminal Court may mean and include a Magistrate,

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but the term Magistrate will not necessarily mean and include a Criminal Court. If S. 37 had been dealing with the subordination of Criminal Courts, it is reasonable to suppose that the words Criminal Courts would have been used instead of Magistrate. The distinction is one which the Code itself draws, and is important, for while S. 37 limits the subordination of Magistrates to Sessions Judges, there is nothing in the Code to the effect that the Court of the Magistrate of the First Class is not subordinate to the Court of the Sessions Judge, but on the contrary its subordination as a Criminal Court, that is, where a Magistrate is acting judicially, seems contemplated and enforced by the provisions of the Code, for instance, by the appellate jurisdiction of the Sessions Court over Magistrates' Courts, and more particularly by the powers conferred on the Court of Session over the Courts of Magistrates by Ss. 295 and 296. This establishment of a power of supervision and revision seems to me in itself to constitute a subordination, within the meaning of S. 468. S. 37 may be dealing with the subordination of Magistrates personally and executively, and not with Criminal Courts. I do not think we need consider it in interpreting S. 468, which deals with the subordination of Criminal Courts, but be this as it may, as I have already remarked, it seems to me that the intention and effect of Ss. 295 and 296 are to constitute the subordination to the Sessions Court of the Magistrates' Courts; which thereby become subordinate Criminal Courts within the meaning of that term in S. 468. I think we have in S. 419 an indication of what is intended to constitute subordination of Criminal Courts. That section is dealing with orders passed by Criminal Courts for disposal of property and runs: "Any Court of Appeal, Reference, or Revision, may direct any such order passed by a Court subordinate thereto to be stayed, and may modify, alter or annul it." The use here of the words subordinate Court seems to show that Courts over which Courts of Appeal, Reference, and Revision are appointed are subordinate to the latter in the meaning of the term as used in **[216]** the Code. This subordination will not of course enable the Sessions Court to exercise any powers over the Magistrate's Court other than those allowed by the Code. The learned Judges who decided *Imperatrix* v. *Padmanabh Pai* (1), and who have taken a contrary view to the one I have expressed, seem to consider that the Legislature intended that the sanction contemplated should be given by the Court before which the offence was committed or by the Appellate Court or the High Court, in fact that the Legislature intended to recognise a subordination of the Magistrates' Courts to the Sessions Court, within the meaning of S. 468, but they consider that, in face of the express provisions in S. 37 applied to S. 468, they cannot give effect to a possible intention of the Legislature. For my part, I think that the law as it stands and the intention of the Legislature are not irreconcilable.

My answer to the reference is that the Sessions Court has power under S. 468 to sanction the prosecution.

(1) 2 B. 384.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

AHMAD BAKHSH (*Defendant*) *v.* GOBINDI (*Plaintiff*).

[27th March 1879.]

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Registration Act (1871), S. 17—Mortgage.

A bond charging land with the payment of a principal amount of less than Rs. 100, in which there is no stipulation preventing the debtor from repaying the loan within the time fixed, need not be registered. But, if registered, it is entitled to take effect against a prior unregistered bond, which is not compulsorily registrable.

[F., 12 A. 688 (689).]

Certain persons, who had given the present plaintiff an unregistered bond for payment of Rs. 75 by instalments without interest within 5 years, charging at the same time certain land with such payment, gave also on 11—1—1874 to the present defendant a registered bond for the payment of the money charging the same land agreeing to pay the principal amount of Rs. 99 within six months after the execution of the bond and to pay interest every month on the principal at 2 per cent and stipulating that, in the event of default of payment of interest in any month, the whole amount specified in the bond should become due at once. On 7—8—1874 the defendant in the suit obtained a decree on his bond and attached the property on 26—12—1876. Meanwhile the plaintiff obtaining a decree on his bond on 24—11—1876, attached the same land on 15—4—1877, and purchased it in execution of these decrees on 20—4—1877. The plaintiff in this suit,—the auction-purchaser—, after paying the defendant in this suit the sale-proceeds as directed by the Court executing the decree, brought the present suit for recovering the money so paid to him and succeeded in his suit in both the lower Courts. The defendant preferred an appeal to the High Court.

JUDGMENT.

[218] PEARSON, J.—In the bond executed in favour of the defendant, appellant, there was no stipulation preventing the debtor from repaying the loan advanced to him at any time within the six months after which it was reclaimable. This being so, it cannot be said that any portion of the interest accruing on the principal was secured for certain, in the sense that it could be definitively calculated and taken into account at the date of the execution of the deed. The only amount certainly secured was the principal which was below Rs. 100. The bond did not therefore need to be registered; but having been registered is entitled to take effect against the unregistered bond executed in the plaintiff's favour. The property was moreover first attached by the defendant, appellant, who, for that reason as well as because his bond is registered, is entitled to preference over the plaintiff, respondent. We accordingly decree the appeal with costs of all Courts, reversing the decree of the lower Courts, and dismiss the suit.

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

FULL BENCH.

EMPRESS OF INDIA *v.* SARMUKH SINGH. [28th March 1879.]

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1. *The Foreign Jurisdiction and Extradition Act, XI of 1872, Ss. 3, 9—Offence committed by Native Indian British subject in Cyprus—Jurisdiction of British Courts.*

Held by the Full Bench (STUART, C. J., *dissenting*).—Cyprus is a "Native State" in reference to Native Indian subjects of Her Majesty within the meaning of Act XI of 1872. Such a person, a soldier in Her Majesty's Indian Army, while serving with his regiment in Cyprus, committed murder, and was charged with that offence at Agra, after his return with the regiment. *Held*, that the Criminal Courts of Agra had jurisdiction to try the case.

Per STUART, C. J., *contra*.—Cyprus is not a foreign or a "Native State" according to the true intent and meaning of Act XI of 1872.

[R., 24 B. 287=1 Bom. L.R. 678.]

2. *Crim. Pro. Code, 1872, Ss. 288, 297—Opinions of Division Court on preliminary question of jurisdiction—Jurisdiction of Full Bench.*

Where, a Division Bench of the High Court ordered a Magistrate, who refused to try a case on the ground of want of jurisdiction, to make the enquiry, holding that he had jurisdiction, and the case came before the Full Bench, for the confirmation of the sentence of death passed on the accused by the Sessions Judge, to whom the case was committed by the Magistrate, *held, per Stuart, C. J., Spankie and Oldfield, JJ.*, that the Full Bench was not precluded, by the order of the Division Bench, from considering whether the conviction was by a Court of competent jurisdiction, in determining whether such sentence should be confirmed.

JUDGMENTS OF THE FULL BENCH.

[222] STUART, C. J.—This is a reference for confirmation of a capital sentence passed on the accused Sarmukh Singh by the Sessions Judge of Agra under these circumstances: On the recent occupation by the British of the Island of Cyprus, situated in the Mediterranean, and within the Empire of European Turkey, one of the regiments forming part of the military forces on the occasion was an Indian regiment, the 13th Native Infantry, and in the regiment was a man named Sarmukh Singh. On the night or early in the morning of the 21st of August, 1878, while the regiment was still at Cyprus, another sepoy named Dewa Singh came to his death by a shot from a rifle fired, it was believed, by Sarmukh Singh. He was at once placed in custody by the military authorities, and on the return of the regiment shortly after to Agra, in the North-Western Provinces of India, he was handed over to the Civil Court of that district for trial, and the case came before the Cantonment Magistrate of Agra for the purpose of commitment. But the Cantonment Magistrate believing that he had no jurisdiction to entertain the case ordered the prisoner to be at once sent back to the Commanding Officer of the regiment, with an intimation to that effect; **[223]** whereupon an application for revision under S. 297 of the Criminal Procedure Code was made by the Government to this Court complaining of the Magistrate's proceeding, and praying that he be ordered to inquire into the charge against the accused, with a view to his commitment for trial to the Court of Session at Agra. On that application

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coming before a Bench of the Court, Pearson and Turner, JJ., (1) the accused was not represented, while the Government Pleader appeared for the Crown. The case was therefore heard *ex parte*, and in the result the application for revision was granted, the Bench being of opinion, from their reading of Act XI of 1872, that notwithstanding that the facts had occurred at Cyprus, the civil authorities of Agra had jurisdiction to entertain the case, and the Cantonment Magistrate was ordered to inquire into the charge. The inquiry was accordingly made, and the accused committed for trial on the charge of murder before the Sessions Judge of Agra, who, after hearing evidence, convicted the accused, Sarmukh Singh, and sentenced him to death.

On the case coming up to this Court again for confirmation of sentence, and feeling serious doubts of the soundness of the decision in favour of the jurisdiction at Agra, I directed the case to be brought before the Full Bench by the following order: "In the ordinary course this case should go before a Bench of the Court for confirmation of the capital sentence, but the peculiarity of the procedure that has taken place is such that I consider it ought to be heard by myself and the Judges of the Court in Full Bench. The reference to us for confirmation of the sentence assumes that the Magistrate and Judge of Agra had jurisdiction to entertain the case, and it has been so decided by a Division Bench of this Court. But the proceeding was entirely *ex parte*, and the question may be reconsidered. I therefore direct that this case be brought before a Full Bench of the Court."

The case came before a Full Bench accordingly, when Pandit Ajudhia Nath, a pleader of this Court, appeared for the accused against the

(1) Order by Pearson, J., and Turner, J., dated 24th January, 1879.

"The ninth section of Act XI of 1872, the Foreign Jurisdiction and Extradition Act, declares that all British subjects, European and Native, in British India, may be dealt with in respect of offences committed by them in any Native State as if such offences had been committed in any place within British India in which any such subject may be or may not be found, and in S. 3 of the Act the term 'Native State' is defined as meaning, in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominion of Her Majesty. Cyprus is a place without and beyond the Indian territories under Her Majesty's dominion, and is therefore a Native State as defined in that Act. Consequently the prisoner being in the Agra Cantonment may be dealt with in respect of the offence it is alleged he has committed in Cyprus as if such offence had been committed in the Agra Cantonment. The Indian Articles of War are not inconsistent with the provisions of the Foreign Jurisdiction Act to which we have referred. Although the titles of Articles 170 and 171 are inaccurate, the former declares that any person subject to the Articles who, at any place in British India within the jurisdiction of any Court of CriminalJustice established by Her Majesty, or by the Government of India, &c., is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles shall be delivered over to the nearest Magistrate to be proceeded against according to law; and Article 171 declares that such offences when committed by any person amenable to the Articles, shall in any place out of British India be cognizable by a General Court Martial. The prisoner is accused in British India within the jurisdiction of Courts of Criminal Justice established by the Local Government; he must be delivered to those for trial, the offence of which he is accused not being included in the Articles which precede Article 170. The Magistrate is directed to hold an inquiry and to proceed according to law. The prisoner, a sepoy in the 13th Native Infantry, was accused of having committed murder in the Island of Cyprus, and was in custody under that charge in the Cantonment of Agra. The Military authorities desired that an inquiry into the charge should be made by the Cantonment Magistrate, and for that purpose the prisoner was sent to the Cantonment Magistrate's Court and a charge preferred. The Cantonment Magistrate has declined to hold an inquiry on the ground that he has no jurisdiction. We may observe in passing that no record of the proceedings was framed by the Cantonment Magistrate. This should have been done and the grounds stated on which the Magistrate arrived at the conclusion that the charge was not cognizable by him. The Government has applied to this Court to order the Magistrate to inquire into the charge, and in our judgment it is entitled to the order."

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confirmation of the sentence, on two grounds, the first of which was that, whereas the murder is said to have been committed by the appellant in Cyprus, the Sessions Judge of Agra had no jurisdiction to try the appellant on that charge; the second ground **[224]** was on the merits and for the purpose of this judgment need not be further referred to.

On the reference for confirmation of the sentence coming on for consideration, the Junior Government Pleader took the preliminary objection, that the judgment of the Division Bench could not be called in question in such a proceeding, but that contention we had no difficulty in disallowing. My colleagues Mr. Justice Spankie and Mr. Justice Oldfield have given cogent reasons against such an objection, and in all they say on this subject I concur. But I may add, it appears to me, that such an objection is sufficiently disposed of by S. 297 of the Criminal Procedure Code. By S. 288 it is provided that, "in any case so referred, whether tried with assessors or by jury, the High Court may either confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction and order a new trial on the same, or an amended charge, or may acquit the accused person;" and any sentence warranted by law includes of course any judgment, sentence, or order authorised by S. 297.

The argument was then addressed to the principal question raised by the reference, *viz.*, whether the Court at Agra had jurisdiction to try the accused for the murder alleged to have been committed by him in Cyprus, and on that question the doubt I originally entertained when I read the judgment of the Division Bench has on reflection been fully confirmed. The question is one purely of law, and depends for its solution on the true intent and meaning of Act XI of 1872 entitled "An Act to provide for the trial of offences committed in places beyond British India and for the extradition of Criminals." Other Acts of the Indian Legislature and of the British Parliament were referred to, but at best they appear to me to serve merely as illustrative of what had been done in regard to the commission of and trial for offences under different, although analogous, circumstances, while they did not appear to me to give any support to the argument for the Crown. These Acts and authorities were Act I of 1849, the Indian Articles of War, being Act V of 1869, and provisions in two Acts of the British Parliament, 26 Geo. III, c. 57, S. 29, and 33 Geo. III, c. 52, S. 67. I shall afterwards refer more particularly to these authorities, but meanwhile I desire to direct attention to Act XI of 1872 upon the true **[225]** construction of which the question now before us more especially depends, and it contains within itself matter quite sufficient for that purpose. The judgment of the Bench now under our consideration begins by referring to S. 9, and for the meaning of the words "Native State" there, the interpretation of the expression as given in S. 3 of the Act is referred to, it being assumed that that definition is wide enough to include not only Indian Native States, but all other places in any part of the world without and beyond British India, and that therefore the Island of Cyprus is a "Native State" within the meaning of the definition. And no doubt if this definition could be read by itself without reference to or connection with any other part of the Act, it is comprehensive enough to include not only Cyprus but any "place" in the habitable globe. Can that really have been the meaning and intention of the Legislature when it passed this Act? It seems impossible to believe it. The Act itself shows the limits within which the definition in question is to be applied, and we have only to look to the preamble to see what these limits are. It is remarkable that the judgment now under our consideration makes no allusion whatever to the preamble, but reads the

term "Native State" simply by itself and without the least regard to such a guide and light in the interpretation of Acts of the Legislature as the preamble. The preamble is as follows: "Whereas by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means the *Governor-General of India in Council has power and jurisdiction within divers place beyond the limits of British India*; and whereas *such* power and jurisdiction have from time to time been delegated to Political Agents and others *acting under the authority of the Governor-General in Council*; and whereas doubts have arisen how far the exercise of such power and jurisdiction and the delegation thereof are controlled by and dependent on the laws of British India; and whereas it is expedient to remove *such* doubts, and to consolidate and amend the law relating to the exercise and delegation of *such* power and jurisdiction, and to offences committed by British subjects beyond the limits of British India, and to the extradition of criminals: It is enacted, &c." The purpose, intent, and limits of everything in the Act are thus plainly seen, and "Native State" means and means only a place so defined, that is, a place where by treaty, &c., the Governor-General **[226]** of India in Council has jurisdiction, and Cyprus certainly is not such a place. The Government of India have no power and jurisdiction there, no more than that Government has power and jurisdiction in all the capital towns and countries not only of Europe but in the four quarters of the globe. This is what the ruling of the Division Bench not only leads to, but necessarily involves. In support of that ruling the two forms of the definition as given in the Act were referred to as shewing that places such as Cyprus were clearly within the meaning of the first part of the definition, and which states that "Native State" means, "in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominions of Her Majesty," and this *arguendo* was contrasted with the other part of the definition, which says that "Native State" means, "in reference to European British subjects, the dominions of Princes and States in India in alliance with Her Majesty." But so far from affording any contrast to the first part of the definition, it is simply to my mind, as regards the expression "Native State," another way of saying the same thing, unless it be supposed that the Legislature of India were anxious to provide against the possibility of there being understood to have contemplated the application of the Indian Penal Code to Englishmen on account of offences committed in England, or any part of Europe where there is established law and properly constituted tribunals. Both parts of the definition read by the light of the preamble mean one and the same thing, *viz.*, a "Native State," where by treaty, capitulation, &c., the Governor-General has power and jurisdiction.

Allusion was made at the hearing to the third and fourth sections of the Indian Penal Code, Act XLV of 1860. S. 3 provides that "any person liable by any law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories." This raises, in a somewhat loose way, the same argument we have had to consider under Act XI of 1872. It is to be observed that the Indian Penal Code was passed in **[227]** 1860, and came into operation on the 1st January 1862, and therefore long before the passing of Act XI of 1872, and it affords therefore no assistance in interpreting the words "Native State" as used in the Act, although I think it can only mean "Native State" within the purview of its preamble. And by S. 4 of the Penal Code the words "the

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dominions of any Prince or State in alliance with the Queen" are to my mind plainly synonymous with "Native State" as used in Act XI of 1872. But is it really the case that Cyprus is a "Native State" in the sense of being a foreign country, *i.e.*, a country not subject to but foreign to the Queen's Government? I think it may be gravely doubted whether Cyprus is such a "Native State" or a "Native State" in any sense whatever. It has for the present been ceded by the Turkish Government to the Crown of England. This is shown by the treaty between the two powers called "Convention of defensive alliance between Great Britain and Turkey," signed the 4th June 1878, and by the first articles of which it is, among other things provided as follows: "In order to enable England to make necessary provision for executing her engagements, His Imperial Majesty the Sultan further consents to *assign the Island of Cyprus to be occupied and administered by England*," and the Island is accordingly occupied by military forces directly under the control and command of the Queen's Government, and it is governed, and in all respects fully administered, by English officials, and it would be hopeless to discover this state of things as in any way contemplated by Act XI of 1872, or to maintain that Cyprus under such conditions was within the meaning and intent of that Act a "Native State," for so far from being a place in the sense of a "Native State" without and beyond the dominion of Her Majesty, it is directly administered by Her officers, and is under Her Majesty's dominion and control.

I shall now briefly notice the other Acts and authorities to which I have already alluded as bearing on the construction to be put on Act XI of 1872. The first of these is Act I of 1849, which is entitled "an Act to provide more effectually for the punishment of offences committed in Foreign States," and which, to say the least, affords no support whatever to the argument for the prosecution. It recites the various old Indian Regulations which it states it is [223] expedient to make more effectual and uniform, and also to extend their application, and then by S. 2 it provides that "all subjects of the British Government, and also all persons in the civil or military service of the said Government, while actually in such service, and for six months afterwards, and also all persons who shall have dwelt for six months within the *British territories* under the Government of the East India Company, subject to the laws of the said territories, who shall be apprehended *within the said territories or delivered into the custody of a Magistrate within the said territories, wherever apprehended*, shall be amenable to the law for all offences committed by them *within the territory of any Foreign Prince or State*, and may be bailed or committed for trial as hereafter provided, on the like evidence as would warrant their being held to bail or committed for the same offence, if it had been committed within the British territories." This speaks for itself, the expression Foreign Prince or State plainly meaning not such a place as Cyprus, but any Foreign Prince or State in India, or in other words, "Native State," while by the words "the British territories" can only be intended territories or possessions in India as distinguished from those of a "Native State" there. The expression "*the* British territories" occurs in other sections of the Act, while the word "Government" is defined to mean the *Governor or Governor in Council or other person or persons having supreme executive authority in the Presidency or place to which the committing Magistrate belongs*. The whole Act is only intelligible as a law to be carried out in India, having reference on the one hand to the British territories and on the other to those of Native Princes or States. S. 9, the last section of this Act, is not undeserving of notice;

it provides that the authority given to the Government may also be exercised by any Commissioner or other person acting in the civil service, a provision which is consistent with the other portions of the Act, and which it would surely be absurd to apply to Cyprus.

With regard to the Indian Articles of War, Article 171 has been referred to. It is there provided that "in any place out of British India offences against the Indian Penal Code, and not included in the foregoing Articles, shall, when committed by any person amenable to these Articles, be cognizable by a General Court Martial [229] to be convened by any officer who is empowered by warrant, or Order in Council, or by Article 77, to appoint General Courts Martial." Now it appears to me that the fair inference from such an express provision is that, in contemplation of the Legislature which passed it, there was no other law on the subject, and the trial by Court Martial was the only and sole proceeding intended for offences against the Indian Penal Code committed in places out of British India by persons subject to the Articles of War. Such offences are distinctly and expressly so specified, and we are not left to surmise suggestion such as is necessary in order to favour the reading of the term "Native State" as maintained by the prosecution in this case.

The next authority referred to in support of the conviction was the 29th section of the Act of Parliament, 26 Geo. III. c. 57, as showing that the jurisdiction of the Courts in British India over any of the King's subjects could be extended so as to include cognizance of offences committed beyond British territory, and not only in India, *i.e.*, in States governed by Native Princes, but in other parts of the world. But in my judgment the 29th section has exactly the opposite effect, for it plainly appears to me to limit the extension of the authority of the Courts in question to the countries or parts of the world specially selected and named, and that not only no other places but that no general or indefinite extension of jurisdiction was intended. The 29th section of 26 Geo. III, c. 57, is in these terms: "That as well the servants of the said United Company, as all other of His Majesty's subjects resident or to be resident in India, shall be and are hereby declared to be amenable to the Courts of oyer and terminer and goal delivery, and Courts of general or quarter sessions of the peace, in any of the British settlements in India, for all murders, felonies, homicides, manslaughters, burglaries, rapes of women, perjuries, confideracies, riots, routs, retainings, oppressions, trespasses, wrongs, and other misdemeanours, offences, and injuries whatsoever, by them done, committed, or perpetrated, in any of the countries or parts of *Asia, Africa or America, beyond the Cape of Good Hope, to the Straits of Magellan, within the limits of the exclusive trade of the said United Company*, whether the [230] same shall have been done, committed, or perpetrated, or shall hereafter be done, committed, or perpetrated, against any of His Majesty's subjects, or against any other person or persons whatever." It will be observed that the countries or parts of the world to which this section was to apply were "Asia, Africa, or America beyond the Cape of Good Hope, to the Straits of Magellan," a definition and description which by no contrived meaning or ingenuity could be made to apply to Cyprus or any other place in the same position or relation to the British Government or the Government of India.

The only other authority in support of the conviction I need refer to was another Act of the British Parliament, the 33 Geo. III, c. 52, and S. 67 of that Act. I was, I confess, not a little surprised that this S. 67 should have been referred to on behalf of the Government, for it is not only plainly inconsistent with the conviction of the accused by the Agra

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Court, but it supplies an express definition of the lands or territories to which its application was to be limited altogether at variance with the meaning attempted to be put upon the term "Native State" as that is used in Act XI of 1872 S. 67 of the 33 Geo. III, c. 52, is in the following terms: "That all His Majesty's subjects, as well servants of the said United Company as others, shall be and are hereby declared to be amenable to all Courts of justice, both in India and Great Britain, of competent jurisdiction to try offences committed in India, for all acts, injuries, wrongs, oppressions, trespasses, misdemeanours, offences, and crimes whatever, by them, or any of them, done, or to be done, or committed in any of the lands or territories of any Native Prince or State, or against their persons or properties, or the persons or properties of any of their subjects or people, in the same manner as if the same had been done or committed within the territories directly subject to and under the British Government in India." The words here used are thus made distinctly to apply to "the lands or territories of any Native Prince or State," and the offences described being offences "committed *in India*," and the expression "Native State" must be similarly limited. This provision therefore of the 33 Geo. III, c. 52, is an authority directly and expressly against the jurisdiction of the Agra Court in the present case.

[231] I have now, I think, adverted to all the principal authorities referred to in support of the conviction and of the application for confirmation of sentence, and, I think, I have shown that not only do they fail to afford that support, but that their weight, if not their distinct and express bearing, is entirely in the opposite direction. The conclusion therefore at which I arrive is that Cyprus is not a "Native State" within the meaning of Act XI of 1872, that in fact it is not a "Native State" in any sense. It never was and is not now a "Native State" in relation to Turkey, for it was and in some sense still is part of the Turkish dominions. It cannot I consider be otherwise in its relation to the English Crown and Government, nor can we make it so by any interpretation of our laws.

But there is another and most serious consideration which I feel bound to notice, *viz.*, whether it is within the powers of the Indian Legislature not to pass such a law as Act XI of 1872, but a law capable of such a construction as is necessary in order to sustain this conviction of Sarmukh Singh. In other words can the Government of India in its legislative capacity pass a law for trial and punishment in respect of offences committed in other territories and jurisdictions governed and administered by and equally representing the Crown and Government of England? I think the answer to these questions in the affirmative might be successfully disputed. On this subject our attention was directed to certain opinions expressed by Wheaton in his International Law, 8th edition, pp. 179, 180, Ss. 111-113. Wheaton there lays down that every sovereign State is independent of every other, in the exercise of its judicial power. But this general position must of course be qualified by the exceptions to its application arising out of express compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with other States, for some common purpose. "Subject to these exceptions, the judicial power of every State is co-extensive with its legislative power." Wheaton goes on to state that: "The judicial power of every independent State, then, extends, with the qualifications mentioned,—(1) to the punishment of all offences against the municipal laws of the State, by whomsoever committed within the territory; (2) **[232]** to the punishment of all such offences, by whomsoever committed,

on board its public and private vessels on the high seas, and on board its public vessels in foreign ports; (3) *to the punishment of all such offences by its subjects, wheresoever committed.*" This last sentence would require more precise definition even if Cyprus was truly a "Native State" within the meaning of Act XI of 1872, without the tribunal and procedure afforded by the Articles of War. Wheaton further lays down as follows: "By the Common Law of England, which has been adopted in this respect in the United States, criminal offences are considered as altogether local and are justiciable only by the Courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States, and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the Courts of that country to which the party owes allegiance, and whose law he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favour of the jurisdiction of the Courts of the offender's country." The legal doctrine which it is here admitted is paramount in the British and American Courts, *viz.*, that criminal offences are local and triable only where committed, appears to be qualified in a rather doubtful manner, on the authority too of certain jurists among whom there is a difference of opinion, although the weight of authority favors the jurisdiction of the offender's country, and the views so stated assume their application to a distinctly foreign State. But it is unnecessary to pursue the subject further, as, I think, I have shown that Cyprus is clearly not a foreign or "Native State" according to the true intent and meaning of Act XI of 1872.

For all these reasons I am of opinion that the conviction in the present case cannot stand, seeing that it rests on the authority of a Court which was without jurisdiction to try the accused.

PEARSON, J.—The question of jurisdiction raised by the first plea in appeal, and decided by Mr. Justice Turner and myself on **[233]** the 24th January last, and now brought before the whole Court for reconsideration, is in so far as it relates to S. 3 of Act XI of 1872 simply whether Cyprus is or is not without and beyond the Indian territories under the dominion of Her Majesty; upon this point there is no room for discussion. The provisions of S. 9 of the Act appear to be quite within the competency of Legislature, and to be not less consistent with sound reason and good policy than conducive to the interests and ends of justice.

Apart from the question whether Cyprus is a Native State as defined in S. 3 of Act XI of 1872 is the question of the construction to be put on the 170th and 171st Articles of War. I entertain no doubt that the construction placed by Mr. Justice Turner and myself in our proceeding of the 24th January last is correct.

The evidence on the record fully convicts the prisoner of the offence of murder, and there are no circumstances which would warrant a modification of the sentence passed upon him by the Agra Sessions Court. I would dismiss his appeal and confirm the sentence.

SPANKIE, J.—A preliminary objection was taken by the Junior Government Pleader, that this Court had no power to review under S. 297 of the Criminal Procedure Code the ruling that the Cantonment Magistrate of Agra had jurisdiction to inquire into the charge of murder preferred against Sarmukh Singh. The Criminal Procedure Code provides that no judgment or final order, once signed, shall be altered or reviewed by the

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Court which gives such judgment or order; we are not now asked to review the order of the Division Bench which directed the Magistrate to commence the inquiry. That order was not a final order or judgment in the case. It was a preliminary order. At the stage at which the case has now arrived, we are called upon to consider whether we can confirm the sentence of death passed upon the prisoner who has been convicted of murder. An appeal has been preferred from the sentence passed by the Sessions Judge, and the question of jurisdiction has again arisen. The case has been laid before all the Judges of this Court, and I do not understand how we are precluded from determining this question of jurisdiction because, for the purpose of determining whether or not the Magistrate should make an inquiry, a Division [234] Bench of the Court had ruled that he was competent to do so. If we come to a decision that there was no jurisdiction, then the commitment was bad, we could not confirm the sentence of death, and would be competent to annu the proceedings. Again, if there was no jurisdiction, it would be monstrous if we were to hold that we were bound to accept as conclusive the order of this Court sitting as a Division Bench, directing the Magistrate to commence his preliminary inquiry.

On the point of jurisdiction I see no possibility of differing from the learned Judges who directed that the inquiry should proceed. Act XI of 1872 is one to provide for the trial of offences committed in places beyond British India, and for the extradition of criminals. It is called the Foreign Jurisdiction and Extradition Act. The definition of Native State may be arbitrary, but it must be accepted. There is no doubt whatever of the power of legislation to pass such an Act in regard to the native subjects of the Empress, and if this be so, the object of the Act being to provide for the punishment of offences committed by them beyond British India as if they had been committed in British India, Cyprus or any other foreign country, would be a "Native State," in reference to the prisoner in this case, within the meaning of the Act. I also accept the view taken by the learned Judges as to Articles 170 and 171 of the Articles of War. There are no grounds whatever for not accepting the decision of the Sessions Judge on the merits. I would therefore confirm the sentence of death passed upon the prisoner.

OLDFIELD, J.—The material point raised by the counsel for the prisoner is that the Agra Sessions Court had no jurisdiction to try the prisoner, a soldier in the 13th Native Infantry, for the offence of murder committed in Cyprus. A preliminary objection was taken on the part of the prosecution that the Court cannot now go into the question of jurisdiction, since it has been determined by the order of two Judges of this Court on the 24th January, 1879. That order was made under S. 297 of the Criminal Procedure Code, and it directed the Cantonment Magistrate of Agra to inquire into the charge against the prisoner, and in passing the order the learned Judges held that the Agra Court had jurisdiction to entertain the charge.

[235] The case is now before this Court for confirmation of the sentence of death passed by the Sessions Judge on the prisoner, convicted for murder under S. 302 of the Indian Penal Code, and in dealing with it, it is incumbent on us and our absolute duty, before we can affirm the sentence, to satisfy ourselves that the sentence is one which could legally be passed by the Sessions Judge, and we cannot be restricted by any order which may have been passed in the course of the proceedings. I may add that I can find no prohibition in the Code of Criminal Procedure against a review of an order of the nature of the one which has been made

in this case. The only express prohibition contained in the Criminal Procedure Code against altering or revising orders is in S. 464, and that section refers to judgments and final orders given under chapter xxxiv on conclusion of a trial in any Criminal Court.

On the question of jurisdiction I concur in the view taken by Mr. Justice Pearson and Mr. Justice Turner in their order of the 24th January last. Act XI of 1872 is an "Act to provide for the trial of offences committed in places beyond British India, and for the extradition of criminals." S. 1 makes it apply to "all Native Indian subjects of Her Majesty without and beyond the Indian territories under the dominion of Her Majesty," and by S. 9 "all British subjects, European or Native, in British India, may be dealt with in respect of offences committed by them in any Native States as if such offences had been committed in any place within British India in which any such subject may be or may not be found," and "Native State" is defined in S. 3 to mean, "in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominion of Her Majesty; in reference to European British subjects, the dominions of Princes and States in India in alliance with Her Majesty." It has been urged that it could not have been intended that the term "Native State" should include a remote country like Cyprus, that the term Native State is not a fitting term to apply to States beyond the Peninsula of India, but such a consideration as this cannot be allowed to override the plain language of the Act, which admits of but one interpretation, namely, that all places without and beyond the Indian territories under the dominion of Her Majesty are "Native States" in the **[236]** sense in which the term is used in the Act. And the objection deserves little weight when we find that the term is used in different senses in the Act, when referred to Native Indian subjects and European British subjects. The term took the place of that of "territories of any foreign Prince or State" used in Act I of 1849, and that it was intended to have a very extended application is shown by some alterations in the language of the Act as passed, and as it was first introduced. The Governor-General in Council was given under a previous draft of the Act power to establish Courts for trial of offences committed in "the territories of Native States and Princes in and adjacent to British India," and for the appointment of Justices of the Peace in such State or territory, whereas in the Act as it was passed these powers can be exercised "within any country or place beyond the limits of British India."

I should have scarcely thought it necessary to enter so fully into this point, but for the stress which was placed on it by the prisoner's pleader. Cyprus is therefore clearly a Native State within the meaning of the Act. It was also pointed out that by a proviso in S. 9 no charge as to any offence shall be inquired into British India unless the Political Agent, if there be such for the territory in which the offence is said to have been committed, certifies that in his opinion the charge is one which ought to be inquired into in British India, but this proviso only applies "if there be such" a Political Agent in the territory, and it has not been shown that any such Political Agent, that is, as defined in S. 3, any officer representing the British Indian Government, was established at Cyprus. The prisoner can therefore be dealt with in respect of the offence alleged to have been committed in Cyprus as if such offence had been committed in the Agra Cantonment.

Referring to Article 170 of the Indian Articles of War, "Any person subject to these Articles, who, at any place in British India within the jurisdiction of any Court of Criminal Justice established by Her Majesty,

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or by the Government of India, or by the Local Government, is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles, shall be delivered over to the nearest Magistrate to be proceeded against according to law."

[237] The Penal Code applies to British India, *i.e.*, the territories defined in the 1st section of the Code, and had the prisoner been accused at Agra of an offence against the Indian Penal Code he would have been delivered over to the nearest Magistrate to be proceeded with according to law, and the effect of S. 9 of Act XI of 1872 will be to permit his being dealt with for the offence committed in Cyprus as if it had been committed within British India and the proceedings which have been taken are therefore quite according to law. There is nothing in Article 171 inconsistent with effect being given to Article 170.

The crime of murder is clearly proved against the prisoner, and in my opinion the sentence of death must be confirmed.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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MADHO DAS AND OTHERS (*Plaintiffs*) *v.* RUKMAN SEVAK SINGH AND OTHERS (*Defendants*). [28th March 1879.]

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C.P.C. (1859), S. 377—Review of judgment—Limitation.

An application for review of judgment cannot be granted after the proper time, on grounds which should have been, but were not, urged at the hearing of suit, unless just and reasonable cause were shown to the satisfaction of the Court for not preferring it within the time allowed by law.

JUDGMENT.

[288] PEARSON, J.—This appeal has been pending here for more than two years because one of the defendants, respondents, *viz.*, Rukman Sevak Singh, who is a minor, was not properly represented. He is now at last represented by Dip Narain Singh, who has been duly appointed his guardian, and the appeal is ready for hearing. The appeal relates to a judgment passed by the lower Court on the 29th November, 1876, in review of a former judgment dated 23rd August, 1873. The decree is in favour of the plaintiffs, appellants; but one of the grounds of the appeal is that the minor aforesaid was not duly represented in that Court. An objection has been taken by the counsel for the guardian of the minor on his behalf that [289] the review was improperly granted more than two years after the date of the judgment originally passed in the suit, without any sufficient explanation of the long delay in making the application for review. We have considered the objection, and are of opinion that it is valid and must be allowed.

The application for review of the judgment passed on the 23rd August 1873 bears the date of the 3rd November, 1875, and the explanation which it offers of the delay of more that two years in preferring it is that fresh evidence has come to hand, which could not be adduced either when the case was decided or within the period allowed by law. The evidence so tendered was a copy of a judgment of this Court dated 13th August, 1875, in regular appeal No. 151 of 1874, Ato Kuar and Ranjit Kuar herself and

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as guardian of Rukman Sevak Singh, minor, defendants, appellants, *v.* Kishna Ram, plaintiff, respondent. In that case, in reference to a transaction then in question between the parties aforesaid, the Court remarked that the minor's mother was competent to act in the transaction as his guardian, and, as she had not been empowered to administer his estate by the Civil Court, was not bound to obtain its sanction to her proceedings. The object of filing the judgment containing the remark aforesaid was to support the contention that the minor was bound by the mortgage-deed executed by his mother as his guardian in the present case. The judgment so filed was not properly speaking evidence at all. It was merely authority in support of a contention which should have been urged upon the Subordinate Judge when hearing the case in the first instance.

We do not say that the grounds set out in the application for review were not good grounds for granting a review, nor can they be called in question. But, however good they were, the application could not be granted unless just and reasonable cause were shown to the satisfaction of the Court for not having preferred it within the time allowed by the law. In this case no such just and reasonable cause was shown. The reference to this Court's judgment dated 13th August, 1875 was a mere blind. The argument to which that judgment gave countenance and the other arguments and statements contained in the application might have been adduced within the proper time.

[290] The lower Court was not therefore warranted in granting the application and reviewing its former judgment of 23rd August, 1873. We accordingly allow the objection taken here on behalf of the minor respondent and dismiss the appeal with cost, and set aside the judgment and decree dated the 29th November 1876.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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On Appeal from the Court of the Judicial Commissioner of Oudh.

RAJAH KISHENDATT RAM (*Dft.*) *v.* RAJAH MUMTAZ ALI KHAN (*Plff.*)

[28th March 1879.]

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1. *Purchase by mortgagee of subordinate tenures in respect of mortgaged property—Redemption.*

Where the usufructuary mortgagee of a zemindari purchased with his own funds certain subordinate *birt* tenures that had existed in respect of it, and merged them in the taluk instead of keeping them alive as distinct sub-tenures, the mortgagor was held entitled to redeem, in the peculiar circumstances of the case, the subordinate tenures also, on payment to the mortgagee of the mortgage amount, *plus* the sums expended by him in purchasing the sub-tenures.

[R., 1 C.W.N. 174, 14 C.P.L.R. 169, 33 C. 1212, 8 O.C. 121, 11 O.C. 183, 12 O.C. 97.]

2. *Effect of sale of equity of redemption.*

The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee, exercising the power, a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent

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encumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the encumbrances.

[F., 18 B. 684; 24 M. 96; 5 C.L.J. 95 = 11 C.W.N. 284. R., 10 B. 49; 27 M. 428 = 12 M.L.J. 390; 7 O.C. 307; 33 C. 92 = 9 C.W.N. 989; 33 C. 915 = 10 C.W.N. 747; 3 S. L.R. 17.]

3. *Semble.*—1. *Acquisition by mortgagor and mortgagee.*

Generally, most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of the security; and similarly, any acquisitions by the mortgagee are accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption.

[R., 25 A. 46 = 22 A.W.N. 176.]

Semble 2.—Every purchase by a mortgagee, of a sub-tenure existing at the date of the mortgage, cannot be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms.

[R., 5 C.P.L.R. 105.]

JUDGMENT.

[201] SIR JAMES COLVILE.—The facts of this case, though some of them were originally contested, are now hardly in dispute, and may be shortly stated.

On the 22nd May, 1846, Raja Umrao Ali Khan, described as the Zemindar of Ilaka Utraola (the father of the respondent), executed in favour of Pande Ramdutt Ram (who is now represented by his brother the appellant) an instrument of mortgage which is at p. 2 of the record. The nature of the interest so mortgaged, or intended to be mortgaged, will be afterwards considered. At present it is sufficient to state that the deed purported to be a usufructuary mortgage of the villages specified in the schedule to it, redeemable on the re-payment, at a certain season of the year, of Rs. 36,000, the principal sum secured; the mortgagee entering into possession, and taking, until re-demption, the rents and profits of the mortgaged property in lieu of interest. Of those villages, two, *viz.*, Panipur and Mubarakpur, have in some way ceased to belong to the estate; the others have (at p. 129 of the record) been conveniently divided into seven separate classes or groups.

Immediatly after the execution of the deed, the mortgagee attempted to enter into the actual receipt of the collections from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons, who claimed to hold all or most of those villages under various 'birt' tenures, the effect of which was to make each of them the zemindar of the **[202]** villages comprised in his tenure, rendering only some small dues and payments to the Raja of Utraola. The resistance of the *birtias* seems to have been in a great measure successful; and it must now be taken to have been found in the suit that the birts were valid and subsisting sub-tenures at the date of the mortgage; and that the rights of the birtias in the different villages comprised in the 1st, 3rd, 4th, and 6th of the seven classes or groups above referred to were purchased by the mortgagee some time in or before the year 1849. The birt right (if any) in the villages comprised in the remaining three groups remained in the original birtias or their representatives. Thus stood the rights of the parties at the time of the annexation of Oudh.

At the summary settlement, posterior to Lord Canning's proclamation, the mortgagee appears to have been allowed to engage for all the villages contained in the seven groups, and thenceforward to have held them as a talook, subject of course to the right of any subordinate zemindar, or other sub-tenant, to a sub-settlement.

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In December, 1870, and in the course of the regular settlement of the province, the respondent, as the son and representative of the original mortgagor, asserted by the present proceedings his right to redeem. That right, though at first disputed, is now admitted, and the only questions that remain open between the parties are what are the nature and extent of the redeemable interest, and on what terms is the right of redemption to be exercised. These questions have received three different solutions in the course of the voluminous proceedings that have been had in the cause.

Captain Forbes, the Settlement Officer, in his proceeding of the 5th November, 1873, found that at the time the mortgage-deed was executed, the mortgagor's right and interest in the property mortgaged was limited to the annual levy of a village tax, called 'bhent,' and of certain market dues, to the occasional levy of a cess known as 'Sharakatana,' and to a reversionary right in all lapsed 'birt' estates, the title in which had been derived from the mortgagor's family; that the taxes thus levied were of the nature of feudal or manorial tribute, and though **[203]** necessarily fluctuating in amount, may be held to be represented by a sum equivalent, as nearly as possible, on an average, to 10 per cent. of the rental taken as the standard for assessment of the Government demand, and that the right and interest thus defined was all that the Rajah of Utraola was competent to convey, and all that was conveyed under the mortgage-deed.

This proceeding being under a remand, Captain Forbes was not competent to determine the case judicially; but, from the above finding, it may be inferred that, in his opinion, all that the mortgagor was entitled to redeem was the superior title as above decribed, subjects to the *birt* interests whether vested in the mortgagee or others.

The Commissioner, by his final judgment of the 20th June, 1874, decided that what was conveyed by the mortgage and was then redeemable by the mortgagor was, as between him and the mortgagee, the full and unrestricted proprietary title in the estates covered by the deed of mortgage. He treated the acquisition of the *birts* by the mortgagee as made on behalf of the mortgagor, and apparently proposed to allow the former nothing for what he had expended on such acquisitions.

This judgment was on appeal varied by the Judicial Commissioner, whose order of the 9th February, 1875, was in the following terms:—

"The right of redeeming the mortgage on the estate of Itwa Khera, executed in 1253 Fusli (1846) by Umrao Ali Khan, ancestor of plaintiff, in favour of defendant, is decreed in favour of plaintiff on payment of Rs. 36,000, and if the plaintiff at the time ofr edemption pays to defendant the further sum of Rs. 3,139, he will be entitled to re-enter on the estate with all the rights and privileges now enjoyed by the defendant, but if he fail to pay the further sum of Rs. 3,139 at the time of redeeming the mortgage, defendant will be entitled to retain the rights and interests of the *birtia* zemindars purchased by him in the estates of Khera Dih, Bankata Ganeshpur, Sanapar and Itwa, and will retain these rights as an absolute under-proprietary tenure in subordination to plaintiff, paying to the plaintiff a rent equivalent to the Government demand for the time being, with an addition of 10 per cent."

[204] Against this order the present appeal is preferred. There is no cross-appeal, and, therefore the contention between the parties is narrowed to this, can the mortgagor, upon paying the purchase-money of the *birts*, *plus* the original mortgage-money, redeem the estate as it is now enjoyed by the mortgagee; or is the latter entitled in any case to retain the rights and interests of the *birtia* zemindars purchased by him as an absolute

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under-proprietary tenure in subordination to the talookdar, and to have a sub-settlement on that basis.

The issue thus evolved from this lengthy litigation is a narrow, but a nice and somewhat difficult one.

The appellant originally insisted that what was mortgaged was the mere right to receive a malikhana allowance; and he still insists that the mortgage must be taken to have been made subject to the *birts*; that those *birts*, though held in some sense under the Rajah of Utraola, were distinct estates; that the plaintiff is not entitled to redeem more than his ancestor mortgaged, and that the appellant or his brother was, notwithstanding the relation of mortgagor and mortgagee, entitled to purchase, and must be deemed to have purchased, the *birts* bought by him in his own right, and for his own benefit.

Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

It may well be that when the estate mortgaged is a zemindary in Lower Bengal, out of which a putnee tenure has been granted, or one within the ambit of which there is an ancient mokurari istemrari tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that putnee or mokurari. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it [205] for his own benefit. In such cases, also the putnee, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindary would always have been held subject to the mokurari.

Their Lordships nevertheless have come to the conclusion, though not without some doubt and difficulty, that the decision of the Judicial Commissioner was, in the peculiar circumstances of this case, correct, and ought to be affirmed.

The first point to be considered is what is the true construction of the original contract, and what were the intentions and understanding of the parties to it. The deed was not in terms made subject to recognized *birts*, for it contains no reference to them. On the face of it, it is a mortgage of the ilaka or ilakas, consisting of the 35 villages, one piece of land, and one jote, "including all the internal and external rights which had descended to the mortgagor from his ancestors." And it is expressed to be upon the following conditions, *viz.*:—"That the said Pande is allowed to take possession of the said villages, and enter into engagement with the Government for the payment of revenue. I (the mortgagor) shall have nothing to do with the profits of the estate, or to stop the injuries which may be done to it. I shall be entitled to redeem the estate when I pay the said sum (the Rs. 36,000) in one lump to the Pande in the month of Bysack, when there are no crops standing on the ground. If any one appears to lay claim to the said estate, it will be my duty to defend the suit, with which the Pande shall have nothing to do." The last stipulation obviously points to a possible claim by title paramount to the whole zemindary, and is in the nature of a covenant for title. The other stipulations plainly indicate that the mortgagee, until redemption, was to be the zemindar *de facto* of the estate, with all the rights,

privileges, and powers of a zemindar, as between him and the sub-tenants; that he was to take the profits of it, and defend it against the injuries done to it; and, further, that it was in the contemplation of both parties that he might take possession of the villages, and receive the collections from them. This construction is consistent with the decisions of all the Courts that have dealt with the case. All have negatived the **[206]** original contention of the defendant, that the plaintiff had no other right than that of redeeming a malikhana allowance, and have held that the subject of the mortgage was the talookdary interest, with all its incidents, whatever that might include.

The next point to be considered is what was the nature of the *birt* tenure, and what the relations between the *birtias* and the superior zemindar. Upon this, their Lordships were referred by Mr. Doyne to the Settlement Circular of the 29th January, 1861, being an official paper issued by the then Chief Commissioner of Oudh by way of instructions relative to the regular settlement of the province then about to be made.

The material paragraphs of the paper are the 18th to the 25th, both inclusive.

The 18th says:—that *birts* were given for whole mouzahs, or patches of lands in mouzahs, and proposes in the first instance to deal with the latter. The 19th says:—"These tenures, when granted by the talookdar for money received, will be maintained as representing the proprietary rights of the *birtias*, who by purchase have acquired the position of intermediate holders, and as constituting the portion of profits left them by the talookdar." And then, after distinguishing between birts given by talookdars, and those given by mere thikadars, and treating the latter as not entitled to be maintained, it says, "*Birts* given by the original zemindars before the village was incorporated in the talook will be upheld, unless the talookdar resumed them prior to 1262-63, F. (1855-6)—" The 21st paragraph says:—"*Birts* of entire mouzahs are very common in Gondah and Gorakpore. They originated in purchases from needy talookdars, and sometimes in clearing leases of jungle land. In the Utraola and Batui Pergunnahs of the Gondah districts, the *birtias* had been in many instances admitted to direct engagements with the Native Government for years previous to the annexation, and, of course, were settled with, and should have been so at the late summary settlement, on the principle that we are not bound to restore to the talookdars what they had lost before our rule commenced." The 22nd paragraph says, "In other instances the *birtias* held under the talookdar on the terms of their *birt* pottahs. These generally were, that 10 per cent, or redyhak, as it was called, on the amount of the pottahs, **[207]** should be returned to them; that, while they held on their pottahs, the entire control of the village rested with them; and, if they threw them up rather than accept enhanced terms, they were entitled to 10 per cent. on the collections. Sometimes the *birtia's* proprietary profits were shown in holding a portion of the area 'nankar.'" The 23rd paragraph says, "In other instances, the *birtias* had been stripped of every vestige of proprietary right, for embarrassed talookdars would *sell* the *birt* of a village several times over, and nothing was more common than to see several claimants to the *birt* of a village, each with his pottah in correct form." The 24th paragraph says, "Where the *birtia* has lost possession, there is no more to be said. We are not to restore it to him, but the Chief Commissioner is clearly of opinion that the *birtias* who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pottahs under the talookdars, must be maintained in the full enjoyment of their rights in subordination

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to the talookdars. It is no argument that the talookdar may not realize more than 10 per cent. above the Government demand. Such *birt* tenures must be considered an intermediate interest between the talookdar and the ryot, and, as such, entitled to be maintained." The 25th paragraph says, "The meaning of the term 'birt' is a 'cession.' It is the purchase of a proprietary right subordinate to the talookdars on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power. In Gorakpore the *birtias* were generally admitted to direct engagements, though charged with a malikhana of 20 per cent. to the talookdar. Here he must deal with the superior party."

The result of what has been cited seems to be that, under the nawabi, these *birt* tenures were presumably carved out of the talookdar's or superior zemindar's estate; that they were held under him upon terms varying according to the terms of the particular pottah or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements [208] took place, malikhana was payable to the talookdar; that they were sometimes resumable, and when resumed would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the zemindar and the *birtias*, a relation which, in an unsettled state of society like that of Oudh under the nawabi, would probably involve more or less of power in the former over the latter, and, in dealings between them, give to the zemindar advantages which would not be possessed by a stranger. On the other hand, it is clear that *birts* still subsisting are tenures which would entitle their holders to sub-settlement under "The Oudh Sub-Settlement Act of 1866."

The question, however, remains, what was the effect as between the mortgagor and the mortgagee of the purchases by the latter of the *birts* in question? To determine this it is desirable to consider, somewhat more in detail, what has been his course of action.

Upon the evidence in the cause it would seem that, in and after the year 1254 F. (1847) (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the *birtias* had, in former years, been allowed to engage, for the particular villages comprised in their tenures, directly with the Government, and that he continued so to do up to the time of annexation. The first summary settlement after that event seems, however, in accordance with the policy that then prevailed, to have been made with some at least of the *birtias*, including even those of Itwa, who are now said to have previously parted with all their *birt* interests.

It has also been proved that, immediately after the execution of the mortgage, the mortgagee attempted to enter into the direct receipt of the collections of all the villages by force of his talookdary title, and was only prevented from doing so by the resistance of the *birtias*, and the interposition, with or without jurisdiction, of the officer called the nazim. Here, then, the talookdar, *de facto*, was in open conflict with tenants of the estate claiming to be *birtias*. There is no proof of any regular trial and determination, by a civil court, of the disputed right The nazim may have taken action merely as a matter of policy, and [209] to prevent disturbance. Then follow the purchases in 1256 F. and 1257 F., (1849 & 1850) and the execution of the deeds by virtue of which the *birtias* for very inconsiderable sums, conveyed their interests in the *birts* in question nominally to Pande Ram Dutt Ram. There is, however, no evidence of

the negotiations which led to these contracts; nothing which shows upon what basis they proceeded; how far, in making the purchases, the Pande was acting in the character, and using the powers, of talookdar, or how far, in doing so, he was compromising alleged rights which might otherwise have been successfully asserted for the benefit of the estate. The apparent inadequacy of the considertion money affords a strong argument for supposing that the transactions may have been in the nature of compromises, which the powers of talookdar were exerted to effect on favourable terms.

Again, what followed on the purchases? Had they been made by or on behalf of a talookdar holding under an absolute, as distinguished from a mortgage, title, the tenures would, as a matter of course, have merged in the talook. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shown to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation, he never sought to engage for these villages as *birtia*, and on the summary settlement, after Lord Canning's proclamation, he did in fact engage for them as talookdar, and as parcel of the talook. His conduct is not surprising. He probably did not cotemplate redemption (in this very suit he disputed the right to redeem), and he, therefore not unnaturally dealt with the *birts* as merged in the talook, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor.

Again, had the mortgagor redeemed before these purchases, he would have resumed his position as talookdar, with the means of dealing on favorable terms with *birtias* who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of talookdar *de facto*, has so acquired the *birts* and allowed **[210]** them to merge in the talooka. To allow him now to revive these *birts* for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse, by reducing the redeemable estate *pro tanto* to a mere right to malikhana, and possibly rendering the talook no longer worth redemption.

Their Lordships are therefore of opinion that the Judicial Commissioner had strong grounds for applying the principle which, as he explains by his subsequent Minutes of the 26th January and the 9th February, 1875, he intended to affirm in his order of remand of the 26th March, 1873. In his final judgment he says:—"that his intention in sending the case back to the Commissioner's Court was to ascertain whether the defendant could prove that he had increased the value of the estate by buying up certain incumbrances, and, if so, whether he had any claim on the plaintiff in respect of his expenditure on this account".

There was some discussion at the bar on the English decisions, upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognize the general equity of the principle, and show how it has been applied by the Courts of this country. It is therefore, desirable shortly to notice the arguments on this point. It seems

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to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognized by English law to this extent, *viz.*, that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mort-[211]gaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw* v. *Brewer*, (1) as to the renewal of a term obtained by the mortgagee of the expired term, being, "as coming from the same root," subject to the same equity, has never been impeached. The English case, which in its circumstances comes nearest to the present, is that of *Deo* v. *Pott and others*, (2) in which the principle was enforced against a mortgagor. It was there held that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar facilities for obtaining the surrenders. Some stress was laid upon the case of *Shaw* v. *Bunny*, (3) in which Lord Romilly, Master of the Rolls, held that a second mortgagee was entitled, equally with a stranger, to purchase for his own benefit the mortgaged estate when sold under a power of sale contained in the first mortgage. An opinion to the same effect had previously been expressed by Vice-Chancellor Kindersely, in *Parkinson* v. *Hanbury*, (4) though he decided that case against the second mortgagee on the ground of his having had actual notice of an irregularity in the sale. These authorities, however, do not seem to their Lordships to touch the present case. The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not, equally with a [212] stranger, purchase the estate when sold under a power of sale created by the mortgagor. Upon the whole, then, their Lordships are of opinion that the decision of the Judicial Commissioner is equitable and correct, and they will humbly advise Her Majesty to affirm it, and dismiss this appeal with costs.

APPELLATE CIVIL.

PRESENT.

Mr. Justice Pearson and Mr. Justice Spankie.

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GULAB SINGH (*Plaintiff*) *v.* AMAR SINGH AND ANOTHER (*Defendants*). [31st March 1879.]

2 A. 237.

Pre-emption—Limitation—Act XV of 1877, Sch. ii. Art, 10.

Where property is mortgaged on condition that the mortgagor should remain in possession and pay interest annually to the mortgagee, and that, in default of such payment, the mortgagee might sue for actual possession, the cause of

(1) 2 P.W. 511.
(2) 2 Doug. 709.
(3) 33 Beav. 494.
(4) 1 Drewry & Sm. 143.

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action for a suit for pre-emption arises on the date of the deed of mortgage, and not from any subsequent date, on which the mortgagee's name may be substituted for that of the mortgagor in the proprietary register; for, though the mortgagee may not have been in plenary possession of the property from the date of the deed, he had constructive possession of it by receipt of interest on the mortgage-money.

JUDGMENT.

[238] PEARSON, J.—On the 19th December, 1876, Amar Singh borrowed money from Tota Ram and mortgaged his zamindari share as security for the repayment of the amount. The agreement was that the mortgagor should remain in possession of his share and pay the interest on the loan annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. By the terms of the *wajib-ul-arz* the plaintiff contends that he was entitled to have had an offer of the share made to him before it was mortgaged to Tota Ram, and he now claims proprietary possession of it. The suit was instituted on the 8th February, 1878, and the cause of action is said to have arisen on the 19th of May, 1877, when Tota Ram's name was substituted for that of Amar Singh in the proprietary register in pursuance of the transaction. The plaint, however, alleges that Amar Singh, notwithstanding the mutation of registry, is still in possession of the share. On the other hand Tota Ram alleges that he has been in possession of it since the execution and registration of the deed of mortgage. Whether the mutation of registry was merely a precaution to secure the mortgagee's interests, whether he has been only hitherto receiving the interest due to him annually for the mortgagor still in possession of the share, or whether in consequence of default in payment of the interest the share has passed into the actual possession of the mortgagee, these are questions which find no answer in the judgments of the lower Courts. But it seems to us that whether, as Tota Ram avers, he has been in plenary possession since the date of the deed, or **[239]** whether, in accordance with the tenor of the deed he has only had such constructive or partial possession of it as is involved in the receipt of interest on the loan secured by the mortgage, the plaintiff was equally bound to have brought his suit within a year from the date of the deed, and is not entitled to reckon the year from the date on which the possession of the mortgagee of the share was rightly or wrongly recognised by the revenue department. Concurring therefore in the opinion of the lower Courts that the suit is barred by Art. 10, Sch. ii of Act XV of 1877, we disallow the pleas in appeal, and dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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2 A. 239.

MANGAL KHAN (*Defendant*) *v.* MUMTAZ ALI AND OTHERS (*Plaintiffs*). [31st March 1879.]

Land held by a lambardar as "khud kasht" at a nominal rental—Liability of co-sharer for profits—Act XVIII of 1873 (N.W.P. Rent Act), S. 209.

S. 209 of the Rent Act provides that, in any suit brought by a co-sharer against a lambardar for a share of the profits, the Court may award to the plaintiff not only a share of the profits actually collected, but also a sum equal to the

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plaintiff's share in the profits, which, through gross misconduct or negligence, the lambardar has omitted to collect. The application of this section to lands held at fixed rents is obvious; but even were it applicable to lands held by a lambardar himself as "*khud kasht*," a co-sharer cannot succeed in a suit against him for a share of the profits, unless he proves that there were profits, or that his failure to realize any was owing to gross negligence or misconduct on his part.

JUDGMENT.

[240] PEARSON, J.—The land in this mahal appears to have been recorded as the *khud-kasht** of the lambardar Mangal Khan, and to have borne a nominal rental of Rs. 79-6-0. In 1282 and 1283 fasli it is stated to have been under-let by him in part or in whole for Rs. 28-6-0, and in 1284 fasli to have lain fallow.

This is a suit brought by the plaintiffs as co-sharers in the mahal for Rs. 115-6-0 as their share of the profits on account of the three years above-mentioned. The answer is that, in reference to the facts above stated, there were no profits; on the contrary, a small loss. The lower Courts have, however, held him answerable for the rental borne on the rent-roll, and the question for our consideration is whether the view taken by them of his responsibility is correct. It appears that in April, 1876, he attempted to get rid of his responsibility by resigning the holding. The Assistant Collector calls it his sir-land, whether rightly or not, in reference to the definition in S. 3 of the Rent Act, we have no means of ascertaining. The attempt was disallowed by the Collector. It may be a question whether S. 31 of that Act is applicable to such a holding. The lambardar's position as cultivator of the joint land was not that of an ordinary tenant. His co-sharers in the estate could scarcely have sued him as a tenant for the amount entered in the rent-roll **[241]** as the rent of the land, or even for a share of it proportionate to their shares in the mahal; although he may have been bound to distribute to them according to their shares the profits realised from it after defraying the expenses of cultivation and paying the Government revenue and village-expenses. S. 209 of the Rent Act provides that, in any suit brought by a co-sharer against a lambardar for a share of the profits, the Court may award to the plaintiff not only a share of the profits actually collected, but also a sum equal to the plaintiff's share in the profits which, through gross misconduct or negligence, the lambardar has omitted to collect. But for this special provision, such an award could not be made in a suit for profits, and it seems very doubtful whether that provision is applicable in the present case. The position of a lambardar who fails to collect rents fixed on lands held by tenants is very different from that of a lambardar who is unable to arrange for the cultivation of lands sometime held by him as *khud kasht*. In the present case even were S. 209 applicable, the lower Courts have neither found that more was realised from the land than has been accounted for by the lambardar, nor that the failure to realise more was owing to gross negligence or misconduct on his part. Such being the state of things disclosed by the record, we are of opinion that the decree of the lower Courts cannot be sustained. We accordingly decree the appeal and dismiss the suit with costs in all the Courts.

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* "*khud-kasht*" is the term applied in the N. W. Provinces to lands which the proprietor cultivates himself.

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PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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EMPRESS OF INDIA *v.* BALDEO SAHAI. [7th April 1879.]

2 A. 253.

1. *Penal Code, S. 161—Attempt to obtain illegal gratification.*

A clerk in the Pension Department, in an interview with an applicant for pension, referred to the difficulties in the way of getting the full pension already sanctioned, and, after mentioning two cases in which increased pensions had been obtained through his influence, informed him that anything might be effected by *Karrawai, i.e.*, by giving and taking money, and, on the overture being rejected, concluded by declaring that he would rue and repent the rejection, *held*, that the offence of attempting to obtain a bribe had been committed.

[Appr., 32 C. 292=9 C.W.N. 547.]

2. *Crim. Pro. Code, 1872, Ss. 218, 351—Right of accused person to cross-examine witnesses for prosecution.*

Where, after hearing the accused, his pleader, being given an opportunity to cross-examine the prosecution witnesses, refused to cross-examine them then, but said that he would apply to the Court after he had examined his witnesses, and the Magistrate discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence, *held*, that the accused was not entitled to have the prosecution witnesses summoned on the date fixed for the examination of the defence witnesses; *held*, also, that the Magistrate was competent to record the evidence for the prosecution, both oral and documentary, after the case for the defence had been closed.

JUDGMENT.

[254] SPANKIE, J.—The accused was charged that he on or about the 30th July, 1878, being a public servant, attempted to obtain from Abbas Ali, for himself, a gratification other than legal remuneration, as a motive or reward for showing favour in the exercise of his official functions, and thereby with having committed an offence punishable under S. 161 of the Indian Penal Code.

[255] If we accept the evidence of Abbas Ali, it is clear that he at least quite understood that Baldeo Sahai had expressed every readiness to use his influence in his (Abbas Ali's) favour provided that he was paid for doing so. I felt some difficulty at first when I considered the case whether "an attempt to obtain" an illegal gratification had been made out. But I am satisfied that not only was the intent to commit the offence defined in S. 161 of the Penal Code present in the mind of Baldeo Sahai, and for some time too, but that he made preparations to do so, and when these preparations and his plans were ripe, he attempted to carry out his intention. It is shown in evidence that the grant of a pension to Abbas Ali was received in the Accountant-General's Office on the 15th June. But an anonymous letter had reached the office, suggesting that there had been breaks in Abbas Ali's service and great care should be taken in passing his pension; that the Assistant Accountant-General in charge of the Pension Department directed that the "permanent payable order" should be issued, that he took no notice of the letter because it was anonymous; and that he made over the file to Baldeo Sahai, who is a clerk in the pension pay department, to carry out his orders.

It is also shown that the Government of the North-Western Provinces had sanctioned the pension on the 12th June, 1878. It is also shown that the file was made over, as stated above, on the 14th August or

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thereabouts by Mr. Carnac after the objections of the Deputy Accountant-General to the pension had been considered by the Local Government and overruled, so that Baldeo Sahai must have been fully aware that no further objections to its payment would be entertained. When Abbas Ali first saw Baldeo Sahai, which I agree with Mr. Thomson must have been about the middle of August, he was told by Baldeo Sahai that an anonymous petition had been received objecting to the pension; that from what was written he was afraid that there would be a fuss about it; that Biss Sahib had raised several objections, and a report had been prepared that Rs. 25 a month in excess of the proper pension had been sanctioned, and Baldeo Sahai promised next day to show Abbas Ali the petition. The next day Abbas Ali met Baldeo Sahai near the Accountant-General's Office with the file in his hand and drove him home. It was evening, and Baldeo Sahai said that **[256]** it was too late, he had better come the next morning, and "I will show you the letter."

So far Baldeo Sahai had made his preparations for carrying out his previously conceived plans and intention. He had also stimulated the curiosity of Abbas Ali and excited his fears by the false assertion that there were still difficulties in the way of his getting the full pension already sanctioned. The next day at 8 A.M. Baldeo Sahai showed the anonymous petition and told Abbas Ali of two pension cases which had been carried through by him. In one instance he had obtained half pay instead of one-third as pension for Mirza Ali, and in the other he had increased the pension of Ali Bakhsh Khan to Rs. 400 a month. There can be no doubt that, if this evidence be true, this statement of his successful efforts to secure better pensions for persons was meant to act upon Abbas Ali and induce him to follow the lead which Baldeo Sahai was now bent upon giving to him. He now begins what may be called business and what I think constitutes an attempt on his part to obtain a gratuity from Abbas Ali.* The intention had been conceived, the plans had been matured, and all preparations made, and though no specific sum had been asked for, the transaction had so far advanced, that Abbas Ali had thoroughly understood what was being done, and put a stop to what might have been successful, if he had not refused to enter into any arrangement and intimated to him, that he "would not give him anything." That Baldeo Sahai understood that his attempt had failed is clear from his declaration, "You will rue and repent it." If Baldeo Sahai had found a willing listener, there can be no reasonable doubt that his offer to arrange the business, if Abbas Ali wished it, in the manner suggested by "*kar-rawai*," which he understood to be the giving and taking of money, would have been accepted. Not only would Baldeo Sahai have succeeded in his attempt to obtain a gratuity, but he would have caused Abbas Ali to commit an offence punishable **[257]** under S. 116 of the Penal Code. I think therefore that there can be no doubt that, if the evidence be true, the offence charged under S. 161 of the Code against the accused has been made out.

On the merits I entertain no doubt of the accused's guilt. I fully accepted Mr. Thomson's judgment in this respect. It is full and exhaustive,

* "He (Baldeo Sahai) said that the office was a large one, much authority was vested in him, and by such *kar-rawai* (*i.e.*, I supposed giving and taking money) such things were effected: I gave him to understand that nothing of that need be expected from me; that as the report had been written which he had shown me, he could have no power in the matter; he then said that the office was a large one, if I wished it, everything might be accomplished: I said I did not wish to do anything of the nature of the '*kar-rawai*' he wished; that is, I intimated to him I would not give him anything: as I left he said you will rue and repent it."

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and deals with all the apparent difficulties, such as contradictory statements and discrepancies. The accused in no way made out his defence that he was the victim of a conspiracy on the part of the office hands organized by the head of his office, and so far from Abbas Ali being eager to secure the punishment of Baldeo Sahai, there is proof on the record that he did not wish that there should be any criminal charge. He from the first stated to the Deputy Commissioner at Lucknow that he wished no notice to be taken of his complaint. If he could have got his pension order made out, he would have been quite content.

An objection was taken by Baldeo Sahai's counsel that the Magistrate had contravened a ruling of this Court and had refused to summon the complainant in order that he might be cross-examined on the day fixed for hearing the defence. The law as laid down in S. 218 of the Criminal Procedure Code is: "If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same and to produce his witnesses if in attendance. and shall be allowed to recall and cross-examine the witnesses for the prosecution." It appears from an order by the Magistrate dated the 4th September, after hearing the defence, that accused's pleader was offered an opportunity under S. 218 of cross-examining the witnesses. The pleader refused to cross-examine them and said that he would apply to the Court after he had examined his witnesses. The Magistrate held that he could not do this. The accused at that time had no witnesses in attendance. The case was adjourned and the witnesses were summoned. The ruling (1) cited by the respondent's counsel did not determine the point whether, if the Magistrate before granting an adjournment called upon the accused to exercise his right of re-calling the witnesses for the prosecution, and the accused refused to do so at that time, the Magistrate would thereupon **[258]** be at liberty to discharge the witnesses for the prosecution. This point the learned Judge expressly said "need not now be determined" in the case before him. In the same volume with the ruling referred to is another (2), by Mr. Justice Pearson, in which it is laid down that the section does not say that accused shall only be allowed to re-call and cross-examine the witnesses for the prosecution, provided that he expresses his wish to do so at the time when he is called upon to make his defence. and provided that these witnesses be still in attendance in the Court and do not require to be re-summoned. The plain meaning and intention of the section was to allow him the right in question at any time while he is engaged in his defence and before his trial is concluded. The object of the section is clearly to secure the accused the opportunity of cross-examining the witnesses for the prosecution after he has been informed as to the nature of the specific charge which he is required to answer. Until he knows this he is not in a position to decide on what points the evidence for the prosecution is material. If this opportunity be secured, I do not apprehend that he has any further right of re-calling the witnesses. If the witnesses for the defence are in attendance, they are to be examined, and after that the accused shall be allowed to re-call and cross-examine the witnesses for the prosecution. But if the witnesses for the defence were not in attendance, the accused would still be at liberty to re-call the witnesses for the prosecution. If he refuses to exercise this right *after he has entered on his defence*, he cannot, I think, demand as a right the re-call of the witnesses for the prosecution, if the case be adjourned because he has not produced his

(1) *Queen* v. *Lal Mahomed*, H. C. R., N.-W. P., 1874, p. 284.
(2) *Queen* v. *Lal Singh*, H. C. R., N.-W. P., 1874, p. 270.

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witnesses. He has had the opportunity intended by the section. What his own witnesses may say can have little or no bearing on the cross-examination of the witnesses for the prosecution who are called to support the charge, but not to refute the evidence for the defence. There is also a second objection that the Magistrate acted illegally and against the practice of the Criminal Courts, inasmuch as he recorded evidence for the prosecution, both oral and documentary, after the case for the defence had been closed. Section 351 of the Criminal Procedure Code, however, gives the Magistrate power to summon any witness at any stage of any proceeding, inquiry or trial, if the **[259]** evidence of such person appears essential to the just decision of the case. "Trial includes the punishment of the offender" (S. 4), so I see no valid objection to the course adopted by the Magistrate. The trial had not closed until he had sentenced the accused, if convicted.

In conclusion I may state that the sentence passed was, in my judgment, too lenient for the offence committed. I now find that my honorable colleague proposes to increase the amount of punishment by a fine, in which proposal I quite agree with him.

PEARSON, J.—I concur with my honorable colleague in the opinion that, for the reasons set forth in the Joint Magistrate's able and well considered judgment, the evidence of Abbas Ali is substantially trustworthy, and that it convicts the accused of an offence punishable under S. 161, Indian Penal Code. Nor does it appear to me that the Joint Magistrate's procedure is obnoxious to material objections. The view of the Sessions Judge, that "the accused has not committed any act towards the commission of the offence," and that "all that he has done is only preparatory to the commission of the offence," is erroneous. It may be that the accused in sending for Abbas Ali and showing him the anonymous petition and exhibit B and making him aware of their contents was only paving the way for the commission of the offence in question. But when, after referring to his own influence in the office and instancing two cases in which by that influence increased pensions had been obtained, he proceeded to intimate that anything might be effected by *kar-rawai*, and on the overture being rejected, concluded by declaring that Abbas Ali would rue and repent the rejection of it, the accused was actually offering inducements for the purpose of obtaining a bribe. To ask for a bribe is an attempt to obtain one; and a bribe may be asked for as effectually in implicit as explicit terms. As soon as he had caused Abbas Ali to understand that he was willing to render him a service for a bribe, the offence of attempting to obtain a bribe was consummated, and the Sessions Judge is wrong in holding that it was not consummated, but that the accused might have foregone his intention of committing it. The punishment awarded by the Joint Magistrate's sentence is, however, scarcely adequate to the offence. **[260]** I would, therefore, set aside the order passed by the Sessions Court in appeal, and restore the finding and sentence of the Court of the Joint Magistrate with this modification, that, in addition to the punishment awarded by the sentence, the criminal Baldeo Sahai pay a fine of Rs. 200, or, in default of payment, undergo a furthsr imprisonment for six months.

CRIMINAL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

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EMPRESS OF INDIA *v.* ASGHAR ALI AND OTHERS.

[10th April 1879.]

2 A. 260=4 Ind. Jur. 250.

Crim. Pro. Code, 1872, Ss. 344, 345, 347—Pardon to accused person—Evidence—Evidence Act, S. 24.

2 A. 260= 4 Ind. Jur. 250.

Tender of pardon to a person concerned along with others in an offence, not exclusively triable by a Court of Sessions, and his examination as a witness, are both illegal. And his statement would be irrelevant and inadmissible with reference to S. 344, Crim. Pro. Code, and S. 24, Evidence Act.

[Appl., Rat. Unrep. Cr. Cas. 461; **R.**, 23 B. 213 (217), 10 M.L.J. 147 (159), 25 M. 61 (69) (P.C.); 52 P.L.R. 1902. 12 P.R. 1902, 16 C.P.L.R. 112 (114), 100 P.L.R. 1902, 33 C. 1353 (1359)=10 C.W.N. 962=4 Cr. L.J. 165, 5 A.L.J. 691 (698)= A.W.N. (1908), 259; **D.**, L.B.R. (1872—1892), 246 (248, 252), 16 B. 661.**]**

JUDGMENT.

[261] The appellants have been convicted by the Sessions Judge of offences under Ss. 261, 262, 409, 411, and 414, of the Indian Penal Code, in connection with certain stamp frauds in the Civil Courts of Shahjahanpur. Asghar Ali is the deputy record-keeper of the Judge's Court. Hamid-ud-din is the decree-writer, and Achal Behari is a literate chaprasi in the Court of the Shahjahanpur Munsiff. The appellants, together with Irtiza Ali Khan, a copyist in the Judge's office, and four others, were sent up by the police to the Magistrate on charges under Ss. 411 and 379, and in the course of the inquiry the Magistrate offered a pardon to Irtiza Ali Khan and admitted him to be a witness for the prosecution. The Magistrate finally committed four of the accused to the Sessions on charges under Ss. 261, 263, 109 and 263, 409, 411. In the course of the trial an objection was preferred on their behalf to the Judge to the admission of the evidence of Irtiza Ali Khan, but was disallowed and his evidence was admitted.

The case for the prosecution is that it was part of Achal Behari's business under orders from the Munsarim to punch the stamps on plaints presented, and of Hamid-ud-din to punch them the second time; that Achal Behari instead of punching them removed the unobliterated stamps and replaced them with old stamps that had been once punched supplied by Hamid-ud-din, who in this turn removed once-punched stamps from plaints passing through his hands, replacing them with twice-punched stamps obtained from the record office and taken from old records, such stamps being in their turn replaced by low value stamps from B. files. In brief it was Achal Behari who stole the fresh stamps, and the others assisted in concealing the fraud by a concerted plan of tampering with the stamps in the records, and that the spoil obtained by the sale of the stolen stamps was divided among them.

The fact that the stamps have been taken off the plaints and the records tampered with appears placed beyond doubt, but the objection taken on behalf of the appellants is that the evidence of the approver is inadmissible, and that apart from it there is no sufficient evidence on which the appellants can be convicted of being concerned in the frauds.

[262] These objections are in our opinion valid. The Magistrate is empowered to tender a pardon to an accused person with a view to

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examine him as a witness for the prosecution against other persons charged at the same time with him for an offence, in the manner and in the cases specified in S. 347 of the Code of Criminal Procedure, that is, "after recording his reason he may tender a pardon to any one of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column 7 of the fourth schedule annexed as triable exclusively by the Court of Session."

In the present case the Magistrate omitted to record his reason for tendering a pardon to Irtiza Ali Khan, and none of the accused before him were charged with any offence exclusively triable by a Court of Session, and we have no ground for inferring that Irtiza Ali Khan was supposed to have been directly or indirectly concerned in or privy to such an offience, and, therefore, the offer of a pardon to him and his examination as a witness by the Magistrate and Judge were illegal and not authorised by S. 347. This examination as a witness not being permissible under S. 347 was contrary to express law.

After the offer to him of a pardon he was under the provisions of S. 347 detained in custody pending the termination of the trial, and his position as one under accusation of an offence was in no way changed when he appeared before the Judge, and could not be altered until he had been discharged, acquitted, or convicted, and with reference to the express provisions of S. 345, being an accused person, so long as he was in that position he could not be put on his oath or examined as a witness in the case in which he was accused.

His statement is also irrelevant and inadmissible with reference to S. 344, Criminal Procedure Code, and S. 24, Evidence Act. The evidence of Irtiza Ali Khan is therefore absolutely inadmissible.

There is a decision by the Bombay High Court (1) quite in point and to a similar effect, and another by the same Court (2) under the old Criminal Procedure Code, where evidence taken illegally under S. 209 of that Code on an offer of pardon was rejected.

[263] The case referred to by the Sessions Judge (3) is not in point, or in that case the prisoner had been discharged by the Magistrate for want of evidence and does not appear to have been offered a pardon. We may add that the statements of Irtiza Ali Khan are exceptionally untrustworthy, for he is believed by the Magistrate and the Judge to have fabricated false evidence against some of those whom he accused, and on this ground we should reject his statements against the appellants unless distinctly corroborated as against them which we do not find to be the case.

Setting aside the evidence of the accomplice, there is nothing against the prisoners but bare suspicion arising out of the positions they held and opportunities they had of access to the records. On two occasions some old stamps were found, in Asghar Ali's house once, and on another occasion hidden under the carpet where Nur Ali, a relation of the record-keeper, was sitting, but the Courts below suspected that these stamps were placed by Irtiza Ali Khan in the place where they were found. As to any opportunities the appellants may have had of getting at the stamps on the plaints and records, it is clear that Hamid-ud-din and Achal Behari were not the only persons through whose hands the records passed, and others besides them had access to them in the Munsif's Court, and these persons have one point in their favour, that the record-keeper of the Judge's Court

(1) *Reg* v. *Hanmanta*, 1 B. 610.
(2) *Reg* v. *Remedios*, 3 Bom. H.C. Rep., Cr. C. 59.
(3) *Queen* v. *Behari Lal Bose*, 7 W.R.Cr. 44.

gave receipts for the records, and they may say, with some show of reason, that the receipts would not have been given if the records had been tampered with. Nor was Asghar Ali the only person in the record office who had access to the records, and indeed it is admitted that many other persons must have been engaged in the frauds.

There is nothing therefore to fix the guilt on any of the appellants, and indeed the counsel for the prosecution was unable to support the conviction on other evidence than that of the approver, whose testimony we have rejected. We set aside the convictions and direct the release of the prisoners.

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2 A. 260 = 4 Ind. Jur. 250.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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2 A. 264.

SHIB GOPAL AND OTHERS (*Defendants*) *v.* BALDEO SAHAI (*Plaintiff*). [15th April 1879.]

2 A. 264.

Dismissal or addition of parties—Revenue Court, power of—Act XVIII of 1873 (N.W.P. Rent Act), S. 106—C.P.C. (1877), S. 32.

Although the provisions of S. 32 of the C.P.C. (1877) have not been declared applicable by the N.W.P. Rent Act to the procedure of Revenue Courts, still a Revenue Court, whether of first instance or of appeal, does not act illegally in allowing an amendment of the plaint; and the addition of parties, where the same is required for the ends of justice, is consonant to judicial practice, and not repugnant to the provisions of the Rent Act.

JUDGMENT.

[264] PEARSON, J.—If S. 32 of Act X of 1877 had been declared to be applicable to the procedure of Revenue Courts, the lower appellate Court's order would have been fully warranted by the terms of its second clause. Merely by reason of the absence of any such declaration, or of similar provisions in the Rent Act of 1873, I am not prepared to hold the order to be illegal. It is a reasonable, equitable order, consonant to judicial practice, conducive to the ends of justice, and not repugnant to anything in Act XVIII of 1873. I would dismiss the appeal with costs.

[265] SPANKIE, J.—The plaintiff is a joint mortgagee of the shares of the defendants, the mortgagors, in an undivided estate. The mortgagees leased the estate to the mortgagors, taking from them a counterpart of lease dated 24th April 1877, the date apparently of the mortgage. By the terms of the lease the mortgagors were to pay Rs. 357 to the mortgagees, half at the *kharif* and half at the *rabi* yearly, on account of the right they held in equal shares. The suit is brought by one mortgagee for half the rent due in respect of 1283 fasli and 1284 fasli. The defendants contend that plaintiff is a co-sharer in an undivided estate, and has never collected rent separately: he is barred from suing separately by S. 106 of Act XVIII of 1873.

The Assistant Collector holds that the case turns on the terms of the counterpart of the lease: this document recites that defendants take over from Mangat Rai and Baldeo Sahai certain lands, whereof Mangat Rai and Baldeo Sahai are possessed in equal shares, in consideration of the payment of Rs. 357 yearly, the former being liable for the Government demand: beyond these words there is no separation of the mortgagees:

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their relation to the farmers is a joint one: no one of them, the Assistant Collector holds, can sue for a share under a division which may obtain as between the mortgagees themselves: the plaint was informal and the suit must be dismissed.

In appeal the Judge considered that the plaintiff could get no redress unless the Court exercised its powers under S. 32 of Act X of 1877. "This being so," the Judge adds, "I think the Rent Court should have exercised its powers, and so conduced to the redress of what is certainly an injury suffered by the plaintiff, *viz.*, the non-realisation of his rent." He, therefore, remanded the case with direction that the plaintiff should have leave to amend his plaint, to pay additional institution fee, and request the Court to make Mangat Rai a co-defendant.

It is contended in second appeal that S. 106 of Act XVIII of 1873 bars the suit: the direction under S. 32 of Act X of 1877 to the first Court to amend the plaint and make Mangat Rai a party to the suit is wrong in law, as that section is expressly limited to the first hearing of the suit.

[266] Section 32 of Act X of 1877 operates in two ways. The Court on or before the first hearing, upon the application of either party, may order the name of any party, whether as plaintiff or as defendant, improperly joined, to be struck out; and it may at any time either upon or without such application, and on such terms as it thinks just, order any plaintiff to be made a defendant, or that any defendant may be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. So that if S. 32 of the Act could be applied to the case before us, the objection taken by the appellant fails. No person, however, can be added as a plaintiff without his own consent thereto.

The present Rent Act, except so far as Ss. 84, 148, 179, and 210 are concerned, has made no provision for adding parties. Nor did Act X of 1859 do so, except under Ss. 77 and 140. But the Courts heretofore have always held themselves at liberty to exercise the power vested in them under S. 73 of Act VIII of 1859 in such cases as the one before us. The order of the Judge, I agree with my honorable and learned colleague, is one that is equitable and not repugnant to Act XVIII of 1873, whilst it is consonant to judicial practice and the ends of justice. In this particular case the plaintiff could have no redress unless he made the co-mortgagee a defendant in the suit. It is stated in the plaint that Mangat Rai had been invited to join in the suit and that he refused, being in league with the defendants. The plaintiff sent a registered letter to him asking him to join in the suit, but got no reply. Therefore the plaintiff was compelled to sue for his half share. If, however, S. 106 of the Rent Act applies to this case, the plaintiff should be instructed to sue for the entire share due, making the co-mortgagee a co-defendant. I, however, do not regard S. 106 as in any way operating to bar the suit. The property referred to in S. 106 is an undivided landed estate, and the co-sharer is the co-sharer in that estate, which is still the property of the mortgagors. It is true that the mortgagees represent the mortgagors as being in temporary proprietary possession of the property, but it is not in the character of a co-sharer in an undivided property that the plaintiff brought **[267]** this suit. On the contrary, the terms of the lease show that though the mortgage was made to Baldeo Sahai and Mangat Rai, their shares in the mortgage were recognised by the mortgagors. Their shares were equal. It is true that it was

provided that in case of default the mortgagees might bring a suit and realise the amount due. But there is the recognition by the lessees that under the terms of the mortgage deed the plaintiff is entitled to half the sum payable under the lease, and on this account I think that the plaintiff was entitled to sue for his share of it. It may, however, be more strictly regular that he should sue for the whole sum due, making his co-mortgagee a defendant; and if this is the course which the lower appellate Court is pursuing, for his order is not very clear, I concur with Mr. Justice Pearson, and would dismiss the appeal with costs.

1879 APRIL 15. — APPELLATE CIVIL. — 2 A. 264.

FULL BENCH.

PRESENT:

Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

1879 APRIL 16. — FULL BENCH. — 2 A. 267 = 4 Ind. Jur. 251.

CHAMAILI KUAR (*Defendant*) *v.* RAM PRASAD (*Plaintiff*).

[16th April 1879.]

2 A. 267 = 4 Ind. Jur. 251.

Hindu Law—Power of a father to alienate ancestral property—Immoral purposes.

By the majority of the Full Bench (Spankie, J. and Oldfield, J.)

An alienation of ancestral property, made for immoral purposes by a father during the minority of his son, can be set aside wholly, even though the purchaser may have taken *bona fide* and for value; it is not valid even to the extent of the father's share.

Per OLDFIELD, J.—The law on the point has been settled by a course of decisions invalidating sales by one co-parcener without the consent, express or implied, of the others.

Per PEARSON, J.—The purchaser, having acted in good faith, is entitled to take the father's share and to have it ascertained by partition.

[**F.**, 5 A. 384 (385) = 3 A.W.N. 61; **Appr.**, 15 A. 339 (350) (**P.C.**); **R.**, 8 A. 205 (208) = 6 A.W.N. 58.]

ORDER OF REFERENCE TO THE FULL BENCH.

[269] SPANKIE AND OLDFIELD, JJ.—The suit has been brought by a son of a Hindu to obtain possession in his father's lifetime of joint ancestral property alienated by the father under a deed of sale, and to cancel the sale. This sale took place in 1859, since when the appellant, defendant and they whom he represents have held possession, and it affected the entire family property and not merely a share of it. The Judge has decreed the claim for possession, subject to the refund of the purchase money to appellant, and reversed the decree of the Court of first instance, and has found on the evidence that the father of the plaintiff, Fateh Chand, who was made a defendant, but did not defend the suit, was a man of immoral habits, who sold the property to further his vicious pleasures, and not under any necessity recognised by Hindu law. There is no reason to believe that the purchaser acted otherwise than *bonâ fide*. We refer to the Full Bench of the Court the question whether the son can obtain possession of the family property, and whether the appellant by his purchase has acquired the share of the respondent's father, Fateh Chand, and may have that share ascertained by partition.

JUDGMENTS OF THE FULL BENCH.

PEARSON, J.—An answer to the first question must apparently be given in the negative, regard being had to the Hindu law as expounded by our Courts.

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On the hypothesis that the purchaser acted in good faith, I should, notwithstanding the lower appellate Court's unsatisfactory finding that the sale was made without any necessity, be inclined to answer the second question in the affirmative.

OLDFIELD, J.—The question of the power of a son to set aside a sale of joint ancestral property effected by the father, and the **[270]** liability of the joint ancestral estate for a father's debts, was discussed by their Lordships of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* and *Muddun Thakoor* v. *Kantoo Lall*, decided 12th May 1874 (1), and the principle there laid down will be a guide to the decision of the case before us. In the first of those cases, a son sued, as in the case before us, to cancel a sale made by his father of joint ancestral property, and to recover possession of the whole estate.

Their Lordships cited the authority of *Hunnoomanpersaud Panday* v. *Babooee Munraj Koonweree* (2), to show the extent of the liability of the ancestral estate, quoted the remarks in that case of Lord Justice Knight Bruce, and observed: "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him: it would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce:—'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.'" And they go on to observe: "It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it, and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt." And further on in their judgment a case decided by the same Court, *Jummuk Kishore Koonwar* v. *Rughoonundun Singh* (3) is cited, in which it was held "that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose;" in that case sales had been made simply in order to raise money for some **[271]** purpose or another. Their Lordships refused to set aside the sale in the case of *Girdharee Lall* v. *Kantoo Lall* (4), finding that the sale had been made *bonâ fide*, and for value, in order to save ancestral property from sale in execution of a decree obtained on a bond, which it was not shown had been given for an immoral purpose.

In the case now before us, however, the facts, as found by the lower appellate Court—and we must accept them—are widely different, and if we apply to them the principle which has been laid down, a case seems to have been made out for cancelment of the sale. It has been found that the sale was not made for the purpose of satisfying any debts due, nor for the use of the family, or from proper necessity, the family being in fairly easy circumstances, but entirely to provide money for the indulgence by the father of immoral and vicious pleasures. A sale under such circumstances would be liable to be set aside at the instance of the son. Nor can

(1) 14 B. L. R. 187.
(2) 6 M. I. A., 393.
(3) S. D. A., L. P., 1861, p. 213.
(4) 14 B.L.R., 187.

we say this is a case in which the purchaser, as dealing with the guardian of a minor, or the Manager of joint ancestral property, can claim partition, for though the transaction was so far *bonâ fide* on his part that he paid value for the property, it is clear that, if he had made reasonable enquiry, he could have learnt the circumstances under which the sale was being made, and been placed on his guard.

It remains to be seen whether the sale is valid to the extent of the father's interest in the property. Referring to West and Bühler, page 289, we find that it is stated that a single member cannot, according to the Shastras and to Colebrooke, deal directly with any portion of the common property but, that, acting on the dictum of Colebrooke, that, in case of an alienation for valuable consideration, equity would perhaps award partition to the alienee, the Court has allowed execution against the common property to ascertain the individual share, and make it available to the creditor, and has recognised that a single co-parcener may sell or incumber his own share for valuable consideration, the vendor acquiring a right to partition ; and the Madras (1) and Bombay (2) High Courts have acted on **[272]** this principle in the case of both voluntary and involuntary sales. But the principle cannot be said to have been hitherto recognised on this side of India. In a recent decision, however, of the Privy Council, *Deendyal Lal* v. *Jugdeep Narain Singh*, dated 25th July 1877, (3) the question has been discussed. In that case a father had executed a bond in favour of defendant who had obtained a decree on it, and taken execution by sale of the father's interests in ancestral property which he himself bought. The son brought the suit to recover the property. A question arose whether under the law of Mitakshara the share of one co-sharer in a joint family estate could be taken and sold in execution of a decree against him alone. After commenting on the cases decided by the Madras and Bombay Courts, and remarking that they affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners, and admitting that the latter proposition is opposed to several decisions of the Courts of Bengal, the Privy Council decided that the law, as respects the rights of an execution-creditor and of a purchaser at an execution sale, should be declared to be the same in Bengal as that which exists in Madras ; and in the case before them they varied the decree which had been given for possession of the property to be held for the benefit of the joint family, by adding a declaration that the purchaser at the execution-sale has acquired the share and interests of the father in that property, and is entitled to take such proceedings as shall be advised to have the share and interest ascertained by partition. No decision was made in that case whether the same principle should apply to the case of a purchaser in a voluntary sale, which is the case before us ; but their Lordships went on to observe that, " however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution-sale may be, it is clear that a distinction may, and in some cases does, exist between them." The objection that the sale is invalid even to the extent of a co-parcener's share is based mainly on the texts of Mitakshara, Ch. i, S. i, vv. 27 to 30, and the **[273]** constitution of the joint Hindu family as defined in *Appovier* v. *Rama Subha Aiyan* (4). The opposite view is sup-

(1) 2 M.H.C.R. 416.
(2) 10 B.H.C.R. 139 ; 11 B.H.C.R. 76 ; 12 B.H.C.R. 138.
(3) 3 C. 198.
(4) 11 M.I.A., 75.

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ported by dicta of Colebrooke, Ellis and Strange, and is that followed in the Madras and Bombay Presidencies, and the question was fully discussed in *Vasudev Bhat* v. *Vankatesh Sanbhav* (1). But the question cannot be said to be at this time an open one on this side of India. There is no doubt a current of decisions by this Court, invalidating sales by one co-parcener without the consent express or implied of his co-parcener, and I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest,—*Ajoodhya Pershad* v. *Lalta Pershad* (2), *Baboo Ram* v. *Gajadhur Singh* (3); *Byjnath Singh* v. *Rameshur Dyal* (4); *Jeymarain Singh* v. *Roshun Singh* (5). The question has been decided in the same way by the Calcutta High Court in *Sadabart Prasad Sahu* v. *Foolbash Koer* (6). The law may be said to have been settled by a course of decisions, and it would be undesirable to disturb it.

On this view the sale must be set aside, and the plaintiff is entitled to have possession of the property to be held as joint family property.

SPANKIE, J.—I accept the opinion of Mr. Justice Oldfield on the point referred to the Full Bench.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1879 APRIL 17. — APPELLATE CIVIL. — 2 A. 273 = 4 Ind. Jur. 304.

SHEO PRASAD (*Judgment-debtor*) *v.* ANRUDH SINGH (*Decree-holder*).

[17th April 1879.]

2 A. 273=4 Ind. Jur. 304.

Cl. 2, Art, 167, Sch. 2, Limitation Act (1877)—Meaning of the words, "where there has been an appeal."

The words "where there has been an appeal," in Cl. 2 of the above article, contemplate and mean an appeal from the decree, and no other appeal. They cannot, therefore, apply to an appeal from the first Court's order, refusing the application of the defendant to set aside an *ex parte* decree. An application for execution will, therefore, be barred, if presented more than three years after an *ex parte* decree, though within three years from the appellate Court's order on appeal from an order of the original Court, dismissing an application to set aside such *ex parte* decree.

[R., 16 B. 123 (125); D., 4 A. 274 (276).]

JUDGMENT.

[274] PEARSON, J.—In our opinion the lower Courts are wrong in holding that the period of three years allowed by law for the execution of the *ex parte* decree, dated 2nd December, 1874, should be reckoned from the date (7) of the order of the Appellate Court which upheld the first Court's order refusing the application made by the defendant for the re-hearing of the suit. The first two clauses of Art. 167, Sch. ii, Act IX of 1871, allow three years for the execution of a decree from the date of the decree, or (where there has been an appeal) from the date of the final decree of the Appellate Court. We think it beyond doubt that the words, "where there **[275]** has been an appeal," contemplate and mean an appeal from

(1) 10 Bom. H.C.R. 139.
(2) S. D. A., N.W.P., 1864, vol. ii, p. 315.
(3) N. W. P., H. C. Rep., F. B. R., 1866-67, p. 86.
(4) S. D. A., N. W. P., 1864, vol. i, p. 299.
(5) S. D. A., N. W. P., 1860, p. 162.
(6) 3 B. L. R., F. B., 31.
(7) 17th April, 1875.

the decree; and no other appeal. In the present case there was no appeal from the decree now sought to be executed; nor indeed under the provisions of the old Code of Procedure was that decree appealable. The application for execution of the decree of 2nd December, 1874, presented on 12th April, 1878, was clearly beyond time, and should have been disallowed. We reverse the orders of the lower Courts and decree the appeal, with costs in all Courts.

1879 APRIL 17. — APPELLATE CIVIL. —— 2 A. 273 = 4 Ind. Jur. 304.

CIVIL JURISDICTION.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1879 APRIL 17. — CIVIL JURISDICTION. — 2 A. 290 = 4 Ind. Jur. 359.

SULTAN KUAR (*Judgment-debtor*) *v.* GULZARI LAL (*Decree-holder*).

[17th April 1879.]

2 A. 290 = 4 Ind. Jur. 359.

Execution of decree—Effect of attachment of money decree—C.P.C. (1877), Ss. 266 and 273.

(*a*) Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree, (S. 266 of the C.P.C., 1877), yet it is apparent from the provisions of S. 273 that the sale of a money decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale.

[**F.**, 16 B. 522 (524), 20 C. 111 (114); **R.**, 28 A. 771 (774) = 3 A.L.J. 585 = A.W.N. (1906) 237 = 1 M.L.T. 247; **D.**, 21 A. 405 (407) = 19 A.W.N. 157.]

(*b*) The penultimate clause of S. 273 applies to decrees other than money-decrees.

(*c*) The provisions of the first clause of S. 273 are applicable where two decrees for money are being executed by the same Court, though they may not have been passed by the same Court.

Gulzari Lal claimed certain property attached in execution of a decree dated 8—8—1878, obtained by Sultan Kuar against Lahro Bai and certain other persons for Rs. 500. The Court to which the decree had been sent for execution ordered on 14—9—1878 that the attachment should be removed, and that Sultan Kuar should pay the costs of the objection which amounted to Rs. 25 or thereabouts. Gulzari Lal to enforce payment of this amount, caused Sultan Kuar's decree to be attached in execution of the said order. On Sultan Kuar objecting to the sale of her decree on the plea that Act X of 1877 did not contemplate the sale of a decree for money, the Court of first instance disallowed the objection and directed that the decree should be sold. She appealed to the District Judge against this order. He referred to the High Court the question whether or not Sultan Kuar's decree was saleable in the execution of the order dated 14—9—1878.

JUDGMENT.

[291] PEARSON, J.—Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree in S. 166 of Act X of 1877, yet it is apparent from the provisions of S. 273 of the Act that the sale of a money-decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale.

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In our opinion the Judge is wrong in holding the last clause but one of S. 273 to be applicable in the present case. That clause applies to other than money-decrees. Although the two decrees held by Gulzari Lal and Sultan Kuar respectively were not passed by the same Court, nevertheless as they are being executed by the same Court, the provisions of the first clause of the section are applicable on principle.

Our opinion may be communicated to the Judge in reply to his reference.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

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APPELLATE CIVIL.

2 A. 275 = 4 Ind. Jur. 357.

RAM KISHEN (*Decree-holder*) *v.* SEDHU (*Judgment-debtor*).

[21st April 1879.]

2 A. 275 = 4 Ind. Jur. 357.

Execution of decree—C.P.C. (1877), S. 230, Cl. 3—Meaning of "the last preceding application."

The words "the last preceding application" in the above clause mean an application under S. 230, C.P.C. (1877), and not an application under C.P.C. (1859).

Where, therefore, an application for execution under the C.P.C. (1877) was disallowed as barred, owing to want of due diligence on the part of the decree-holder to procure complete satisfaction of the decree on the last preceding application under the C.P.C. (1859), *held*, that such order was wrong.

[R., 6 C. 504, 512.**]**

A decree-holder who had previously applied under Act VIII of 1859 for the execution of a decree in July 1877, applied once again in February 1878, under S. 230, Act X of 1877, for the execution of the same. The Court executing the decree refused to grant the application. The lower appellate Court did the same. Thereupon the decree-holder preferred an appeal to the High Court.

JUDGMENT.

[276] OLDFIELD, J.—The Judge has disallowed the application for execution on the ground, though not taken by the judgment-debtor, that the execution of the decree is barred under the provisions of S. 230, Act X of 1877, as due diligence was not used to procure complete satisfaction of the decree on the last preceding application. But the last preceding application to which S. 230 refers is an application made under that section, and in the case before us the last preceding application was made in July 1877, before Act X of 1877 came into force. Those proceedings in execution were ultimately disposed of in December 1877, but there was no fresh application for execution of the decree made intermediately between July and December 1877. We reverse the order of the Judge and decree the appeal, and allow execution of the decree to proceed. The appellant will have costs in all Courts.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Spankie.

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2 A. 276.

EMPRESS OF INDIA v. NILAMBAR BABU. [21st April 1879.]

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1. *Crim. Pro. Code, 1872, S. 418—Discharge of person accused of receiving stolen property—Disposal of such property.*

A Magistrate discharging a person accused of receiving stolen property, on the ground that the evidence was not sufficient, can make such order as he thinks proper for the disposal of the property produced before him, if he believes that the property was stolen.

2. *Ibid, S. 397—High Court's powers of revision.*

Before seeking the aid of the revisional powers of the High Court, recourse should be had, in respect to applications under S. 418, to the ordinary channel of relief, *e.g.*, by way of appeal to the Sessions Court, if such relief is allowed by the law.

[R., 9 M. 148=1 Weir 672, 14 C.P.L. R. 60.]

3. *Ibid, Ss. 297, 416—Proclamation under S. 416—Judicial proceeding.*

Quære:—Whether the issue by the Magistrate of a proclamation under S. 416 of Act X of 1872 is a "judicial proceeding" within the meaning of S. 297 of that Act.

[R., 12 A.W.N. 102.]

JUDGMENT.

[277] SPANKIE, J.—A preliminary objection was taken by the Junior Government Pleader that this Court cannot interfere under S. 297 of the Criminal Procedure Code, as the order complained of purports to have been made under S. 416 of the Code. which directs the course to be pursued where the ownership of property seized by the police, as alleged or suspected to have been stolen, is unknown, and therefore the order was not made in the course of a "judicial proceeding." Ordinarily a proclamation issued under S. 416 would be made in consequence of a seizure by any police officer **[278]** of property alleged (i) or suspected (ii) to have been stolen, or found (iii) under circumstances which create suspicion of the commission of any offence. On receiving the police report the Magistrate is to make such order respecting the custody and production of such property as he thinks proper (S. 415). But when the owner of any such property is unknown the Magistrate may detain it, or the proceeds thereof if sold, and in case of such detention shall issue a proclamation, the particulars of which are detailed in S. 416.

It may perhaps be doubted, if nothing more be done than the mere issue of a proclamation, whether the course adopted by the Magistrate would have amounted to a "judicial proceeding." At the same time "judicial proceeding" means any proceeding in the course of which evidence is, or *may be taken*, or in which any judgment, sentence or final order is passed on recorded evidence. The action of the Magistrate in issuing the proclamation is to require any person who may have a claim to such property as may be sent in by the police under S. 415 to appear before him and establish his claim within six months. This is possibly a stage of a judicial proceeding, for at the expiration of the term provided by the proclamation, it is probable that a claimant might appear, and evidence would be recorded. But it is not necessary for me to determine the point in this case. For Nilambar Babu and Khazan Singh, the accused, were

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arrested and sent in to the Magistrate for trial under S. 411 of the Penal Code (the stolen property being alleged to belong to Government) after an investigation made by the police. This therefore was not a case in which, in dealing with the property seized by them, and finding that the owner was unknown, the Magistrate had issued a proclamation under S. 416 of the Criminal Procedure Code.

The proceeding that followed was a judicial proceeding in which evidence was recorded, after which the Magistrate felt himself bound to discharge the accused, as there was nothing to establish the fact that any tea had ever been stolen or missed from the Commissariat go-downs, and no claim on account of the tea had been made by the Commissariat Department. On the contrary, the Commissariat officials, Lieutenant Spence, Sub-Assistant Commissary General, Sergeant Griffiths, his subordinate, and Lieutenant Davies, Quarter-master, 22nd Regiment, Sergeant Harris, Quarter-**[279]**master Sergeant, all concurred in saying that not only no tea had been stolen, but that under the circumstances it was impossible that it should have been stolen. The Magistrate states that special inquiry had been made by the police in order to ascertain how Nilambar Babu, the victualling *gomashta*, could have become possessed of the tea, which was proved to be ration tea, but nothing further had been elicited, the police reporting that the Commissariat officials would not disclose the real facts of the case.

"It must, however," remarks the Magistrate, "be admitted that the case against the two accused is of the very gravest suspicion : a sack of tea precisely resembling ration tea is carried off in a closed *ekka* (*i.e.*, with the curtains down) from the neighbourhood of the Commissariat go-down, and no explanation appears as to whence this tea came : further, five similar sacks of tea are found in the possession of the victualling *gomashta*, regarding which he can give no explanation whatever, and which (tea) precisely resembled ration tea, which it is his duty to serve out for the troops. Under the circumstances there may possibly be some justification for the assertion of the police that the Commissariat officials, had they chosen to exert themselves, might have discovered how the *gomashta* could have abstracted the Government tea : perhaps even now a thorough investigation into the Commissariat management here by the Heads of the Department might disclose the manner in which the peculation could have been carried on."

The Magistrate then discharged the accused, subject to their apprehension hereafter on the discovery of fresh evidence, and on the same day by a separate proceeding, or what is called "a footnote in the case of Nilambar Babu," ordered that a copy of his judgment should be sent to the Commissary-General for information, together with a complete list of the military stores found in possession of the *gomashta*, and further that "a proclamation under S. 416, Criminal Procedure Code, will issue regarding these articles." Nilambar Babu applies for a revision of this order under Ss. 294, 297 and 419, Criminal Procedure Code, on the ground (i) that there was no evidence on record to show that the property was stolen property; (ii) that there was none that would justify action under S. 416 of the Code of Criminal Procedure; (iii) that the remarks made regarding the petitioner are not borne out **[280]** by the evidence on record, and should be set aside; and (iv) that the property may be released in favour of the petitioner.

Under S. 418 the Magistrate was at liberty, at the close of the inquiry into the police charge under S. 411, Penal Code, to make such order as appeared right for the disposal of the property produced before

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him, and regarding which any offence appeared to have been committed. It is contended that the Magistrate's finding shows that no offence appears to have been committed. But I do not understand the Magistrate to mean that no offence had been committed. I understand that he reluctantly felt himself compelled to discharge the accused for want of further evidence. The petitioner was aware, it would seem, that the Magistrate's order was made really under S. 418, for he cites S. 419 of the Criminal Procedure Code as one under which this Court could deal with it, and this is so. But there was a Court of Appeal to which he should have first resorted, *viz.*, that of the Sessions Judge, who might have interfered in the matter. Resort to this Court as one of Revision was premature, and it has been the practice, I think, of this Court not to interfere in revision, when the petitioner has neglected to avail himself of the ordinary channel of relief below. But as this application has already been admitted by a Judge of this Court, and as the section (419) admits of my interference, it would be better perhaps and more convenient for all to dispose of the case here. My reasons for assuming that the order of the Magistrate was passed under S. 418 is that it was made at the conclusion of the inquiry in his Court into the alleged offence under S. 411 of the Penal Code, and a proclamation under S. 416 was issued, because S. 420 provides that an order passed under Ss. 418 and 419 may be in the form of a reference of the property to the Magistrate of the District or to a Magistrate of a Division of a District, who shall in such cases deal with it as "*if the property had been seized by the Police and the seizure had been reported to him in the manner hereinbefore mentioned.*" It was not necessary in this case that Mr. White, the Magistrate, should make the order in the form referred to, as he was already competent to issue the proclamation referred to in S. 416. So far then it appears that [281] the order was one within the competence of the Magistrate to make, and that the Magistrate believed that an offence had been committed, though it was not on the evidence before him established against the accused. Whether action under S. 416 was justified by the evidence was for the Magistrate to determine. I cannot say that he exercised his discretion wrongly regarding the tea regarding which the Babu made no claim. On the contrary, the latter said that the tea was found in the house occupied by Khazan Singh, his servant, and he supposes that Khazan Singh put it there. Moreover he did not explain how he become possessed of the tea or sugar either, but he said that they were not ration food. He, however, explained his possession of other portions of the property found. There was moreover some evidence that the guns were his as also the "kukri" and pistol, and the cartridges did not appear to bear the Queen's mark. The other articles, too, were such as he could have bought at public auction or might reasonably have in his own possession. This, too, may be said of the sugar which need not exceed $1\frac{1}{8}$ seers in quantity. The law requires that "an offence should appear to have been committed," and when this is the case, an order may be made under S. 418 of the Criminal Procedure Code. But with respect to the property proclaimed an offence appears to have been committed only as regards the tea. Therefore the proclamation must be confined to the tea found and seized by the police, and in this respect the order must be modified, and the remaining portion of the property will be excluded from the proclamation. I see no remarks on the part of the Magistrate regarding the Babu which are not warranted by the suspicious character and the circumstances of the case, and the Court below was quite justified in refusing to give back the tea, but the petitioner may have the rest of the property restored to him.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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APRIL 22.

SOHAN LAL AND ANOTHER (*Decree-holders*) *v.* KARIM BAKHSH (*Judgment-debtor*). [22nd April 1879.]

APPEL-LATE CIVIL.

2 A. 281=4 Ind. Jur. 357.

Execution of decree—Act X of 1877 (C.P.C.), S. 230, Cl. 3.

2 A. 281= 4 Ind. Jur. 357.

The concluding clause of S. 230 of the C.P.C. (1877) refers to the question of limitation, and not to that of due diligence. Therefore, an application for execution under S. 230 could not be disallowed, on the ground that a previous application, under the same section, made in the previous year, had not been prosecuted with due diligence.

On the dismissal of the previous application presented on 21—12—1877, by the transferees of the decree in this case, under S. 230, Act X of 1877, for the execution of the decree dated 30—3—1872 owing to their failure to pay the Court-fees for the service of the notice required by S. 248, Act X of 1877, they applied on 23—2—1878 for the execution of the same. On the judgment-debtor setting up as a defence to this that under S. 230 of Act X of 1877 it ought not to be granted, the decree-holder not having on the preceding application, dated the 21st December, 1877, used due diligence to procure satisfaction of the decree, the Court refused to grant the application. On appeal by the decree-holders, the lower appellate Court affirmed the order refusing the application. Thereupon the decree-holders preferred an appeal to the High Court.

JUDGMENT.

[282] PEARSON, J.—The concluding clause of S. 230 of Act X of 1877 appears to us to refer to the question of limitation, not that of diligence. In this case a previous application had been made to the Court under the section, of which the third clause therefore appears to be applicable. The appeal is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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APRIL 23.

KADIR BAKHSH (*Decree-holder*) *v.* ILAHI BAKHSH AND ANOTHER (*Judgment-debtors*). [23rd April 1879.]

APPEL-LATE CIVIL.

2 A. 283=4 Ind. Jur. 358.

Execution of decree—Assignment of decree—Powers of Court in executing transmitted decree—C.P.C. (1877), Ss. 228 and 232.

2 A. 283= 4 Ind. Jur. 358.

When a decree is transferred to a Court for execution, and subsequently transferred by assignment, the ssignee's application for execution must be made to the Court which passed the decree, and not to the Court to which the decree has been sent for execution.

[F., 27 C. 488 (492).]

The Subordinate Judge of Aligarh was directed by the District Court at Aligarh to execute a decree sent to it by the District Court at

Cawnpore. On the 7th June, 1878, the decree was transferred by assignment and the transferee applied to the Subordinate Judge of Aligarh for its execution. On the judgment-debtor's objectin to the application being made to the Subordinate Judge of Aligarh, contending that it should be made to and be disposed of by the Court which passed the decree, the Subordinate Judge of Aligarh overruled it, but the lower appellate Court allowed it. The decree-holder preferred an appeal to the High Court.

1879 APRIL 23. — APPELLATE CIVIL. — 2 A. 283 = 4 Ind. Jur. 358.

JUDGMENT.

[283] PEARSON, J.—We see no sufficient reason to interfere with the lower appellate Court's decision which is in conformity with the terms of the law, and is supported by this Court's ruling dated the 20th December, 1870. The appeal is therefore dismissed.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1879 APRIL 23. — APPELLATE CIVIL. — 2 A. 284.

COLLINS (*Decree-holder*) *v.* MAULA BAKHSH AND OTHERS (*Judgment-debtors*). [23rd April 1879.]

2 A. 284.

Execution of decree—Limitation.

An application to transfer a decree for execution from one Court to another is an application to keep the decree in force.

[F., 22 C. 375 (376) ; R., 20 C. 29 (32).]

A decree passed by the Munsif of Meerut on 23—12—1873, was affirmed by the Appellate Court on 13—6—1874. On the application of the decree-holder on 22—4—1875 to the Munsif of Meerut under S. 285, Act VIII of 1859, for the execution of the decree by the Munsif of Bulandshahr, the former granted the certificate required by that section, and, as it appeared, made it over to the decree-holder. On the Munsif of Bulandshahr refusing to receive the certificate presented by the decree-holder on 22—7—1877 and directing thé decree-holder to apply for a fresh certificate, the decree-holder, after obtaining a fresh certificate from the Munsif of Meerut, applied on 29—1—1878 to the Munsif of Bulandshahr for the execution of the decree. On the Munsif dismissing the application for execution as time-barred, the lower appellate Court affirmed the order of the Munsif, holding that an application to transfer a decree for execution from one Court to another is not an application to keep a decree in force. The decree-holder preferred an appeal to the High Court.

JUDGMENT.

[284] PEARSON, J.—The appeal must prevail. The decision of the lower Courts is opposed to numerous rulings of this Court (1) to the effect that an application to transfer a decree for execution **[285]** from one Court to another is an application to keep a decree in force. We accordingly decree the appeal with costs, and reversing the orders of the lower Courts, direct the Court of first instance to proceed with the application according to law.

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(1) 1 A. 525.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1879

APRIL 25.

RAGHU RAM AND OTHERS (*Judgt.-dbtrs.*) *v.* DANNU LAL (*Decree-holder*).

[25th April 1879.]

APPELLATE CIVIL.

2 A. 285.

Execution of decree—Proceeding to keep decree alive—Limitation—Act XIV of 1859, S. 20.

2 A. 285. An order of a Court striking an execution petition off the file, for default of prosecution, is not a proceeding to keep the decree alive. (5 B.L.R. 616 and 11 B.L.R. 23, *F.*).

JUDGMENT.

[285] PEARSON, J.—The question is whether the application of the 18th February, 1868 was within time. The last preceding **[286]** application was made on the 21st December, 1864, and in pursuance thereof notice was issued to the judgment-debtor. On the 7th February, 1865 the Court required the decree-holder to produce proof of the service of the notice within four days, and on the 23rd idem, in consequence of his having failed to comply with the requisition, struck off the application.

The first Court has held the application of the 18th February, 1868 to have been beyond time, being of opinion that the period of three years allowed by law should be reckoned from the 7th February, 1865, the date on which the decree-holder ceased to proceed in the matter of the application of the 21st December, 1864. The lower appellate Court has held that the period of limitation should be reckoned from the 23rd February, 1865, the date on which the application of 21st December, 1864 was struck off, and consequently that the application of 18th February, 1868 was within time. The first plea in appeal impugns the lower appellate Court's ruling on the point in question, and is accepted by us as valid.

There was no proceeding either of the decree-holder or of the Court between the 7th and 23rd February, 1865. On the part of the decree-holder, instead of action, there was inaction; and the Court's proceeding of the latter date striking off the application for default of prosecution was certainly not a proceeding to keep the decree alive. The view we take appears to us to be strongly supported by some of the observations in the Privy Council's Judgment dated 14th July, 1870, in the case of *Dhiraj Mahtab Chund Bahadur* v. *Bulram Singh Baboo* (1) as well as by the Judgment (2) to which the lower appellate Court refers in support of its own view.

We accordingly decree the appeal with costs, reversing the lower appellate Court's order and restoring that of the Court of first instance.

(1) 5 B.L.R., at p. 616.
(2) *Roy Dhunput Singh Roy* v. *Mudhomottee Debia*, 11 B.L.R., 23.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Spankie.

1879

APRIL 28.

APPELLATE CIVIL.

2 A. 291.

KANCHAN SINGH AND OTHERS (*Judgment-debtors*) *v.* SHEOPRASAD (*Decree-holder*). [28th April 1879.]

2 A. 291.

1. *Execution of decree payable by instalments—Limitation—Act IX of 1871, Sch. II, Art. 167.*

An application for execution of a decree, payable by instalments, is within time, if made within three years from the time when the instalment sought to be realized became due. In such a case, it is immaterial whether previous instalments have been paid or not.

2. *Clause making whole amount realizable in case of default—Effect of waiver.*

A clause in the decree, making the whole amount realizable on default of payment of any instalment, may be waived, and such waiver does not operate so as to deprive the decree-holder of the right to execute for the instalments.

JUDGMENT.

[293] PEARSON, J.—Art. 167, Sch. ii of Act IX of 1871, provides that an application to enforce payment of instalment which the decree directs to be paid on a specified date may be made within three years from the date so specified. The present application to enforce the payment of instalments which became due under the decree in Bhadon 1875 and Bhadon 1876 was preferred on the 17th July, 1877 withinthe time allowed by the law. It is difficult therefore to understand how it can be contended that the application is barred by the Limitation Law. The ground of the contention is that there is no legal proof of any previous payments having been made under the decree which was passed in April, 1866; and that, as the decree-holder was empowered by the terms of the decree to realise the whole amount at once in the event of two instalments not being duly paid, and failed to do so within three years from Bhadon 1868, he is now precluded from recovering the instalments of 1875 and 1876. This contention appears to me to be quite untenable. The decree-holder's omission in 1868, 1869, and 1870 to avail himself of his right to realise at once the entire amount of the judgment-debt may possibly preclude him from now enforcing that right; but he is not seeking to do so. By foregoing or forfeiting that right he has not lost his right to the instalments annually falling due. It seems to me to be immaterial whether former instalments have been paid or not; but I observe that it was not seriously pleaded in the lower Courts that they had not been paid. What the judgment-debtors pleaded was that payments out of Court do not save limitation; and the Court of first instance held that the payments having been made out of Court could not be recognised. The non-recognition of those payments does not, however, exclude the present application from the operation of the clause above quoted of Art. 167, Sch. ii, Act IX of 1871. The pleas in appeal are worthless in my opinion and I would dismiss the appeal with costs.

[294] SPANKIE, J.—On the facts found by the lower appellate Court that there had been no such default as that referred to in the decree in the payment of instalments, I do not think that I could interfere in second appeal, and this appears to be the more proper course, because the judgment-debtor does not really seem to have denied the payments out of Court allowed by the decree-holder to have been made to him in accordance with the terms of the decree. I would dismiss the appeal and affirm the order with costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

1879
APRIL 29.

HARSAHAI MAL AND OTHERS (*Defendants*) *v.* MAHARAJ SINGH (*Plaintiff*).

[29th April 1879.]

APPEL-LATE CIVIL.

2 A. 294.

Act XIX of 1863, Ss. 8 and 9—Adjudication of title—Res Judicata.

An adjudication of title by a Collector under S. 8 of Act XIX of 1863, which, under S. 9, becomes final by not being appealed against, is *res judicata* and cannot be re-opened in a civil suit.

2 A. 294.

[F., 5 A. 280 (284) = 3 A.W.N. 20; D., 2 A. 839 (843).]

In a suit brought in May, 1877, the plaintiff, who was in possession of a share of nineteen biswas and sixteen biswansis and a half in a certain village, claimed a declaration of his right as proprietor to four biswas and ten biswansis of this share, and the defendants contended that they were the proprietors of the property in suit, and the plaintiff was only in possession of it as a mortgagee and not as a proprietor. The Court of first instance gave the plaintiff a decree, holding on the issue whether the plaintiff was the proprietor or the mortgagee of the property in suit that he was the proprietor of it. The defendants appealed to the High Court.

JUDGMENT.

[295] PEARSON, J.—Having inspected the Collector's proceedings we are of opinion that the first ground of appeal is valid and must be allowed. It appears that the plaintiff's father applied for a partition of 19 biswas and 16½ biswansis share of the mauza under Act XIX of 1863, and that an objection was taken to this application by Har Sahai and the other defendants in the present suit on the ground that out of the share claimed by him 4½ biswas belonged to them in proprietary right and was in his possession only as a mortgagee. They demanded an inquiry into their objection and claim under S. 8 of the Act above mentioned; and the Collector ordered the Tahsildar to receive the evidence tendered by the parties in support of their respective claims and to submit a report on the point in dispute. The Tahsildar made a full inquiry and submitted a report; whereupon the Collector decided that the applicant for partition was only in possession of 15 biswas and 6 **[296]** biswansis as proprietor, the remaining 4½ biswas being held by him as mortgagee. There can be no doubt that his decision was an adjudication of a question of title or of proprietary right which not having been set aside in appeal in the manner provided by S. 9 of Act XIX of 1863, became final, and bars any fresh adjudication of the question so decided. We have therefore no alternative but to allow the appeal and to dismiss the suit by reversal of the lower Court's decree with costs of both Courts.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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APRIL 29.

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2 A. 368.

SHEEN AND ANOTHER (*Defendants*) *v.* JOHNSON (*Plaintiff*)

[29th April 1879.]

2 A. 368.

1. *Suit for infringement of patent—Act XV of 1859—Measure of damages.*

In a suit for damages for infringement of a patent, the measure of damages, where the plaintiff has been in the habit of licensing other persons to use his patent at a fixed royalty, would be the loss of such royalty sustained by him from the date of infringement.

2. *Act XV of 1859, S. 34.*

When, in a suit for damages for infringement of a patent, the defendant pleads want of novelty, but omits to mention, in his statement, the places where the invention was publicly used prior to the date of plaintiff's petition for leave to file the specification, he cannot adduce evidence that the invention was publicly used in such places. The plaintiff is not bound, in such a case, to call upon the defendant, before trial, to supply particulars as to such places, nor can the plaintiff's omission to do so give the defendant the right to adduce such evidence.

3. *Act XV of 1859, S. 23.*

Meaning of the words "publicly or actually used" in S. 23, Act XV of 1859, discussed by Spankie, J.

4. *Ascertainment of damages before decree.*

When, in such a case, the Court decides that the plaintiff is entitled to damages, it must assess the same in the first instance, so that they may become part of the decree, and must not leave them to be ascertained at the time of the execution.

JUDGMENTS OF THE HIGH COURT.

[371] STUART, C. J.—In this case the plaintiff, Percy Bilton Johnson of Allahabad, the assignee of Richard Johnson's patent for making thermantidotes taken out in 1870 under Act XV of 1859, instituted a suit in the Court of the District Judge of Allahabad in which he alleged that the defendants, Bradley and Sheen, had at divers times since the 1st September, 1875, infringed his patent, and that they, or one of them, had, without plaintiff's license, at Allahabad and elsewhere, publicly advertised for sale under the name of "Sheen's new improved self-working patent thermantidotes" which, it was complained, were dishonest infringements of the plaintiff's patent rights, and he claimed Rs. 1,000 as compensation for such infringement with interest to date of decree. The plaintiff further prayed for an injunction to restrain the defendants or either of them from thereafter making, selling, or advertising, under any name whatever, thermantidotes of the kind described and known as "Johnson's patent thermantidotes," and from otherwise infringing the plaintiff's exclusive rights and privileges under his patent.

The peculiarity of the thermantidote covered by the patent was shown chiefly by the manner in which the frame-work of the machine and the wheel used in its operation were made. There were other peculiarities, one a telescopic slide for, if necessary, diverting the breeze, and there was also attached to the machine a self-watering apparatus. The defendants, in their written statement, denied the alleged infringement of the plaintiff's patent, and they pleaded that the parts of the patented

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machine in respect of which infringement by them was alleged were not new, inasmuch as the defendant Sheen had actually used in India a thermantidote with the same frame-work and driving (or wheel) arrangement as that for which Richard Johnson had obtained his patent, "before the said Richard Johnson filed his petition for leave to file a specification thereof," *i.e.*, before 1870. In 1875, shortly before the infringement of the plaintiff's patent, which was alleged to have commenced in September of that year, the defendant Sheen had filed a spe-[372] cification for an "improved method of wetting and working *khas* tatties on thermantidotes and other apparatus for cooling houses, dwellings, offices, &c.," and he obtained a patent for this invention. The plaintiff's case suggests that the defendants took advantage of their bringing out Sheen's patent, which related solely to a watering apparatus, by connecting it with their construction of the thermantidotes which they then began to make, and which in all other respects were alleged by the plaintiff to have been infringements of his patent; and this appears to me to be fairly shown by the evidence. The plea or excuse that the defendants had previous to 1870 constructed and sold thermantidotes identical in form and contrivance with that for which the plaintiff had obtained his patent in the same year is wholly unsupported, if not disproved, by the evidence on the record. It appears to rest entirely upon the statement that in 1869 the defendants had supplied the Masonic Lodge in Allahabad with a thermantidote, but which evidently had been of a totally different kind from that made under the plaintiff's patent, for it was evidently of an old-fashioned and very clumsy pattern. One of the carpenters who assisted in making it in 1869, by name Sukhdan, states that he had never made one before nor since, and that it was of mango wood, and another witness, Mr. R. F. Castellari, describes it as a common bazar one. He says: "When the Lodge was moved in 1874, there were two thermantidotes, one a common bazar one of mango wood, and the other one of Johnson's patent thermantidotes: the bazar one was of the old pattern in which the frame and wheel were separate from the body of the thermantidote:" and he goes on to describe it as "very old, in fact it was nearly in pieces * * * had been thrown aside as useless." It is clear that there is no evidence of user by the defendants other than their making or getting made for them this clumsy and old-fashioned thermantidote which they supplied to the Masonic Lodge in 1869. The transaction, or gift, or whatever it was, was in truth a merely isolated affair, being in fact neither preceded nor followed by anything of a similar kind. The attempt, therefore, to show any user by it on the part of the defendant is simply absurd. Of the fact of the infringement by the defendants of the plaintiff's patent rights there can be no doubt whatever, in fact it is not seriously disputed. Mr. Johnson, the original patentee, ap-[373]pears to have acted in a very straightforward manner towards the defendants, after having satisfied himself that they were manufacturing machines covered by the patent which he had obtained in 1870, and with much consideration for them, as the following letter addressed by him to Mr. Sheen on the 16th March, 1877, shows: "I must ask you to make such arrangements in your thermantidote this year as do not infringe on my patent, same as the ones you manufactured last year do: should you desire to use any portion of my patent in your machine, I shall be glad to arrange with you for the royalty to be paid for its use: you will see by reference to my specification and drawings in the patent office, or with me any time you may call, when I shall be glad to see you, that your's of last year infringes upon my patent rights: it is not only the watering

apparatus, but the general arrangement of the frame-work and fly-wheel, with other improvements, that are included: if you call in for a few minutes some morning, I am sure we can amicably arrange all." In reply he received the following most evasive letter from Sheen: "I beg to acknowledge receipt of your letter of the 16th ultimo, and in reply can only refer you to the provisions of Act XV of 1859, under which my patent was registered, entitled "An Act for granting exclusive privileges to inventors," which you appear to have overlooked in addressing me on the subject of my thermantidotes: I should have sent you a reply earlier, but domestic and other matters fully occupied my time." It will be remembered that Sheen's patent related exclusively to the watering apparatus and had nothing whatever to do with his thermantidotes in any particular. Indeed, I consider it my duty to state that in my judgment the defendants' conduct throughout has been most disingenuous and fully deserves the consequences they, must now face. There is on the facts no escape from the conclusion that they have deliberately infringed the plaintiff's patent and the plaintiff is entitled to a decree accordingly, and so far I approve the Judge's order. The plaintiff is also entitled to damages and to the injunction he seeks against the defendants.

In regard to damages we do not understand what the Judge means when he says that the amount of damages will be more conveniently ascertained at the time of the execution of the decree. The Judge held, and we agree with him, that the plaintiff was entitled [374] to damages. These must be in the first instance assessed, and when so determined they will form part of the decree and will be recoverable in course of execution, if not otherwise and previously settled. The damages might be assessed in this Court, but we think it more convenient that this should be done by the Judge, and we therefore remand the case to him for that purpose, with directions that he will make an immediate and peremptory appointment for hearing the parties and for his finding on that question, and that he will return the record to this Court with such finding within a week from the date of this order. In assessing the damages the Judge will be guided by the royalty which the plaintiff has been accustomed to be allowed on sales of his patent thermantidotes; and in order to ascertain that, he should examine the plaintiff and any other witnesses who may be named to the Judge as having knowledge on the subject. On receipt of the Judge's findings assessing the damages three days will be allowed for objections.

SPANKIE, J.—P. B. Johnson, the plaintiff, respondent, as assignee o a patent granted to Richard Johnson under S. 4 of Act XV of 1859, whereby he acquired the sole and exclusive privileges of making and using and selling an invention for the improvement of thermantidotes for a period of fourteen years, sues the defendants, Sheen and Bradley, for damages to the amount of Rs. 1,000, as compensation for an infringement of the patent so granted to Richard Johnson, in making and selling thermantidotes constructed with the same frame-work and driving arrangement as that for which the patent was given to the said Richard Johnson. The plaintiff also prayed that defendants might be restrained in future from making, selling, or advertising, under any name whatever thermantidotes, of the kind described and known as Johnson's patent thermantidotes, and from all infringement of the patent of any kind whatsoever.

The defendants contended that Richard Johnson's invention was not a new one, the improvements patented having been in use in different parts of the country, and having been used by Sheen himself, who made in 1869, prior to the filing of any specification, a thermantidote, on the same

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principle as that patented by Richard Johnson, and presented the same to the Masonic Brotherhood of the Lodge of Independence and Philanthropy, No. 391, in Allahabad. **[375]** The defendants, Bradley and Sheen, were in partnership together in 1875, and it is not denied that they made thermantidotes, whilst the partnership lasted, on the same principle, with regard to frame-work and driving arrangement as that which Sheen says that he used in 1869. Bradley contends that when the partnership was dissolved in August, 1877, he had the right to make such thermantidotes, because Sheen had transferred to him all his (Sheen's) rights and interests in the manufacture of thermantidotes. The Judge has held that there cannot be any doubt that defendant Sheen had made a thermantidote on the plaintiff's patented principle in April or May, 1869, which thermantidote he (defendant) presented to the Free Masons' Lodge. "It is impossible," the lower Court observes, "to reject the testimony of such a witness as Mr. Shircore on this point: he swears that he distinctly recollects a vote of thanks having been accorded on the occasion to Sheen at a banquet held in the Lodge: I attach little weight to the fact of presentation by Sheen not being found recorded in the proceedings of the Lodge: the evidence shows that if it was presented to the banquet room, the fact could" (or would) "not be recorded": Mr. Shircore says that the thermantidote was presented immediately after Sheen had been made a member of the Lodge, and this is proved to have been in March, 1869: there is no reason, moreover, for rejecting the evidence of the witnesses who swear that they made the thermantidote and took it to the Lodge." But the real point in the case, as it occurred to the Judge, was whether the making of the thermantidote and its presentation to the Lodge amounted to a "public or actual" user such as that contemplated by S. 23 of Act XV of 1859, so as to entitle the defendants to plead that the invention was not a new one. Citing the case noted (1), he (the Judge) had to determine whether the user was of a kind which made the invention known to the public at large, the word "known" being used in that particular sense as being part of what is called the common or public knowledge of the country. If the user has not been of that kind, the person using, although in reality he may have been the actual inventor, will not be the legal inventor as against the patentee. With this principle before his mind the Judge came to the conclusion that **[376]** the presentation of the thermantidote on a certain improved principle to a private body of people like the Free Masons' Lodge for private uses did not constitute a "public or actual" user of the kind the law contemplates. The lower Court remarks that with the verandah of the Free Masons' Lodge the invention stopped, probably nobody but Sheen himself knew of the existence of the invention. The public had no opportunity afforded them of knowing that there was a useful invention in the thermantidote in the Free Masons' Lodge of which they could avail themselves if they liked. This point the Judge proceeds to insist on with various arguments, which it is unnecessary to reproduce here, coming to the conclusion that Sheen adopted a new invention and then kept it to himself. He did not even impart the invention to the persons to whom he presented the thermantidote, and as far as the public were concerned they were kept in profound ignorance of the invention. Such a party, remarks the Judge, has no right to plead to an action for infringement of patent that the invention of the patentee was not a new invention. As far as the party pleading to the action is concerned, the patentee is the

(1) *Primpton* v. *Malcolmson*, L. R. 3 Ch. 531.

real and actual inventor, for the party pleading does not say that he himself was the inventor. With this view of the case the lower Court decreed the claim, but reserved the amount of damages to be ascertained at the time of execution of the decree.

The defendants appeal the whole case, and plaintiff objects that the judgment is silent regarding costs, and he is also entitled to the costs of the injunction proceedings. The defendants urge (i) that on the evidence on the record the Judge should have found that C. J. Sheen had "publicly used" in India, in Allahabad, the invention which plaintiff claims to have been his assignors, and, therefore, plaintiff was not entitled to a decree; (ii) that on the evidence on the record the lower Court should have found that defendant C. J. Sheen had "actually used" in India, in Allahabad, the same invention; (iii) that the mode and the manner in which C. J. Sheen had used the thermantidote proved to have been made and constructed by him in March, 1869, *i.e.*, previous to the date of plaintiff's assignor's petition for leave to file the specification, was such as is contemplated by Act XV of 1859, and the Court **[377]** below has erred in its interpretation of the words "publicly or actually used" mentioned in the Act.

Under S. 19 of Act XV of 1859, an Act for granting exclusive privileges to inventors, an invention shall be deemed a new invention, within the meaning of the Act, if it shall not before the time of applying for leave to file the specification have been *publicly used* in India, or in any part of the United Kingdom of Great Britain and Ireland, or *been made publicly known* in any part of India, or in any part of the United Kingdom, by means of a publication, either printed or written, or partly printed or partly written. It is not necessary to quote the remaining portion of the section. All that is required for the purpose of this case has been cited.

The lower Court appears to have somewhat misapprehended the bearing of the precedent quoted by him (1). In that case the Master of the Rolls pointed out the legal sense and meaning of a first and last inventor, if the invention being in other respects novel and useful was not previously known in the United Kingdom, "known" being used in that particular sense as being part of what had been called the common or public knowledge of the country, and by this common knowledge it was not meant that every individual member of the public knew of the invention. What is meant is that if it is a manufacture connected with a particular trade, the people in the trade shall know something about it: if it is a thing connected with a chemical invention, people conversant with chemistry shall know something about it, and he (the M. R.) adds that it need not go so far. It needed not to show that the bulk or even a large number of those people knew it. If a sufficient number knew it, or if the communication is such that a sufficient number may be presumed, or assumed to know it, that will do. It may be shown that the trade had commonly used it. That is the best evidence. It may be shown that it was published and made known to the public. It had been held in a modern specification which had been enrolled in the Patent Office and not published besides, that will do. It had also been held that, as a common rule, if the description has been printed in England and published in England in a book which circulates in England, that will do. But after all it is a question of fact. The Judge must decide from the evidence **[378]** brought before him whether it has, in fact, been sufficiently published to come within the definition of being made known within the realm.

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(1) *Primpton* v. *Malcolmson*, L. R. 3 Ch. 531.

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We, however, are bound by the terms of our Act, and an invention by that Act is new, as we have seen, if it shall not before the time of applying for leave to file the specification have been "publicly used" in India, &c., or "been made publicly known" by means of a publication either printed or written, or partly printed and partly written, &c. This definition answers the question how the invention is " to be made publicly known" to people, and on this point no question arises here, and, therefore, the authority quoted has no bearing upon this case. Under S. 23 of the Act no action shall be defended upon the ground of any defect or insufficiency of the specification of the invention, nor upon the ground that the original or any subsequent petition relating to the invention, or the original or any amended specification, contains a wilful or fraudulent mis-statement, nor upon the ground that the invention is not useful, nor shall any such action be defended upon the ground that the plaintiff was not the inventor, unless the defendant shall show that he is the inventor or has obtained a right from him to use the invention, either wholly or in part. Any such action may be defended upon the ground that the invention was not new, if the person making the defence, or some person through whom he claims, shall before the date of the petition have publicly or actually used in India, or in some part of the United Kingdom, the invention or that part of it of which the infringement shall be proved; but not otherwise. This action has been defended under the last part of the section.

Now, the meaning of "public use" is that a man shall not by his own private invention, which he keeps locked up in his own breast, or in his own desk, and never communicates, take away the right that another man has to a patent for the same invention. The prior use of an invention need not be general. It has been held that a single instance of use would be sufficient, but it must be public. In the case of *Carpenter* v. *Smith* (1) Baron Alderson said that "public use" means a use in public, so as to come to the know-[379] ledge of others than the inventor, as contra-distinguished from the use of it by himself in his chamber, and Lord Abinger said the public use and exercise of an invention means a use and invention *in* public, not *by* the public. Thus the Judge appears to have taken an erroneous view of the words " publicly used " as applied to an invention. It does not at all follow that because the thermantidote was presented to the Free Mason's Lodge there was no public use of it. The Masonic brethren are alleged to have used it, and even on the assumption that the lower Court's interpretation of the words could be correct, inasmuch as the public had no opportunity of knowing that there was a useful invention in thermantidotes in the Free Mason's Lodge, of which they could avail themselves if they liked, the assumption itself is hardly borne out. There is certainly no evidence in favour of it, and I am unaware that the brethren of a Masonic Lodge are bound by any rule to be silent as to benefits they may have derived from a new and useful thermantidote, or that they could not, if they pleased, freely communicate to their neighbours, friends, and families a new invention that was entirely unconnected with the secrets and mysteries of Masonry. But the Judge has misconceived the meaning of use in public as distinct from use by a man of his own invention in private.

I do not, however, think it necessary to dwell further on this point. The particulars of grounds on which defendants contended that plaintiff was not entitled to exclusive privileges, which they were bound to put in, are in effect that Sheen had himself manufactured and actually used

(1) 9 M. and W., 300.

in Allahabad in March and April, 1869, a thermantidote with the same frame-work and driving arrangement, for which a patent was given to Richard Johnson, before the specification was filed for the purpose of obtaining the patent; and further, that the principle on which the driving wheel was attached to the body was commonly known throughout the country. The terms of the Act (S. 23) are "shall have publicly or actually used" the invention. If, therefore, it can be established that Sheen made and presented the thermantidote of the kind and with the arrangements described in the defence, he may be said both by himself and by the Masonic body to have actually used that thermantidote. When, however, we come to analyse the evidence, there does not appear sufficient proof of this defence.

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the Judge below, by what is called a miscellaneous application before the trial came on before him, I cannot say that it was incumbent on the plaintiff to make the application. The defendants might have done so, and, perhaps, ought to have done so, as in the particulars filed by them they simply say that at the time the thermantidote was manufactured, the principle on which the driving wheel was attached to the body was commonly known throughout the country, which was a very vague statement, and it does not in any way indicate that they relied on evidence in any particular place for corroboration of such a vague statement. Moreover, the defendants should have applied to the Judge at the trial if they wished to amend the particulars. This would have allowed the Judge to adjourn the case, and to enable the plaintiff to rebut the proposed evidence. Under the proviso the Judge certainly could have acted, but he was not asked to do so. I would not, therefore, interfere; nor do I think it necessary. The main defence is that Sheen himself made the thermantidote and used the same principles as Johnson did in 1869, and then presented the machine to the Lodge, which points he has failed to establish. Had the fact been so well known, and the use of the same principles so common throughout the country, the circumstances would have been stated in Sheen's letter and in the proceedings before Mr. Quinton, or surely in the grounds set out on the 10th June, 1878.

I may, however, remark that I do not admit that there is anything in S. 23 which would forbid the record of the desired evidence. The defendant, by that section, must show that he himself had used the invention, but there is nothing which stays him, after that, from proving that it was in common use in particular places. There is [382] one other point. The Judge refused to take Mr. Bradley's evidence, though he was present in Court. He ought to have taken it, if the defendants wished it. But their case was in no way prejudiced by his not having done so, and they do not refer to the matter in their memorandum of appeal.

As to damages, the Judge should not have left the amount to be determined at the time of execution of the decree. The defendants did not contend that plaintiff had not suffered damages, if there had been an infringement of his rights. They simply denied that there had been any such infringement as that complained of, nor did they question the amount of damages sought to be recovered.

It appears from the proceeding in the Court of Mr. Quinton, late Officiating Judge, dated 8th May, 1878, that Johnson applied under S. 493 of the Civil Procedure Code for a temporary injunction to restrain defendants from manufacturing, selling, or advertising thermantidotes, which. he asserted, were built in such a way as to infringe his patent. At this time the present suit had been filed. But the Court refused to issue the injunction, because so far back as March, 1877, Johnson was aware that defendants had infringed his patent, and correspondence had ensued, which closed abruptly in May with a curt letter from Sheen, and Johnson had taken no legal steps to vindicate his alleged rights. He lay back until the 24th April, 1878, and then brings his suit, and filed an application for an injunction. The Judge accepting the rule laid down in the case of *Bovill* v. *Crate* (1) held that a patentee who lies by and allows a person to continue doing what he says is an infringement of his patent cannot claim an interlocutory injunction to restrain this person. Mr. Colvin for the defendants had then stated that the defendants were quite ready to keep an account, and, therefore, the Judge issued an injunction to the

(1) L. R., 1 Eq. 388.

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defendants, ordering them to prepare an account of the manufacture and sale of the thermantidotes, which are said to infringe the patent, from the date of the institution of the suit. Plaintiff was directed to pay the costs of the application. The order was appealable under S. 588 of the Code, but Johnson did not appeal it. Ordinarily the rule in Courts of Equity, as now in those of Common Law, is, when no interlocutory order has been given, to order, as part of the final judgment, an account of all the profits made **[383]** by defendants since the commencement of the action, and after notice that an account would be required. Mr. Quinton appears to have given such a notice. If here damages are assessed the plaintiff would not be entitled to an account prior to the suit, for the damages would be compensation for his loss of profits up to the date of suit. The plaintiff has not asked in this suit, nor did he ask in his petition dated the 24th April, for an injunction that an account should be taken. He has simply sought to recover Rs. 1,000 damages. Under these circumstances he may not be entitled to profits. The plaintiff is assignee to a manufacturer himself, and if he has been in the habit of licensing other persons to use his patent at a fixed royalty, then it may be that the loss of that royalty would be the proper measure of the damages sustained by him from the 18th September, 1875, to date of decree (1). It does not appear what fixed royalty Johnson has charged, but he says in his letter of the 16th March, 1877, to Sheen that he would be glad to arrange with him for the royalty to be paid for the use of his invention. Perhaps the best course to adopt would be to remand the case to the lower Court for further inquiry, and to ascertain what sum Johnson or his father have been in the habit of taking as a royalty, and whether this royalty has been taken on each machine made, or a lump sum has been paid for the use on the patent. Having ascertained this point, the lower Court should take an account of the machines made by defendants between the 1st September, 1875, and the date of the institution of the suit. If many machines have been made since, they should be taken into account, and the damages should be assessed according as it may be found what has been the royalty charged. On a return of the lower Court's finding on these points, we can dispose of the appeal and the objections of the plaintiff under S. 561. One week might be allowed for objections to the finding of the lower Court from the date of its return of the record. Or if the parties prefer it, we might ourselves make the inquiry suggested, and determine the point, though it would be more convenient for the Judge to do it.

I have, since writing as above, seen the Hon'ble Chief Justice's proposed order of remand, and I quite agree in the propriety of it. It will enable us to dispose of the appeal on receipt of the Judge's finding.

[384] On receipt of the Judge's finding on the issue remitted the Court delivered the following

JUDGMENT.

We have now received the finding of the Judge on the remand directed to him by our order of the 26th March, and there are no objections to the finding on either side. The Judge finds that the defendants made six of the plaintiff's thermantidotes in 1876, fifteen in 1877, and five in 1878, in all twenty-six. He is also of opinion upon the evidence taken before him, that where the thermantidotes manufactured by defendants exceed twenty in number, a royalty of Rs. 40 on each machine would be a fair charge. It would thus appear that that royalty charged on the twenty-six thermantidotes made by the defendants would produce a sum of Rs. 1,040. But as that is larger by Rs. 40 than the

(1) *Penn* v. *Jack*, L.R., 5 Eq. 31; *Galloway's Patent*, 7 Jur. 453.

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amount claimed, we reduce the sum accordingly, and assess the damages to be paid by the defendants to the plaintiff at Rs. 1,000, and we decree that amount to the plaintiff and dismiss the appeal with costs in both Courts, but excepting the costs relating to the plaintiff's petition of objection, which petition we over-rule, and we order that the plaintiff shall bear the costs thereof. Under the circumstances it is unnecessary to make any order respecting the injunction asked for in the plaint.

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2 A. 368.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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MANNI KASAUNDHAN (*Plaintiff*) *v.* CROOKE, SECRETARY TO THE MUNICIPAL COMMITTEE OF GORAKHPUR (*Defendant*).

[6th May 1879.]

2 A. 296.

1. *Suit against Municipal Committee in name of wrong officer—Substitution of proper officer--Act XV of 1873 (N. W. P. and Oudh Municipalities Act), Ss. 40 and 43—Limitation Act (1877), S. 22.*

A suit, brought against a Municipal Committee in the name of the wrong officer, cannot, by the subsequent substitution of the proper officer as defendant, be deemed, with reference to S. 22 of the Limitation Act (1877), to have been instituted against such Committee when such substitution is made. S. 22 of the Limitation Act seems to apply to new plaintiffs and defendants personally made parties to a suit after its institution, rather than to cases where a Committee is sued through their officer, and a clerical error is corrected by the Court allowing the substitution of the proper officer as defendant in the place of the wrong one.

[Appr., 32 C. 582 (598)=9 C.W.N. 421 ; **R.**, 16 M. 296 (299) ; 6 C.W.N. 218 (220, 221); A.W.N. (1908), 165.**]**

2. *S. 43, Act XV of 1873 (N.W.P. and Oudh Municipalities)—Class of suits to which applicable.*

Semble :—The suits contemplated by S. 43 of Act XV of 1873 seem to be those claiming relief of a pecuniary character, for some act done under that enactment by the Committee or any of their officers or any other person acting under their directions, and for which damages can be recovered from them personally, and not suits against a Committee to prove the right of the plaintiff to certain property, and for compensation for such property demolished by order of the Committee.

[Appr., 4 A. 399 (342) (**F.B.**)=2 A.W.N. 63 ; **Appl.**, 4 A. 102 (106) ; **D.**, 28 A. 600 (604) =3 A.L.J. 341=A.W.N. (1906), 107.**]**

JUDGMENT.

[297] SPANKIE, J.—The plaintiff appears to have made the Secretary, instead of the President, of the Municipal Committee, defendant. When he asked the Court to make the President defendant, it refused to do so, and the Courts have held that, though the suit as against the Secretary was in time, it was not so against the President, even if his name had been substituted for that of the Secretary, as it would have been brought more than three months after the accrual of the cause of suit (S. 43, Act XV of 1873).

Notice of the action required by S. 43 was given in the Office of the Municipal Committee. It is true that the suit ought to have been instituted against the Committee in the name of the President, and that if S. 22 of the Limitation Act applied, and the name of the Secretary had been

struck out and that of the President added, more than three months would have elapsed from the accrual [298] of the cause of action. But the suit is not against the President personally, and S. 22, Act XV of 1877, seems to apply to new plaintiffs and defendants personally made parties to a suit after its institution rather than to cases like the present, where a Committee is sued through their officer, and a clerical error is corrected by the Court, and the substitution, as defendant of the proper officer for the wrong one might be permitted. It was an error of form only and not an act of wilfulness, and the Committee who are really sued have had full notice of action. Moreover the suits contemplated by the Act seem to be those claiming relief of a pecuniary character for some act done under the Act (XV of 1873) by the Committee, or any of their officers, or any other person acting under their directions, and for which damages can be recovered from them personally. The last paragraph of S. 43 bars all recovery if the person to whom the notice prescribed by the section has been given before the suit is brought tenders sufficient amends to the plaintiff.

The present suit is one to prove the right of plaintiff to build certain verandahs and a platform, which he avers were demolished by order of the Committee, and for which compensation is sought. It may be said that if notice to the Committee was required, it has been given, and that the Courts below should have substituted the name of the President in lieu of the Secretary and have tried the case on the merits. Substantially the requirements of the Act have been complied with, and the substitution of the name of the President for that of the Secretary is not affected by S. 22 of the Limitation Act, the suit against the Committee having practically been instituted within three months after the accrual of the cause of action.

On the other hand, if this is not one of the suits contemplated by Act XV of 1873, it is not at all affected by S. 43 of the Act, and would be certainly within time if the name of the President was substituted for that of the Secretary. Either way the substitution should be made and the case should be heard on the merits. We therefore decree the appeal, remand the case through the Judge to the first Court, for amendment of the plaint by the substitution in it of the President as provided by S. 40, Act XV of 1873, and for the disposal of the case on its merits. Costs to abide the result.

CIVIL JURISDICTION.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

IN THE MATTER OF THE PETITION OF MULO. [7th May 1879.]

2 A. 299=4 Ind. Jur. 359.

Sale in execution of decree—C.P.C., 1859—Application by dispossessed auction-purchaser under S. 315, C.P.C., 1877, for refund of purchase-money.

Where immoveable property was sold in execution of a decree under the C.P.C., 1859, which did not allow an application by an auction-purchaser for refund of purchase-money, and the auction-purchaser was dispossessed of the same on the ground that the judgment-debtor had no saleable interest in it, an application by him for such refund was held maintainable under S. 315 of the C.P.C. (1877), which had then come into force.

[Diss., 2 A. 780 (783).]

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CIVIL JURISDICTION.

2 A. 299 = 4 Ind. Jur. 59.

Subsequent to the sale on the 20th September, 1877, of a certain village in execution of a decree against Husaini Begam as her property, under the provisions of Act VIII of 1859, and purchase of the same by Nur Ahmad, one Altaf Ali sued Nur Ahmad for possession of the property and to set the sale aside on the ground that the property belonged to him, he having purchased it from Husaini Begam under a private sale before it was sold to Nur Ahmad by auction, and obtained a decree on the 30th January, 1878, which was affirmed by the High Court on the 13th November, 1878. The application of Nur Ahmad with reference to Ss. 313 and 315, Act X of 1877, to the District Judge of Bareilly, by whom the decree against Husaini Begam had been executed, for the refund of his purchase-money, on the ground that he had been deprived of the property by reason of Husaini Begam having no saleable interest in it, was objected to by the decree-holders on the ground that it could not be entertained under Act X of 1877, as the sale had taken place while Act VIII of 1859 was in force and under its provisions, and that the latter Act did not provide for such an application in the execution of a decree, but left the auction-purchaser to institute a suit. On the District Judge holding that the provisions of S. 315 of Act X of 1877 were applicable to the case, and ordering the refund of the purchase-money, the decree-holder applied to the High Court to set aside the order of the District Judge.

JUDGMENT.

[300] PEARSON, J.—The Judge's order seems to be a very right, just and proper one, with which we ought not to interfere, unless absolutely bound to do so. The proceedings commenced under Act VIII of 1859 appear to have terminated with the sale. The application under S. 315 of Act X of 1877 may be regarded as a new proceeding. We are not prepared to say that the Judge could not entertain the application preferred to him under the second clause of S. 315, Act X of 1877; and we therefore decline to interfere, and dismiss this application with costs.

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PRESENT:

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, and Mr. Justice Oldfield.

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EMPRESS OF INDIA *v.* LALAI. [16th May 1879.]

2 A. 301.

1. *Prisons Act, S. 3--Havalat, whether a prison.*

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Held by SPANKIE and OLDFIELD, JJ. (STUART, C. J., *dissenting*). A *havalat* or lock-up in which prisoners under trial are confined, is a prison within the meaning of that term in S. 3 of the Act.

2. *Prisons Act, XXVI of 1870, Ss. 3, 45, 54—Taking food for under-trial prisoner—Penal Code, S. 442—House trespass.*

Per STUART, C.J.—Food is not an article within the meaning of S. 45.

Per STUART, C.J., and OLDFIELD, J. (SPANKIE, J., *dissenting*).—The act of conveying or attempting to convey food to a man confined in the *havalat* and under trial, does not amount either to house trespass or to an offence punishable under S. 45 of the Prisons Act.

3. *Crim. Pro. Code, 1872, Ss. 454, 460—Acquittal on previous charge—Subsequent charge for a different offence.*

Per STUART. C.J.—Where a person charged with the offence of criminal trespass in having taken food to an under-trial prisoner in a *havalat* against the orders of the officer guarding it, was acquitted, *held*, that a subsequent trial for an offence under S. 45 of the Prisons Act was not barred.

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JUDGMENTS.

[303] STUART, C. J.—These are two appeals by the Government against two acquittals of the same respondent, and on the same facts, although under different charges or different denominations of crime. The facts common to both cases are these :—On or about the 29th April 1878 an octroi muharrir, otherwise called a chungi muharrir, had been sent to the havalat at Gorakhpur on a charge of embezzlement. On the following day the accused Lalai in company with his brother named Lochan, an octroi chaprasi, came to the havalat about 12 o'clock noon and asked the head-constable, Bakhtawar Khan, who was in charge of the guard, to allow them to give some food to the chungi muharrir who was confined there; this the head-constable refused and told the accused and his brother Lochan to go away. About half an hour after an alarm was raised by a constable on duty that some one was on the top of the havalat wall where there is a platform for the police sentry. The police were sent to the spot and the prisoner was taken. On being searched there, there was found on him a packet of "*puris*" (wheat-cakes fried in *ghi* or oil) and vegetables, and these together were the food which the accused and his brother attempted to give to the octroi muharrir. On these facts the accused Lalai was **[304]** first charged with house-trespass under S. 448, Indian Penal Code, and tried before and convicted of that offence by the Joint Magistrate, and sentenced to rigorous imprisonment for three months. On appeal to the Judge the Magistrate's order was reversed, the appeal allowed, and the accused ordered to be discharged; the Judge's order to that effect was dated 31st May 1878. Subsequently and on the same facts the accused respondent was tried before the Deputy Magistrate of Gorakhpur on a charge preferred under S. 45 of the Prisons Act XXVI of 1870, and convicted and sentenced on the 19th August 1878, to rigorous imprisonment for three months, but on appeal to the Judge, the Magistrate's order was reversed and the prisoner again released from custody.

It would be convenient to notice and dispose this second appeal first. But before considering the merits in this second appeal, I would notice an objection in the way of a plea of *res judicata*, and which objection was allowed by the Judge. "In this case," he said, "I consider that there can be no doubt that appellant has been imprisoned for committing the same offence for which he was tried and sentenced on 15th May 1878, and released on appeal on 31st May. Under these circumstances his second trial and imprisonment for the same offence must be quashed under S. 460 of the Criminal Procedure Code." In this opinion I do not concur. By the second paragraph of S. 460 it is provided that a person convicted or acquitted of any offence may afterwards be tried for any other offence for which a separate charge might have been made against him on the former trial. Under S. 454, Criminal Procedure Code, first paragraph, which provides that "if in one set of facts, so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time;" S. 460, however, providing that this may be done, "afterwards." The Judge's objection therefore of *res judicata* or of *autrefois*

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acquit, as they would call it in English criminal pleading, fails, and the second prosecution and all that followed upon it were perfectly valid.

But on the merits I am of opinion that it is too doubtful a case to justify Lalai's conviction. Lalai was charged under S. 45 of **[305]** Act XXVI of 1870 of an offence against the Prisons Act, in that he had taken to the havalat and attempted to give to the octroi muharrir food contrary to the prison regulations. Now a conviction on such a charge involves two things: first, that the havalat is a prison within the meaning of that term in S. 3 of Act XXVI of 1870, and secondly, that the act of introducing food into a prison is prohibited by the prison regulations and therefore an offence. With reference to the first point a prison is by S. 3, Act XXVI of 1870, defined to mean "any gaol or *penitentiary*, and includes the airing-grounds or buildings occupied for the use of the prison," meaning by a gaol or penitentiary, as I understand those terms, a place of permanent confinement for a fixed and definite period, and not a mere place of temporary or preliminary custody, which appears to be the meaning of the term havalat. I observe that Act XXVI of 1870, S. 30, makes a clear distinction between criminal prisoners before trial and "convicted prisoners" and very properly, because the ultimate condition of the former class has yet to be determined. I am therefore rather of opinion that a havalat is not a prison within the meaning of S. 3, Act XXVI of 1870. As regards the second point, and assuming that a havalat is a prison as defined by S. 3, Act XXVI of 1870, I doubt very much whether the act of introducing food into a havalat in the way alleged in this case was an offence against the prison regulations. Such an act cannot, I consider, be deemed to be such an offence unless it can be shown to be so against some prohibitory law or regulation. Now I can find nothing of that character either in Act XXVI of 1870 or in the rules for the management and discipline of prisoners adopted under the Act. This conviction appears to proceed on S. 45 of the Act, clause 3, where it is provided that "whoever contrary to such regulations (of the prison) conveys or attempts to convey *any letter or other article not allowed by such regulations* into or out of any such prison or place" shall, on conviction, be liable, &c. The question thus at once arises whether the food attempted to be taken into the havalat by the accused was an "article" within the meaning of this section. According to the principles upon which statute laws are usually interpreted, "article" here would mean something of the same kind with a letter such as other documents or a newspaper or a book or other **[306]** matter brought to the accused in a printed or written form, and whatever else may have been intended, food does not necessarily come within the category, and this being a criminal case, we are not to determine against an accused person what is not plainly expressed or necessarily implied. Then as to the prison regulations, I was referred to No. 418 which is one of the rules relating to prisoners under-trial (and I presume received into havalat for that purpose). This rule provides that such prisoners shall receive the non-labouring rations of the gaol with certain additions of *ghi* and mustard oil. I was also referred to rule 524 which prescribes a dietary for native prisoners with a suggestion that such was the food the prisoners were to receive, and no other. That may have been the intention of the rule, but such intention is nowhere expressed, nor can I find any prohibition whatever against a friend of a prisoner in custody before trial and not after conviction doing what is here charged against Lalai. And again, I say we must not forget that this is a criminal case in which the presumption is against guilt, and we are not to assume that

guilt without some express rule to the contrary, or without evidence which necessarily and irresistibly shows or, it may be, implies the accused's complicity. In fact these prison regulations merely prescribe the diet that is to be given to different classes of prisoners without any other meaning in a penal sense, and there is nowhere in any of them any rule or order against such a contribution to a prisoner's food as Lalai attempted in the present case. It is also to be observed that Lalai and his brother came openly in the first instance to the havalat, and requested permission of the head-constable to give their friend who was in custody then a little food. This was refused, but it does not appear that Lalai was then informed that what he asked permission to do was against the rules of the havalat, much less that it was a criminal offence to give a little *puri* to a prisoner there. It may, as I have suggested, be reasonable to believe and to imply that the diet detailed in a prison regulations was to be all the food that the prison authorities were to provide, but it does not therefore follow that what was here done was a criminal violation of the regulations, unless we are to read S. 45 of the Act otherwise than I have done and so as to include within its sanction what Lalai attempted. But I repeat this is a **[307]** criminal case and everything charged against the accused should, to justify his conviction, be clearly shown to be contrary to express law, and not merely to be implied by any covert inference, however reasonable unless it be irresistible.

For all these reasons I consider the validity of Lalai's conviction under Act XXVI of 1870 is too doubtful, and I would quash it.

This, so far as my judgment is concerned, determines the second appeal before us, and I shall now proceed to dispose of the other or first appeal, and with a like result. The legality of the conviction in this first appeal depends on the solution of the question whether what Lalai did was an "offence" within the meaning of S. 40 of the Indian Penal Code and Act XXVI of 1870. That question I have already determined by the opinion I have expressed in the second appeal to the effect that what Lalai did was not an offence as that term is so defined, or what is the same thing, that what he did was of too doubtful a character to necessitate conviction as an offence. That being so, Lalai was neither guilty of criminal trespass nor of house-trespass, the *intent* to commit an *offence* being essential under both sections. I would therefore disallow the appeal and affirm the order of the Judge in both these respects.

SPANKIE, J.—It appears to me that on the facts found Lalai Ahir did commit the offence of criminal trespass. It was established by the evidence that an octroi muharrir had been sent to the havalat at Gorakhpur in custody on a charge of embezzlement. The next day Lalai Ahir came to the havalat about noon and asked the head-constable in charge of the guard to allow him to give some food to the muharrir. The head-constable refused to do so and warned him off. Sometime afterwards an alarm was raised that some one was on the top of the havalat wall, where there is a platform for the police sentry. Constables were sent to the spot and Lalai Ahir was caught. On being searched, a packet of "*puris*" and vegetables were found on his person. The Assistant Magistrate being of opinion that a havalat does not come under the definition of a prison within the terms of S. 3, Act XXVI of 1870, convicted Lalai Ahir on the charge of house-trespass under **[308]** S. 448, Indian Penal Code. The Sessions Judge considered that no offence had been committed. Lalai had entered the havalat for the purpose of giving food, and the giving food under such circumstances was not punishable by law. He therefore annulled the conviction.

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Under S. 441, Indian Penal Code, whoever commits criminal trespass, by entering into or remaining in any building, tent, or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, s said to commit house-trespass. This havalat or lock-up is certainly a place used as a human dwelling. Its officers, guards, and persons accused of offences occupy it as a dwelling place. The introduction of any part of the trespasser's body is entering and sufficient to constitute house-trespass. But the trespass must be criminal. Under S. 441, Indian Penal Code, whoever enters into or upon property in the possession of another, with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence is said to commit criminal trespass. Now Lalai Ahir himself was a constable enrolled under the Police Act, and a public servant. Presumably he was quite aware that he was entering a place in which parties accused of offences were kept in custody, and that the head-constable of the guard was only doing his duty when he refused to allow him to give food to a person in custody and warned him to leave the premises, which he did do. But instead of keeping away, he managed to effect another entry and was caught. After due warning from the head-constable in charge of the building who was lawfully in possession of it, that he could not be allowed to give food to a person in custody therein, and after being told to leave the building, he is found after a short interval on the top of the wall with the food and vegetables, which he was told could not be given to the prisoner, concealed on his person. We must judge of his intent from his conduct, and it appears to me that his re-entry into the lock-up was, on the facts established, made with an intent to commit an offence against prison regulations and rules, and thereby an offence against the Prisons [309] Act. If he had no such intention, why did he conceal the food, and re-enter a building which he had been told to leave?

There cannot I think be a doubt that to secretly introduce food into the lock-up was an offence against the Prisons Act and therefore the offence of criminal trespass was committed, and on the facts found, which are also beyond a doubt, the offence of house-trespass was also committed. The conviction therefore under S. 448 might have been sustained by the Sessions Judge. But if there had been any room for doubt, the second conviction under S. 45 of Act XXVI of 1870 appears to have been good. I cannot admit that a havalat or lock-up is not a prison within the meaning of the Act. In S. 3 prison means any gaol or penitentiary, and includes the airing-grounds or other grounds or buildings occupied for the use of the prison. Criminal prisoner means any prisoner charged with or convicted of a crime. By S. 4 the Local Government is to provide for prisoners accommodation in a prison or prisons constituted and regulated in such manner as to comply with the requisitions of this Act in respect to the separation of prisoners. By S. 30, Cl. 3, criminal prisoners *before trial* shall be kept apart from convicted prisoners. By Ss. 34 and 35 a civil prisoner may maintain himself but is not allowed to sell any part of his food, clothing, bedding or necessaries to any other prisoner. By S. 45 whoever, contrary to the regulations of the prison, conveys, or attempts to convey, any letter or other article not allowed by such regulations into the prison, is liable on conviction to rigorous imprisonment for a period not exceeding six months, or to a fine not exceeding Rs. 200, or to both. By S. 54 the Local Government may make rules consistent with

the Act, amongst others, as to the food and clothing of criminal prisoners. The Government has exercised such powers, and rule 417 allows prisoners under trial to cook their own food, and directs that they shall be subjected to no further restraint than is absolutely necessary for their safe custody. Rule 418 directs that these prisoners under trial shall receive the non-labouring rations of the jail, with the addition of two chittaks of *ghi* or mustard oil to each group of 25 prisoners, the oil to be given with their vegetables and the *ghi* with their *dál*. So that the food they are allowed to cook is not food which they purchase for themselves, but food which is supplied **[310]** as rations. The head of a prison is the Superintendent (S. 7 of the Act), and the Inspector-General of Prisons for the North-Western Provinces has been vested with the general control and superintendence of all prisons situate in the territories under the Government, North-Western Provinces (S. 6). By the 424th rule made by the Government, the Inspector-General of Prisons is to exercise a legitimate watchfulness over the numbers and excessive detention of prisoners confined in the havalats under his inspection, and to call the attention of Government to the subject if circumstances necessitate this action. The classification of gaols in the North-Western Provinces authorized by the Government includes (i) Central Prison, (ii) 1st class District gaols, (iii) 2nd class District gaols, (iv) 3rd class District gaols, (v) 4th class District gaols, (vi) lock-ups. But it may be said that these lock-ups are within the prisons, and persons committed for trial by the Magistrate are confined therein, and that the term lock-up does not include the Magistrate's havalat. This however is not the case, as Rule 14, p. 18 of the work just cited above, directs that—"In lock-ups shall be confined all the prisoners under trial before any Court, unless, where the lock-up is separate from the District gaol, the Magistrate or committing officer may think it necessary for greater security to send any prisoner committed to the Sessions to the District gaol." On the 27th August 1864 the Lieutenant-Governor was pleased to approve of the proposal that all the "havalats" (lock-ups) in the North-Western Provinces should be placed under the supervision of the Inspector-General of Prisons from 1st May 1865. The resolution also approved of the suggestions made by the Inspector-General of Prisons regarding the diet and clothing to be supplied to prisoners under trial.

The Magistrate of Gorakhpur reports to this Court that up to 1862 the gaol and lock-up were under charge of the Magistrate of the District. In 1862 the gaol was placed under charge of the Civil Surgeon as Superintendent. But the lock-up remained as before in charge of the Magistrate. In 1864 it was placed under the supervision of the Inspector-General of Prisons under the Government order dated 27th August 1864 quoted above, and in 1868 it was also **[311]** placed under the supervision of the medical officer in charge of the district gaol by order dated 28th July 1868.

It appears therefore to be quite certain that the Magistrate's havalat or lock-up is, under the rules which the Local Government is authorized by S. 54 of the Act to make, a fifth class gaol within the meaning of prison as defined in S. 3 of the Act, and therefore if the accused committed any breach of the regulation in force and authorized to be made by the Prisons Act, the conviction would be legal, if had under S. 45 of the Act. On the merits there can be no doubt that the facts proved in the second case show that an attempt was made to introduce to a prisoner charged with an offence articles of food not allowed by the regulations. I would therefore decree the appeal and reverse the decision of the Sessions Judge and

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re-affirm the conviction and sentence passed under S. 45 of Act XXVI of 1870.

I would also decree the appeal in the house-trespass case, but as the subsequent conviction by the Magistrate has been affirmed in the other case, I do not think it necessary to do more than reverse the Sessions Judge's order and to approve the conviction of the Assistant Magistrate. There does not appear to be any necessity for pressing the sentence against the accused under S. 448, Indian Penal Code, and it might be remitted.

[The case was referred to Oldfield, J., under S. 271-B. of Act X of 1872.]

JUDGMENT.

OLDFIELD, J.—I will first deal with the offence under S. 45 of Act XXVI of 1870.

The definition of the word prison in S. 3 of that Act appears to me to include a havalat or lock-up in which prisoners under trial are confined. That such was the intention of the Act would appear from the definition of criminal prisoner in S. 3, which "means any prisoner charged with or convicted of an offence," any by the Act treating of prisoners under trial as well as conviction. It is unnecessary, however, for me to determine this point, for assuming that an offence against the prison regulations of the nature of **[312]** those provided for in S.45 committed with reference to a prisoner under trial confined in the havalat will be an offence under S. 45, I am unable to hold that such an offence has been committed in this case. The offence alleged against the accused is that he conveyed or attempted to convey some food to a man confined in the havalat and under trial, and by doing so has contravened S. 45 of Act XXVI of 1870, which provides, *inter alia*, that "whoever, contrary to such regulations (*i.e.*, the regulations of the prison), conveys or attempts to convey, any letter or other article not allowed by such regulations into or out of any such prison or place, shall on conviction before a Magistrate be liable to rigorous imprisonment for a term not exceeding six months, or to fine not exceeding Rs. 200, or to both." Before, however, a conviction can be had under this part of S. 45, it must be shown that to convey food to a prisoner in the havalat is contrary to the regulations of the prison. Now the only regulations on the subject to which we are referred is rule 418 of Rules for the management and discipline of prisoners in the North-Western Provinces issued under the authority of Government under S. 54 of the Prisons Act. This rule refers to prisoners under trial, and amongst other provisions provides that "they shall receive the non-labouring rations of the gaol with the addition of two chittaks of *ghi* or mustard-oil to each group of 25 prisoners, the oil to be given with their vegetables, and the *ghi* with their *dâl*;" and the authorised scale of dietary is laid down in rule 524.

It is urged that, inasmuch as these rules provide a particular ration of food to be supplied by the prison authorities, it is contrary to the regulations to convey any food to such prisoners, and to do so will amount to the offence contemplated in S. 45. But this contention cannot, in my opinion, be maintained. To render the act of conveying, or attempting to convey, any articles to a prisoner in havalat penal, it must be shown distinctly that there is a regulation which prohibits it. The rules in question merely deal with the articles of food which such prisoners are to receive from the prison authorities; they contain no prohibition against their receiving any other supplies of food, or any prohibition against any person conveying or attempting to convey food to them; and we are not at liberty to make assumptions or introduce prohibitions not

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contained in the regulations. We cannot hold that an act done [313] by a person is "contrary to the regulations" merely because it is something not affirmatively allowed by the regulations. I hold therefore that the conviction under S. 45, Act XXVI of 1870, cannot be maintained, and it will follow that there can be no conviction of the offence of house-trespass or criminal trespass, since it cannot be shown that there was the intent required to constitute criminal trespass. It is not urged that there was an intent to commit an offence punishable under the Penal Code, and there was none to commit an offence punishable under special or local law, since the only offence under such a law to which such an intent could be referred is the offence under S. 45, Act XXVI of 1870, which in my opinion is not proved in this case.

I therefore affirm the order of the Judge in both the appeals before this Court.

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PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

BALL *(Defendant)* v. STOWELL *(Plaintiff)*. [19th May 1879.]

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Instalment bond—Cause of action—Limitation Act, 1877, Sch. II, Arts. 67, 68, 75 and 80.

A bond, which stipulates for the repayment, within three years, of the principal, and every half year, of the interest thereon and of the premia of certain policies of insurance made over to the creditor as collateral security for the debt, and that, in default of such half-yearly payments, the whole amount of the debt shall become payable, but that it should be optional with the creditor to claim full payment on the failure of any one or more half-yearly payments or on the expiry of the period of three years, is not an instalment bond; and, therefore, Art. 75, Sch. II of the Limitation Act, 1877, does not apply to it.

Per STUART, C.J.—The cause of action for a suit on the bond arises at the end of three years allowed for the payment of the debt.

Per SPANKIE, J.—The bond does not fall under Arts. 67 and 68 of Sch. II of the Limitation Act, but belongs to the category of bonds mentioned in Art. 80, on which the cause of action arises when the bond becomes due, and it becomes due on default of payment of both interest and premia on the due date, and not of either of them only.

[R., 1 A.W.N. 157, 8 O.C. 77 (78); D., 20 M. 245 (246).]

Suit for money due on a bond dated the 15th August 1874, the suit being instituted at Agra in the Court of the Subordinate Judge on the 16th July 1878. The defendant, Ball. alone defended the suit; and the first Court gave judgment for plaintiff.

The defendant, Ball, preferred an appeal to the High Court.

JUDGMENT.

[327] STUART, C. J.—The decree of the lower Court in this case is clearly right, both in regard to the question of limitation and the joint liability of the defendants for the sum decreed. In the lengthened and anxious argument of the counsel for the appellant, numerous authorities in the English Courts, and also in the Courts in this country, were cited to show

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that the bond in this case (1) was an instalment bond, and it is chiefly from a desire to examine these authorities that I have delayed my judgment. I have now carefully considered all the authorities, and find that they all assume and relate to the case of an undoubted instalment bond. In the present case, however, I am quite clear that the bond sued on [328] is not an instalment bond, but a bond simply acknowledging the debt with interest payable half-yearly, with the proviso that if not so paid the obligors should be liable to pay up the whole amount from date of such default, that is, from date of failure in payment of interest. As to the limitation pleaded, the period clearly runs from the expiration of three years allowed by the bond for the payment of the debt, that is, from the 15th of August 1877, the date of the bond itself being the 15th of August 1874. Such appears to be the real nature and position of the bond, but it contains an allusion to policies of assurance, and premia thereon, as to which there is no contract apparent on the face of the bond itself, although there would appear from the evidence to have been an arrangement of the kind between the parties to fortify and further secure the bond debt. Be that as it may, we are only concerned with the decree made by the Subordinate Judge, and we affirm that decree with costs in both Courts.

SPANKIE, J.—The bond recites that the sum of Rs. 15,000 borrowed from C. W. Stowell, the plaintiff, respondent, obligee, is to be payable within three years from the date thereof (15th August 1874); that the interest is to be payable half-yearly, namely, on the 30th June and 31st December in each calendar year, that premia on life policies are to be endorsed to the said C. W. Stowell periodically according to the rules of the Insurance Company. The second clause recites that in the event of failure in the payment on due date of the interest and premia, and whether advice be or be not given of such default, the defendants, obligors, jointly and severally render themselves liable to pay up the full amount of the bond, or such portion or balance thereof as may be due, according to the account of C. W. Stowell, from date of such default to payment of loan in full and other charges that may or shall be incurred on account of the bond. In the third clause of the bond there is a condition that "it shall be optional to the said C. W. Stowell to claim, and if necessary to sue for the full amount due on the bond on the failure of any one or more stipulated payment, or on the full expiry of the period this bond was originally intended to run, if all its provisions had been

(1) Terms of the bond:—"Know all men by these presents that we the undersigned, Edward Charles Ball and William DeRussett Stowell, having jointly and severally borrowed and received the sum of rupees fifteen thousand (Rs. 15,000) from Christopher William Stowell, at Agra, do hereby covenant and agree to pay or cause to be paid at Agra, unto the said Christopher William Stowell, or to his order, or to his heirs, executors, and assigns the said sum within three years from date hereof; interest on the same at the rate of 8 per cent. per annum being payable half-yearly, namely, on the 30th June and 31st December in each calendar year, and premia on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance Company.

"In the event of failure in the payment on due date of the interest and premia, and whether advice be or be not given of such defaults, we hereby jointly and severally render ourselves liable to pay up the full amount of this bond, or such portion or balance thereof as may be due or may become due according to the account of the said Christopher William Stowell, from date of such default to payment of loan in full and other charges that may or shall be incurred on account of the said loan.

"It shall be optional to the said Christopher William Stowell to claim and, if necessary, to sue for the full amount due on the bond, on the failure of any one or more stipulated payment, or on the full expiry of the period this bond was originally intended to run, if all its provisions had been fulfilled by us."

fulfilled by us." There are two defendants, one, Mr. W. DeRussett Stowell (son of C. W. Stowell, the obligee), unreservedly [329] admitted the justice of the claim. The other, E. C. Ball, acknowledged execution of the bond but pleaded limitation generally. His counsel, however, contended that Art. 75, Act XV of 1877, applies to the bond, which is one payable by instalments, as interest, the fruit of principal, was payable half-yearly; the plaintiff's cause of action arose when default occurred which gave him a right of suit, and from that time limitation would run; the proviso could not stop limitation from running; nor, if the bond is one payable by instalments, does the proviso amount to a subsequent waiver, and, therefore, it gives the plaintiff no further right than the law allowed him before it was written. The Subordinate Judge held that the bond contemplated in Art. 75, Sch. ii of the Limitation Act, is one in which the principal amount secured by the bond is made payable by instalments; that the bond in suit was not payable by instalments, but it was stipulated that the amount secured by the bond should be paid in a lump sum within three years from the date of the bond (15th August 1874); that the lump sum became due on the 15th August 1877, and, therefore, this suit instituted on the 16th July 1878 was within time. The Subordinate Judge also held that the stipulation to pay interest half-yearly, with the proviso that in the event of default in such payment the principal as well as the interest shall be payable at once, cannot convert the bond into one under Art. 75. He further held that Art. 68 would not apply to the bond, as there was no stipulation in it for any penalty; but the bond came under Art. 66 which provides for a single bond or a bond without a penalty, and being of this character the suit was not barred by limitation. The Subordinate Judge, therefore, decreed in favour of plaintiff against both defendants. E. C. Ball, defendant, alone appeals from the decree, and his counsel insisted upon the pleas on which appellant's defence rested in the lower Court, citing various authorities to show that, as the bond was one payable by instalments, the cause of action accrued to the plaintiff on the occurrence of the first default, and that limitation began to run from that date, the plaintiff not being at liberty to fall back upon the proviso that it was optional to him to wait until the term of repayment fixed in the bond had expired; that there had been no waiver of the right to sue, and consequently the suit was barred. Further, it was contended that, even if there was not a bond payable [330] by instalments, the right to sue accrued when the default provided for in the bond occurred, and, therefore, the suit was barred; that Art. 66 did not apply to the deed, as no day of payment was specified in the bond, and, therefore, limitation ran from the date of execution, and again the suit was barred. It was also urged that Art. 68, Sch. ii, might apply, the bond being subject to a condition, but this point was not seriously pressed, it being contended that Art. 80 applied, which refers to a suit on a bill of exchange, promissory note, or bond herein not expressly provided for, and the time from which limitation begins to run in such a suit is when the bill, note or bond becomes payable, and this suit should be barred, as the cause of action accrued on the first default. I propose first to deal with these contentions, and then dispose of the remaining objections in the memorandum of appeal to which I will subsequently refer.

I am not prepared to admit that the bond in suit is one payable by instalments. There was no contract between the parties that the sum borrowed should be paid off by instalments, that is to say, there was no agreement that the money borrowed and secured by the bond should be repaid in certain portions at different times. Interest may not be a part of

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a contract between the parties to it. If there is a condition in a bond that simple interest should be paid at a certain rate, then it is as much payable by virtue of the contract as the principal. It is a necessary incident to the original debt, but it is not a part of the original sum borrowed. It is the sum of money paid or allowed for the use of the money lent for a certain time at a fixed rate per cent. It is not added to the principal as a part of the original debt, but principal and interest in case of failure to pay make up the amount due under the bond. If I hold (as I do hold) that the bond in suit is not one payable by instalments, then Art. 75, Sch. ii, Act XV of 1877, does not apply to it. But I am quite willing to admit that if this article could be applied to it, then on the ruling of the authorities cited (1) this suit might be barred, assuming that the circumstances of this case are on all fours with those quoted, and that there had been no waiver. I was at first disposed to **[331]** apply Art. 66 to the bond, accepting the conclusion of the Court below on this point. The bond at first sight appears to be a single bond, no penalty being attached to it, in which a day is specified for payment, and the time from which limitation begins to run is the day so specified. It is true that the day, the 15th August 1877, is not so specified in so many words. But the debt is to be paid within three years from the date of the bond: any one is entitled to tender payment of a debt of this nature within the time fixed for its repayment, and the bond in suit allows this to be done, but the time at which the debt must be repaid is specified in this case, and the last day would be the 15th August 1877. If this be so, the suit clearly is, unless otherwise barred, not beyond time, as it was instituted in 1878, and the period of limitation is three years from that date. If this view be correct, then Art. 67 does not apply, as it cannot be said that the bond is one in which no day for repayment has been specified. Had the bond been silent in this respect the period of limitation would begin to run from the date of its execution, and Art. 67 would have applied. I have, however, no doubt that Art. 68 is not appropriate, as I do not find that the bond is subject to a condition. In the third section of the Limitation Act (XV of 1877) " bond " includes any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void, if a specified act is performed, or is not performed, as the case may be. Bearing in mind this interpretation of the word bond, and applying it to Sch. ii of the Act, the instrument now before us does not contain any condition of the nature described in S. 3, and, therefore, it does not come under Art. 68. But, as I have already stated, the learned counsel for the appellant did not press this point. But the learned counsel for the appellant has argued that Art. 80, Sch. ii of the Act applies, and, after full consideration of the point, I come to the conclusion that there is something more in the bond than meets Art. 66. It is a single bond, and there is a day specified for payment, but there is also a liability for immediate demand of the entire amount due before the expiration of the term of the bond on the occasion of default of payment. This provision may, and, I think, does take the bond out of Art. 66, and, in the absence of any provision for it in the schedule, places it under Art. 80, and the limitation would run from the date when the bill, note, or bond became due. This brings us to the **[332]** very serious contention as to the date when the cause of action accrued. Whether this be or be not a bond payable by instalments, it is urged that the right to sue accrued when the default occurred, and that

(1) *Hemp* v. *Garland*, 12 L.J.N.S.,Q.B., 134; 1 M.H.C.R. 209; 11 B.H.C.R. 155.

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limitation began to run from that date. The authorities cited to us and already referred to relate to bonds payable by instalments, but it is argued that the principle laid down in the Indian cases and in *Hemp* v. *Garland* (1) applies equally to any bond in which the right to sue is given on the occurrence of a default. It is laid down that if a plaintiff chose to wait till all the instalments became due, no doubt he might do so. But that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it. On the principle that every person is bound to sue when there is a complete present cause of action, the question in this case would be, when did the cause of action arise? When the defendant failed (if he did fail) to pay the interest on the first half-year and premia, or when the bond became payable on the 15th August 1877? The bond certainly recites that in the event of failure of the payment on due date of the interest and premia the defendants were liable to pay the full amount of the bond, or such portion or balance as might be found to be due according to plaintiff's account. But the third clause leaves it optional with plaintiff to claim his money at once, and if necessary to sue for the full amount due on the bond, on the failure of any one or more stipulated payment, or he might sue when the term of repayment fixed by the bond had fully expired. But it is contended on the further authorities cited (2) that "if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined, proof being given that the action did clearly accrue more than six years before the commencement of the suit, the defendant, notwithstanding any agreement to inquire, is entitled to the verdict." In the Full Bench ruling of five Judges of the Presidency High Court (3), it was ruled by a majority of four Judges, one Judge alone dissenting, that no arrangement between parties could be recognised which enlarged the period of limitation allowed by law for the execution of decrees, and it was observed in that decision: "If a man having a **[333]** cause of action against another to recover immoveable property, or to recover money, or to recover damages for a trespass upon his land, or for an assault, should say, 'I will not sue you for twenty years,' he would not acquire a right to sue after the period of limitation fixed by law: if he does not intend to give up his right to sue at all he must take care not to bind himself beyond the time with which the Law of Limitation allows him to sue." This Court also recognised the force of this ruling in the case of *Stowell* v. *Billings* (4).

It is true that by the terms of the contract between the parties an option is given to the plaintiff either to take his money at once on the occasion of default or to postpone his suit until the full term of the bond has expired, and the contract in this respect may be supposed to represent the true meaning of the parties and might not unreasonably be construed in favour of the plaintiff, who was at liberty to elect which of the two courses he would adopt. But the Act of Limitation would still control his choice. Mr. Justice Story has remarked on the Statute of Limitation that "it was intended to be a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demand after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of the witnesses." The Indian Law of Limitation certainly insists upon the peremptory

(1) 12 L.J. N.S., Q.B., 134.
(2) 5 M.I.A. 43.
(3) 4 B.L.R., F.B., 101.
(4) 1 A. 350.

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strictness with which its provisions are to be enforced, and it fixes upon the Courts an obligation to dismiss all suits, appeals and applications made after the period of limitation as prescribed in Sch. ii of the Act, although limitation has not been set up as a defence. The words, therefore, already cited from the Presidency Full Bench ruling (1), "If he does not intend to give up his right to sue at all, he must take care not to bind himself beyond the time within which the Law of Limitation allows him to sue," may be quite relevant to this case. For if it can be established that there was a default on which a right of action was given to the obligee to sue, there would be a good defence on the plea of limitation.

[334] It has been argued below by appellant's counsel that the third clause in the bond contemplates the occurrence of default of payment either of interest or premia as giving rise to an immediate cause of action, and that it is not necessary that the default should be in the payment both of interest and premia, although there had been default of this nature as a matter of fact: on the other hand, it is contended by respondent's counsel that the words in the third clause "any one or more stipulated payment" refer to the terms of the second clause "in the event of failure in the payment on due date of the interest and premia," and, therefore, there must be a default in the payment both of interest and premia, and that it is solely on condition of both these events happening that the obligors made themselves liable to an immediate demand of the entire sum due. It seems to me that the terms of the bond in the second and third clauses read together, and they must be so read in order to understand the real meaning of the parties, provide for the default both of interest and premia, and that in the event of default in the payment either of interest or premia only, and not of both, the obligee is not called upon to choose whether he will at once demand the amount due, or postpone his suit until the full term of the bond has expired. I therefore would hold that if the default does not extend beyond the interest or premia, a complete and present cause of action has not arisen. It is admitted that no interest has been paid on the bond, but it has not been established that there has been any default in respect of the premia. The bond is very carelessly or inaccurately expressed in words: "Interest on the same at the rate of 8 per cent. per annum being payable half-yearly, namely, on the 30th June and 31st December in each calendar year, and premia on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance Company." But owing to the form and position of the words used and to the punctuation, there is some ambiguity. It has been argued that the premia on life policies are, by the terms of the bond, to be endorsed to the obligee periodically, but this is not to my mind the meaning of the bond or the intention of the parties. The meaning doubtless is that the interest and premia are to be payable, the former half-yearly, on the dates named, the latter periodically, according to the rules of the [335] Insurance Company. This may be gathered from the succeeding clause which shows what is to be regarded as a default: "In the event of failure in the payment on due date of interest and premia." These are the words. The punctual payment of the premia is necessary to keep the policies alive. There was no necessity to endorse the receipts for premia. The life policies, in order to make the security more perfect, might be formally assigned to the obligee; but it was no part of the condition, the breach of which would give to the obligee the right of calling in his money at once. If the words

(1) *Krishna Kamal Singh* v. *Hira Sirdar*, 4 B.L.R., F.B., 101.

"being payable" had been added to "premia," thus, "and premia being payable on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance office," there would have been no room for doubt as to what was meant. The life policies, though not endorsed to plaintiff, were nevertheless in his possession and were filed by him and are on the record of this case. There has been no default in the payment of the premia. The plaintiff has filed the evidence of the regular payment of the half-yearly renewal premia required by the Company's rules. There are on the record receipts for such premia on Stowell's life-policy, dated 13th May 1876, 13th November 1875, and 5th December 1876, respectively. There is a joint receipt to Messrs. Ball and Stowell of payment of the half-yearly renewal premia on Stowell's insurance due on the 10th day of May 1878. There are receipts for the payment of the half-yearly premia on the life of Ball, dated 13th May 1875, 13th November 1875, and 5th December 1876. These receipts show that there was no default in the payment of Stowell's premia up to the 10th May 1878, or of premia on Ball's life up to the 13th day of November 1876, consequently if there had been default after that date, and a cause of action had arisen, the suit would be within the period of limitation, assuming that the suit was one coming under Art. 80, Sch. ii of the Limitation Act. Besides these receipts there are Positive Promissory Notes for Rs. 166-10-8 each under the policies both of Ball and Stowell payable to bearer three months after sight, and the death of Ball and Stowell respectively, and redeemable three days after presentation at the office of the Positive Government Security Life Assurance Company, Limited, according to the rules of the Company, which were in the possession of plaintiff. Of all **[336]** these receipts and notes one only was filed by the defendant Ball. The promissory notes payable on the death of Ball are dated 13th November 1874, 13th May 1875, 17th November 1875, 17th May 1876, 8th December 1876, and 18th June 1877. These payable on the death of Stowell are dated 18th November 1874, 13th May 1875, 17th November 1875, 17th August 1876, 8th December 1876, 18th December 1877, and 12th June 1878. With this evidence before us which shows that there has been no default in the payment of premia, and entertaining the opinion that the default giving rise to a right of immediate demand for payment of the amount due on the bond before its expiration must be a default in respect of both interest and premia, I must come to the conclusion that there was no such default that gave to the plaintiff a complete and present cause of action. Therefore the contention that more than three years had elapsed from the date of default, and thereby the suit was barred, fails, the suit being within time, and the debt being acknowledged by one defendant and execution of the bond by the other, limitation alone being pleaded, the plaintiff would be entitled to a decree.

I have now considered all the points involved in the first to the fourth plea inclusive. There are two other pleas to be noticed, the fifth and sixth.

The fifth plea has no force, for if the interest had been barred by limitation, the suit must have been barred by the same limitation. The plea was not pressed before us, and I only notice it because it is on the memorandum of appeal. The sixth plea—that the Judge should have dismissed the suit with costs—is disposed of by this Judgment.

I would dismiss the appeal, and affirm the decree of the lower Court, with costs.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

1879
MAY 20.

PRIVY COUNCIL.

On Appeal from the Court of the Judicial Commissioner of Oudh.

KISHNA NUND MISR *v.* THE SUPERINTENDENT OF ENCUMBERED ESTATES, MEHDOWNA. [20th May 1879.]

3 Suth P.C.J. 649 = Bal. 278.

3 Suth. P.C.J. 649 = Bal. 278. *Oudh Taiookdars – Sub-settlement- -Construction.*

Their Lordships held the appellant entitled to a sub-settlement for life upon the construction of the terms of the letter of the late talookdar, which was binding not only upon him but upon his successor also.

JUDGMENT.

[650] SIR BARNES PEACOCK.—Their Lordships are of opinion in this case that the decisions of the Commissioner and of the Judicial Commissioner ought to be reversed, and the decision of the Settlement Officer affirmed. It appears that the late Maharajah, Sir Maun Singh, caused a notice of ejectment to be served upon the plaintiff, and that the plaintiff presented a petition to the Maharajah on that subject. On the 20th August 1868 the Maharajah wrote to the plaintiff stating:—"I have received your petition and become acquainted with the particulars contained in it; but I have heard that you have filed an objection to notice of ejectment. Now, I don't want to oust you. I wish that the case may be decided, and that there may be incurred no loss in consequence of the increase, which will be made by Government. Such a provision has been recorded in the settlement papers. You may rest assured of this, if you have filed an objection I will do nothing for you until you have withdrawn it. You should come to me, and then I will myself decide the amount you should pay, and maintain you in possession as heretofore." Their Lordships are of opinion that the evidence which was adduced before the Settlement Officer was sufficient to show that the plaintiff was entitled to a subordinate interest under the talookdar, and that the letter shows that some provision was made in the settlement papers respecting it. The Settlement Officer held that the plaintiff appellant was entitled to a sub-settlement for life. But upon appeal that decision was reversed by the Commissioner. In his judgment the Commissioner said, "It is with regret that I come to this conclusion, as the treatment of Kishna Nund"—that is the plaintiff—"will be hard should he be deprived of the leases; but I cannot find a distinct promise of a lease for life which I can enforce against the Maharajah's successor, and I therefore decree this appeal." It appears to their Lordships that the words of the Maharajah were as binding on his successor as they were upon himself, and that the evidence which was adduced before the Settlement Officer was sufficient to show that there was a sub-tenure which was binding not only on the Maharajah but upon his successor. The Judicial Commissioner, as their Lordships understand his judgment, would have affirmed the decision of the Settlement Officer, if he had not considered that the plaintiff was concluded by the judgment passed in the suit brought by his son. Their Lordships are of opinion that the decision in that suit was not *res judicata* as against the plaintiff, and consequently that that defence to the plaintiff's claim fails. The original documents were not produced as they ought to have been by the plaintiff, and their Lordships are unable, in

the absence of those documents, to say that the evidence was sufficient to prove that the plaintiff had a subordinate interest extending beyond his life. Under these circumstances they think that the decision of the Settlement Officer was correct, and that it ought to be affirmed.

Their Lordships will therefore humbly advise Her Majesty that the decisions of the Commissioner and of the Judicial Commissioner be reversed, and the decision of the Settlement Officer affirmed, with the costs of the suit in the lower appellate Courts. The appellant will have the costs of this appeal.

1879 MAY 20. — PRIVY COUNCIL. — 3 Suth.P.C.J. 649 = Bal. 278.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

1879 MAY 21. — APPELLATE CIVIL. — 2 A. 313.

SURJAN SINGH (*Defendant*) *v.* JAGAN NATH SINGH (*Plaintiff*).

[21st May 1879].

2 A. 313.

Mortgage—Property situated in two Provinces—Foreclosure—Regulation XVII of 1806, S. 8.

According to S. 8 of Regulation XVII of 1806, where mortgaged property is situate in two Districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district. The same rule applied where the property is situate in two provinces, and the Regulation was in force in both of them at the time of the foreclosure-proceedings. (4 M.I.A. 392, *F.*)

A mortgage of land situated partly in the District of Shahjahanpur in the North-Western Provinces and partly in the District of Kheri in the Province of Oudh was made by conditional sale, and the mortgagee applied to the District Court of Shahjahanpur to foreclose that mortgage and render the conditional sale conclusive in respect of the whole property, and that Court granted such application. In the present suit instituted in the Court of the Subordinate Judge of Shahjahanpur, the defendant contended, *inter alia*, that the District Court of Shahjahanpur was not competent, in respect of the land situated in the District of Kheri, to grant the application for foreclosure, such land being situated beyond the local limits of its jurisdiction, and consequently the foreclosure proceedings in respect of such land were invalid, and the suit in respect thereof was not maintainable. The Subordinate Judge held that the District Court of Shahjahanpur was competent to grant the application for foreclosure in respect of the land situated in the District of Kheri, and the foreclosure proceedings were valid in respect of such land, and gave the plaintiff a decree. Whereupon the defendants preferred an appeal to the High Court.

JUDGMENT.

[314] PEARSON, J.—The first and last of the pleas in appeal are not pressed and are indeed admitted not to be tenable. The second plea is overruled, in reference to the Privy Council's ruling in the case of *Ras Muni Dibiah* v. *Pran Kishen Das* decided on the 27th June 1848 (1), that, according to S. 8, Regulation XVII of 1806, where mortgaged property is situate in two districts, an order of foreclosure relating to the whole property may be obtained in the Court of either District. The circumstance that Oudh is in **[315]** some respects a distinct Province from the North-Western Provinces does not, in our opinion, take the case out of the operation of that ruling, inasmuch as Regulation XVII of 1806 was in force in Oudh as well as in the North-Western Provinces at the time of the foreclosure proceedings. The appeal is dismissed with costs.

(1) 4 M.I.A. 392.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1879
MAY 23.

APPELLATE CIVIL.

2 A. 315 = 4 Ind. Jur. 414.

JAMNA (*Plaintiff*) *v.* MACHUL SAHU (*Defendant*).

[23rd May 1879.]

2 A. 315 = 4 Ind. Jur. 414.

Hindu law—Widow's right to maintenance—Gift of whole estate by husband—Validity.

Under the Hindu law, a wife is, in a subordinate sense, a co-owner with her husband; he cannot, therefore, make a wholesale gift of his estate, so as to deprive her of her maintenance. The donee in such a case takes and holds the estate subject to her maintenance. (8 M.I.A. 66, *F.*)

[**F.**, 23 A. 86 (87); **R.**, 5 B. 99 (108), 6 A. 617 (621) = 5 A.W.N. 192, 19 A.W.N. 210, 118 P. W.R. 1907, 36 P.R. 1907 = 11 P.L.R. 1908, 12 C.W.N. 808 = 8 C.L.J. 489; **D.**, 5 A. 367 (368) = 3 A.W.N. 65, 31 C. 476 (478).]

The widow of Ramjewan filed a suit for a declaration of her right to a maintenance allowance of Rs. 25 per mensem against Ramjewan's nephew to whom Ramjewan had, shortly before his death, made a gift of his real and personal estate putting him in possession of the same. On the defendant contending that he was not bound to maintain the plaintiff, and that Ramjewan had provided for the plaintiff's maintenance by gifts of money and jewels, the Court of first instance dismissed the suit, without determining the second issue raised by the defence, observing that the plaintiff might have impugned the gift on the ground that no provision had been made for her maintenance, had she not acquiesced in its validity for so long a period of time. This decision having been affirmed on appeal, the plaintiff appealed to the High Court.

JUDGMENT.

[317] PEARSON, J.—The lower Courts have disallowed the plaintiff's claim to be maintained out of her husband's estates given by him on the 8th January 1850, shortly before his death, to the defendant, who was his nephew and partner in business, and who is stated in the deed of gift (1) to have been adopted by him as a son, on the ground that, under the

(1) The material portion of the deed of gift, dated the 8th January 1850 being: "I have made a gift of my whole and entire property and possessions in lands, capital, houses made of bricks and mud situated in the city aforesaid, both ancestral and mortgaged, &c., money, ornaments, vessels, carpets, cash, &c., such as fall under the denomination of, and are called, property, constituting my whole estate and right, to Machul, son of Munna Lall and my nephew, who carries on the business of the firm jointly with me, and whom in absence of a son I have adopted as my son: I have made him its proprietor and my representative: the gift is valid, and lawful, it vests property and is just and proper: it is made in the form of *sila* (gift to a relative) without any dispute, and without any consideration or hopes (from the donee): it is unconditional and free from vicious and false conditions: I have put the said donee in possession, in my place, in respect of the whole and entire property the subject of the gift aforesaid, which is free from all defects and disputes: I have exempted this gift wholly from any claim of resuming it: the said donee may realize by virtue of this deed all that is due from the tenants on account of immoveable property and the money due, and may enjoy and possess the villages under *zur-i-peshgi* lease, &c., by having his name recorded in respect of the same: in short he may enjoy and possess all the villages sold and mortgaged to, or taken on farm or purchased at auction and held by me: after my death none of my heirs shall, for any reason or cause, have any right, claim, or cause of action thereto: and as the said donee has accepted the said gift and transfer of property, these few lines have been executed in the shape of gift and assignment of proprietary right, which may serve in evidence when required."

terms of that instrument, which bestows the whole estate on him without exception, reservation, or condition, she has no right to what she claims. I am not prepared to hold that the deed has been misconstrued, but the second ground (1) of the appeal appears to me to be valid. A wife is, under the Hindu law, in a subordinate sense a co-owner with her husband; he cannot alienate his property or dispose of it by will in such a wholesale manner as to deprive her of maintenance; and I am therefore of opinion that the donee of the entire estate must be deemed to have taken and to hold it subject to her maintenance. This opinion is supported by the remarks at p. 366 of West and Bühler's Hindu Law of Inheritance and Partition, 2nd Ed., and the Privy Council decision dated 30th November and 2nd December 1852 in the case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dassee* (2), and by a judgment of the Madras High Court dated 27th October 1860, in which a sale of a piece of land by a Hindu was set aside on his wife's suit on the ground that it left her without maintenance.

1879 MAY 23. — APPELLATE CIVIL. — 2 A. 315 = 4 Ind. Jur. 414.

The plea that provision was made for the maintenance of the plaintiff in the present cause by her husband in the shape of an [318] assignment of cash and jewels seems inconsistent with the terms of the deed, and the lower Court's finding that his entire estate was without exception or reservation given to the defendant, but the Courts below have not distinctly adjudicated upon it. I would direct the lower appellate Court to adjudicate on that plea, and, if it should disallow it, to proceed to determine whether Rs. 25 per mensem, or what monthly amount, would be a suitable allowance for the plaintiff's maintenance. The lower appellate Court should be instructed to submit its findings, when a week might be allowed for objections.

SPANKIE, J.—I agree with my learned and honorable colleague's proposal to refer the issue laid down above for determination by the lower appellate Court.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

GULAB DAI (*Plaintiff*) *v.* JIWAN RAM AND OTHERS (*Defendants*).

[26th May 1879.]

1879 MAY 26. — APPELLATE CIVIL. — 2 A. 318.

2 A. 318.

Failure to pay Court-fee for summons to additional defendants—Dismissal of suit—C.P.C. (1859), S. 110—Act XXIII of 1861, Ss. 5 and 7—C.P.C. (1877), S. 99.

The irregular dismissal of a suit, as against the defendants, by an order purporting to be made under S. 110 of the C.P.C. (1859), on a day previous to the hearing, on the ground of the failure of the plaintiff to deposit the *talabana* required for summoning certain persons proposed to be made additional defendants in the suit, could not preclude the plaintiff from instituting a fresh suit.

In a suit instituted on the 3rd August, 1866, by Radha Kishen against Lachman Das and certain other persons in the Court of the Munsif for the possession of certain land, no issues were fixed on the 23rd August, 1866, the date fixed for the settlement of issues, but the Munsif made an order which had reference to the addition of other persons as defendants

(1) "that the defendant was equitably bound to maintain her, it not being shown that any provision had been made for her maintenance by her husband."

(2) 8 M.I.A. 66.

1879

MAY 26.

APPELLATE CIVIL.

2 A. 318.

in the suit. On the application of the pleader for the plaintiff on the 27th August, 1866, that certain persons whom he named might be made defendants in the suit, and that summonses might be served on them, the Munsif allowing the same, fixed the 23rd, September, 1866, for the next hearing of the case. It having appeared that the pleader for the plaintiff had endorsed on the summonses which were to be served on the new defendants that the plaintiff would not deposit the Court-fees requisite for the service of such summons, and that he(the pleader) could not proceed, the Munsif on 30th August, 1866, made the following order: "Whereas it appears that the plaintiff has made a default, it is therefore ordered that the suit be dismissed under S. 110." Gulab Dai, the representative of Radha Kishen instituted a fresh suit on 21st March, 1878 against the representative of Lachman Das and the other persons for the possession of the same land (claiming under the same title as Radha Kishen had claimed in the former suit). The first Court determined the suit on its merits, and dismissed it, and the lower appellate Court looking at the circumstances of the former suit, held that the order dismissing the former suit should be taken to have been made under the concluding portion of S. 97 of Act VIII of 1859, and that such order consequently was a bar to the fresh suit. Whereupon the plaintiff preferred an appeal to the High Court.

JUDGMENT.

[319] PEARSON, J.—The lower appellate Court's finding that the former suit was withdrawn by the plaintiff is, in our opinion, an incorrect construction of the fact. The fact is that she failed to deposit the *talabana* required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in the suit. The proper course for the Munsif to have pursued was to have proceeded with the suit on the date fixed for hearing and to have disposed of it in respect of the original defendants. Instead of so doing, he precipitately **[320]** dismissed it as against them for the default aforesaid, which did not apply to them, on a day previous to that fixed for the hearing, in reference to the provisions of S. 110, Act VIII of 1859, which were wholly inapplicable. Had they been applicable the order of dismissal would not have precluded the institution of a fresh suit within the period allowed by law. It is true that the provisions of S. 5, Act XXIII of 1861, were also inapplicable to the circumstances, but the default for which the suit was dismissed by the Munsif was of the same nature as that contemplated by that section; and it is observable that the dismissal of a suit under that section does not preclude the institution of a fresh suit within the time allowed by the law of limitation. It would be hard to hold that the plaintiff should have been deprived of a right which she would have been free to exercise if her suit had been dismissed, under S. 110, Act VIII of 1859, or S. 5, Act XXIII of 1861, not because she committed a greater fault than is punishable under those laws, but because the Munsif committed a strange irregularity which the Legislature had not anticipated and for which it has not made any express provision. It would be more just and reasonable to apply the spirit of S. 7, Act XXIII of 1861, which has been re-enacted in S. 99 of the new Procedure Code. It is not found by the lower appellate Court that the matter of the present suit is a *res judicata* under S. 13 of that Code.

Accordingly we decree the appeal, and setting aside the lower appellate Court's decree remand the case to it for disposal of the appeal on the merits, and direct that the costs of this appeal shall follow the event.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

1879
MAY 29.

APPELLATE CIVIL.

2 A. 320 = 4 Ind. Jur. 415.

HARDEO DAS AND ANOTHER (*Plaintiffs*) *v.* HUKAM SINGH (*Defendant*). [29th May 1879.]

2 A. 320 = 4 Ind. Jur. 415.

C.P.C. (1877), S. 210—Decree on hypothecation bond—Payment by instalments.

The provisions of S. 210, C.P.C., 1877, are not applicable to a suit for the recovery of a bond-debt by the sale of the property hypothecated therein. To direct payment of the decree amount by instalments in such a case would be to set aside and override the contract on the basis of which the plaintiff sues.

[F., 7 B. 332 (335); **Appr.**, 5 B. 604 (607).]

In a suit on a bond dated the 1st August, 1872, whereby the payment of Rs. 12,000 within three years from that date together with interest at the rate of twelve per cent. per annum was secured, the bond charging certain immoveable property with the payment of the same. The first Court gave the plaintiffs a decree for the principal amount claimed by them together with interest to the date of the decree at the rate of one per cent. per annum, directing that the amount of the decree should be paid by fifteen annual instalments, that the property should remain charged with the payment of the amount of the decree, and that in default of payment of any instalment, or should any risk arise of the decree-holder losing the security of the hypothecated property, the decree-holder should be entitled to enforce payment of the whole amount due under the decree. The plaintiffs appealed to the High Court.

JUDGMENT.

[321] PEARSON, J.—The appeal must, in our opinion, prevail. The lower Court has erred in applying the provisions of S. 210, Act X **[322]** of 1877, to this suit, which is not a mere suit for money, but asks for the recovery of the amount of a bond-debt by the sale of the property hypothecated in the bond. Section 210 was not intended to enable the Courts to set aside and override such a contract as that on the basis of which the present claim is laid. The security over the hyhothecated property which it gave for the payment of the debt would be of little value, if it could be so set aside and overridden. The plaintiffs are entitled to an award against the defendants of the principal sum (Rs. 12,000), with interest at the rate of twelve per cent. per annum to date of decree, and to interest from the latter date to the date of realization at the rate of six per cent. per annum, and to their costs with interest thereon at the same rate; and to be empowered to recover the amount of the bond-debt by the sale of the hypothecated property. The decree of the lower Courts is modified accordingly; and the costs of this appeal are allowed.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

1879
JUNE 4.

APPEL-LATE CIVIL.

SADIK ALI KHAN (*Decree-holder*) *v.* MUHAMMAD HUSAIN KHAN (*Judgment-debtor*). [4th June 1879.]

2 A. 384.

Execution of decree—Due diligence—C.P.C. (1877), Ss. 230, 232.

2 A. 384.

Under S. 230 of the C.P.C., it is only when an application to execute a decree has been made under it *and granted*, that no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that due diligence was used in connection with the previous application. Therefore, when, during the pendency of an application for execution of a decree, made by the original decree-holder, the assignee of the decree applies to be allowed to execute it, and notice is ordered under S. 232 of the C.P.C., but the process fee not having been paid, the application is dismissed, a subsequent application by the assignee to be allowed to execute the decree cannot be rejected, because his previous application had not been granted.

JUDGMENT.

[385] SPANKIE, J.—It appears that the original decree-holder had made an application to execute his decree, and notice having issued under S. 248 of Act X of 1877, the 20th September, 1878, was fixed for the hearing. In the meantime, on the 17th, appellant (1) petitioned to have his name registered as purchaser of the decree, and to be allowed to execute the decree. An order for notice on the decree-holder and judgment-debtor was made in accordance with S. 232 of the Act. But "talabana" not having been paid, the case was struck off.

An application for execution (2), the subject of the present contention, was made on the 24th January, 1879, and refused by the Subordinate Judge under S. 230, because owing to his not having lodged the service money on the former application, due diligence had not **[386]** been shown in executing the decree. It is contended that S. 230 does not apply to this case.

It is true that if a decree has been transferred by assignment in writing to any other person, the transferee may apply for its execution to the Court which passed it, and if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Then S. 230 of Act X of 1877 would of course apply. But there is a proviso, the conditions of which must be fulfilled before the Court could allow the execution. The proviso attached to S. 232 is that notice in writing of the application shall be given to the transferer and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution. Until, therefore, this notice has been issued, until the objections (if any) had been heard, the Court would not be in a position to grant execution. Up to the date of the present application, and though a former application had been made both under Ss. 230 and 232, and in each case an order for serving the notice required by law had been made, the application for execution had not been granted. In the one case the decree-holder ceased to have any interest in the decree, and in the other,

(1) Sadik Ali Khan to whom the decree had been transferred by assignment in writing.

(2) by Sadik Ali Khan.

as we have seen, *talabana* had not been paid, and no execution was ordered. Therefore it would seem that the present application cannot be rejected on the grounds set forth in the Subordinate Judge's order, because no former application for execution had been granted, and, therefore, the question did not arise whether "on the last preceding application due diligence was used to procure complete satisfaction of decree."

We, therefore, decree the appeal with costs, and reverse the order of the Subordinate Judge and direct him to proceed to dispose of the application for execution.

1879 JUNE 4. — APPELLATE CIVIL. — 2 A. 384.

APPELLATE CRIMINAL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

1879 JUNE 6. — APPELLATE CRIMINAL. — 2 A. 386.

EMPRESS OF INDIA v. KARIM BAKHSH. [6th June 1879.]

2 A. 386.

Crim. Pro. Code, 1872, Ss. 149, 272—Person under arrest pending appeal—Admissibility of his evidence against persons concerned in the same offence.

Per STUART, C. J.—Where a person accused of an offence was discharged by the Sessions Judge and was re-arrested by the Magistrate pending an appeal from the acquittal to the High Court, and before the appeal was admitted, *held*, that the re-arrest was lawful and absolutely necessary in the interests of justice, and his statement, after his re-arrest and pending his appeal, was admissible in the trial of another person who was arrested subsequently to the arrest of the former as being concerned in the same offence.

Per SPANKIE, J.—Assuming that the re-apprehension after an acquittal and on the same charge was unlawful, his statement and evidence although admissible, was not such evidence, as the Court would place much reliance upon. If his re-arrest was lawful, he was in the position of an accused person and the Magistrate should not have examined him as a witness in the trial of the other accused.

JUDGMENTS.

[388] STUART, C. J.—Karim Bakhsh, the accused, respondent, in the present case, was one of three men, Kamal and Ilahi Bakhsh being the other two, who were believed to be accomplices in the drugging of a man named Akbar Shah with whom they fell in on their travels between Ghazipur and a place called Birmi, and whom, when under the influence of the poisonous drug they had administered to him, they robbed of a large sum of money which, as the fruits of some business of his master, he was carrying home to the latter. Kamal was the first to be apprehended on the charge, and he after being duly committed by the Magistrate was tried before the Judge of Azamgarh and acquitted by that officer. But on appeal by the Government to this Court the acquittal was set aside and Kamal, the accused, was convicted and sentenced to rigorous imprisonment for three years. The evidence in the present case is substantially the same as that adduced against Kamal, the Judge taking the same view that he had done before, and also acquitting Karim Bakhsh, and the Government again appealing to us against that acquittal. I have again carefully considered all the evidence, and am clearly of opinion that the Judge has gone as far wrong in this case as he had done in the case of Kamal, and we must set aside his order. For, even irrespective of Kamal's deposition, I agree with Mr. Justice Spankie that the evidence given by the other witnesses, and in his view of which I entirely concur, is quite sufficient for the conviction of Karim Bakhsh. With respect to Kamal's evidence the Judge is of opinion that it is worthless,

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seeing that he considers that "it affords no proof in support of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." This allusion to Kamal's evidence was remarked on at the hearing, and we have to consider, first, whether the Magistrate was justified in re-arresting Kamal after his discharge by the Judge, and, second, whether, while so in custody again, his statement could be received in evidence against Karim Bakhsh. I am clearly of opinion that these two questions must both be an- [389] swered in the affirmative. Kamal's re-arrest was not only legal, but absolutely necessary in the interests of justice. The Government appealed, as it was by law entitled to do, against Kamal's acquittal; and the effect of that proceeding was to keep him still in peril, and it may even be said on his trial, and his re-arrest was simply a measure necessary for his safe custody pending and for the purposes of the appeal, and also to secure his personal presence and his punishment should he be, as he eventually was by the decision of this Court, convicted. Such a precaution was in the highest degree reasonable, and was in my opinion fully warranted by S. 92 of the Criminal Procedure Code, which provides that a police officer may, even without orders from a Magistrate and without a warrant, arrest "any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in a cognizable offence." For there can be no doubt that the effect of the appeal against Kamal's acquittal was to place, or replace, him in the position described in S. 92. And in this opinion I find I am supported by the ruling of a Division Bench of the Calcutta Court (Macpherson and Morris, JJ.), who in the case of *The Queen* v. *Govind Tewari* (1) ordered the re-arrest of two acquitted persons under S. 92, directing them to be kept in custody till the hearing of the appeal. The reported argument addressed to the Court by the learned Legal Remembrancer, Mr. H. Bell, was extremely forcible, showing as it did that the power to re-arrest under such circumstances was by necessary implication vested in all Courts and officers with proper authority and jurisdiction, and that "where a Court had jurisdiction over an offence, it had of necessity power to bring the persons accused of the offence before it," quoting in support of this proposition an English case (2). Mr. Bell further successfully contended that "the admission of the appeal revived the charge against the accused, and it was absurd to treat persons accused of murder or of any other criminal offence as mere respondents in an appeal. Before the appeal was heard the accused ought to be in the custody of the law." And again "under S. 297 when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the [390] accused person, though there was no express provision on the point in the section: and in the same way the Court had equal authority to re-direct the re-arrest of the accused on the admission of an appeal." These views appear to me to be eminently sensible and just, and I strongly approve them, affording as they appear to do a sound rule to guide us in the present case. On this point of the validity of Kamal's re-arrest I may add that it appears to be warranted by the spirit and principle of S. 149 of the Criminal Procedure Code, which provides that "when a complaint is made before any Magistrate empowered to commit persons for trial before the Court of Session, that any person has committed, or is suspected of having committed, any offence triable exclusively by the Court of

(1) 1 C. 281.

(2) *Bane* v. *Methuen*, 2 Bing. 263.

Session, or which in the opinion of such Magistrate ought to be tried by the Court of Session, such Magistrate may issue his warrant to arrest such person, or, if he thinks fit, his summons requiring him to appear to answer such complaint," an appeal being virtually a re-trial on the same facts.

The next question is, whether the statement made by Kamal after his re-arrest and pending his appeal was admissible in evidence. I am clearly of opinion that it was, and that it ought to have been considered by the Judge, and to be considered by us now, along with the other evidence in the case. Such evidence would be admissible in an English Court—6 and 7 Vict., c. 85, S. 1, and 16 and 17 Vict., c. 30, S. 9—and I know of no law, regulation, or ruling in India excluding it. In one case the English law appears to have been followed by the Calcutta Court, *Queen* v. *Ashraf Shaikh* (1), and in the present instance there is the less reason for excluding such evidence, seeing that a precisely similar statement by Kamal was deliberately made by him in his own case, the facts of which were identical with the present case which resulted in his conviction by this Court, and which statement very naturally influenced our decision.

I have only to add that I do not see that Kamal's statement can be said to have been given under duress, meaning, as that expression does, under illegal restraint or arrest: Kamal was simply by means of his arrest in safe custody for the purpcses of the Government's appeal, and he was legally so.

* * * * * *

[391] SPANKIE, J.—We have already had this case before us on the appeal of the *Queen-Empress* v. *Kamal* (2). The latter was tried separately for the same offence as that for which Karim Bakhsh was committed to the Sessions Court. The Sessions Judge acquitted Kamal. But the magisterial authorities obtained leave to appeal to this Court from the order of acquittal. When this Court tried the appeal, the order of the Sessions Judge was reversed and Kamal was convicted and sentenced to imprisonment for three years under Ss. 107 and 238 of the Penal Code.

We accepted the evidence as good against Kamal which was adduced on the present trial of Karim Bakhsh, who has also been acquitted by the Sessions Judge.

There, however, is one feature in the case which presents some difficulty. After Kamal had been acquitted by the Sessions Judge, he was re-arrested by the Magistrate, and though under duress and awaiting the result of the appeal made on the part of the Crown against the order of acquittal, the Magistrate examined him as a witness against Karim Bakhsh. If the Magistrate regarded Kamal as still in the position of an accused person, though he had been acquitted, he should not have made him a witness against Karim Bakhsh. It may be that the apprehension of Kamal on the same charge after his acquittal by the Sessions Judge was unlawful. The appeal of the Crown had not been admitted when the arrest was made, at least this would appear to be the case. S. 118 of the Indian Evidence Act makes all persons competent to testify who are able to understand the questions put to them, and can give rational answers to those questions. But if the Magistrate looked upon Kamal as still in the position of an accused person under trial, he should not have made him a witness against Karim Bakhsh, against whom the inquiry preliminary to commitment for the same offence for which Kamal had been committed was proceeding. The position of Kamal was not that of an

(1) 6 W.R. Cr., 91.

(2) Unreported.

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accused person admitted to give evidence under pardon, nor was it that of a person who had been separately tried and convicted of an offence, and who was afterwards made a witness against another person charged with the same offence. Nor was this a case where several persons were **[392]** jointly accused, and where any one of them was called as a witness either for or against his co-defendants. Assuming, however, that the re-apprehension of Kamal after an acquittal and on the same charge was unlawful, and that when he made his statement he was a free man, it may be that under S. 118 of the Act already referred to his evidence was admissible, but it is not evidence on which a Court would place much reliance, and the Sessions Judge, perhaps, has not overstated the case respecting it, when he remarks that "it affords no proof in support of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." There is however other evidence, which in Karim Bakhsh's case has already been accepted by this Court, and which in my opinion is sufficient to establish a very strong presumption of the guilt of the respondent which his defence failed to rebut.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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2 A. 392.

KANAHIA LAL AND ANOTHER (*Plaintiffs*) *v.* KALIDIN (*Defendant*).

[9th June 1879.]

Mortgage—Certificate of sale—Registration.

An endorsement made and signed by a Judge on a deed of mortgage of immoveable property, certifying that the deed was purchased at a public sale, held in his Court, in execution of a decree, operates as a sale certificate, and, if it relates to immoveable property of the value of Rs. 100 and upwards, must be registered; and, if unregistered, is inadmissible in evidence.

Plaintiffs claimed certain land in virtue of a transfer to them by sale in execution of a decree of a certain deed of mortgage of the Victoria Hotel and premises, dated the 29th September, 1866, relying, as proof of their title, on the following endorsement—"This deed was purchased on the 10th December, 1875, at a public sale held in the Court at Dehra Dun, by Narain Das and Kanahia Lal (plaintiffs) for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of Narain Das and Kanahia Lal against Richard Powell for self and as guardian of the heir in possession of the estate left by Matilda Powell"—signed by the Subordinate Judge of Dehra Dun. Both the Courts below held that the endorsement operated as a certificate of sale, and that, with reference to S. 17 of the Registration Act of 1871, it should have been registered, and therefore dismissed the suit. Thereupon the plaintiffs preferred an appeal to the High Court.

JUDGMENT.

[393] SPANKIE, J.—I have myself been a party to a ruling in the Court that an instrument of the nature of the endorsement on the deed of mortgage, dated 26th September, 1866, would require registration, that is, I have held that a sale certificate in regard to immoveable property of above Rs. 100 in value would require registration. The endorsement on

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the back of this deed of mortgage, which was sold at auction and purchased by the plaintiffs, [394] is, I think, and operates as a certificate of sale, and I cannot regard it as an order of Court, simply because it is signed by the Subordinate Judge. The signature may authenticate the endorsement, but the endorsement itself is a certificate of sale and a transaction that confers upon the purchasers the rights of the mortgagee and gives them an interest in immoveable property exceeding Rs. 100 in value.

OLDFIELD, J.—I concur in the proposed order for dismissing the appeal with costs. The endorsement by which the deed of mortgage was assigned to the plaintiffs as purchasers of it at auction-sale is an instrument which required registration, and cannot be admitted in evidence.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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2 A. 394.

PIAREY LAL (*Defendant*) *v.* SALIGA AND ANOTHER (*Plaintiffs*).

[11th June 1879.]

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1. *Wajib ul-arz—Absconding co-sharers—Trustee.*

A clause in the administration-paper of a village, stating in general terms that absconders from the village can receive back their property on their return, can neither be availed of by, nor affect the rights of, persons not parties to it.

2. *Co-sharer taking possession of relinquished property—Trustee.*

A co-sharer taking possession of an absconder's property under such circumstances, cannot be held to be a trustee for such absconder, unless there is evidence that he accepted the trust. And a vague statement in the administration-paper that absconders shall get back their property on their return, cannot be evidence of such acceptance.

[R., 3 A. 458 (464).]

3. *Purchaser for value without notice—Representative of co-sharer—Trustee—Limitation Act, 1871, S. 10.*

A purchaser from a co-sharer, in good faith for value and without notice of any trust, is not a representative of such co-sharer, who is a trustee, within the meaning of S. 10 of the Limitation Act, 1871; and a suit against him for possession of immoveable property so purchased by him, will be barred after twelve years.

[D., 9 A. 97 (101)=6 A.W.N. 303.]

JUDGMENT.

[395] OLDFIELD, J.—The plaintiffs bring the suit on the ground that they are sons of Gobinda and Gopal, who many years ago absconded from the village, leaving their property in the hands of their co-sharers as trustees, and they rest the proof of the trust on an entry in the administration-paper of 1864. The defendant pleaded in effect that the plaintiffs are not the persons they represent themselves to be, and that there was no such trust created as they assert, and that the property in suit was for years possessed by Sahib Ram, Param Sukh, and others, whose rights and interests therein were brought in 1912 Sambat, or 22 years ago by the defendant at public auction, and the claim has become barred by adverse possession on the defendant's part. The Court of first instance found in favour of the several pleas advanced by defendant and dismissed the suit.

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The lower Appellate Court has decreed the claim, holding that the plaintiffs are the persons they represent themselves to be; but it is silent as to when and how those whom plaintiffs represent deserted their villages; it holds that under the entry in the administration-paper Sahib Ram must be considered to have become trustee for the absconders, and no period of limitation will bar the suit against him, or against his representative, the defendant, who purchased at auction-sale his rights and interests.

This decision is clearly open to the objections taken in appeal. Accepting the finding that plaintiffs are representatives of Gobinda and Gopal, who at some time or other deserted their villages, in order to establish the fact that Sahib Ram and the others held their **[396]** property as their trustees, there must be evidence that they accepted such a trust, and this fact cannot be taken as proved by a vague and general entry made in an administration-paper of a date subsequent to the relinquishment of the property by the absconders, and which refers to future years, to which Sahib Ram and the others were no parties, and which merely states in general terms that absconders from the village shall receive back their property on their return; and further, could such trust to Sahib Ram and the others be established. the claim is clearly barred by the limitation of twelve years, since the defendant is a purchaser in good faith for value from Sahib Ram and the others, and is not his representative within the meaning of S. 10, Act IX of 1871, and it is not shown that he bought with any notice of the trust.

We decree the appeal and reverse the decree of the lower appellate Court and dismiss the suit with all costs.

CIVIL JURISDICTION.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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CIVIL JURISDICTION.

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KANTHI RAM (*Judgment-debtor*) *v.* BANKEY LAL AND OTHERS (*Decree-holders*). [11th June 1879.]

2 A. 396.

Execution of decree—Application to set aside sale of immoveable property—Auction-purchaser, party to proceedings—Appeal—C.P.C., 1877, Ss. 311, 588 (m).

Although, under S. 311 of the C.P.C., an auction-purchaser may not apply to have a sale set aside, he may be made a party to such proceedings on an application made under that section by the decree-holder or a person whose immoveable property has been sold; and, if an order is made against him, he can appeal under S. 588 (*m*), C.P.C., 1877.

[F., 2 A. 352 (353).]

The application of the judgment-debtors on 6—9—1878 to the Court of first instance, to set aside the sale of certain property held on 23—8—1878 in the execution of a decree against one Kanthi Ram and other persons, on the ground of material irregularities in publishing and conducting it,—was opposed by Mangni Ram, the auction-purchaser, and the Court of first instance finding that the sale had been irregularly published, set it aside. On this the auction-purchaser appealed to the District Judge who, finding that the sale had not been improperly published or conducted, reversed the order of the Court of first instance. Kanthi Ram applied to the High Court contending that the District Judge had exercised an appellate jurisdiction not vested in him by law, and that his order should therefore be set aside.

JUDGMENT.

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[397] SPANKIE, J.—At first sight it appears as if the first plea had force, and that the auction-purchaser was not competent to appeal to the Judge. By S. 311 of Act X of 1877 the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting the sale. By S. 312 if no such application be made, or if it be made and the objection should be disallowed, the Court shall confirm the sale as regards the parties and the purchaser. If such application be made, and if it be allowed, the Court shall set aside the sale. Now it is clear that the decree-holder or any person whose immoveable property has been sold alone may make the application to set aside the sale. The purchaser cannot *apply* under this section. S. 313 provides for the occasion on which he may apply, *viz.*, on the ground that the person whose property purported to be sold had no saleable interest in it. S. 588 (*m*) gives an appeal under S. 312 for confirming or setting aside a sale. But suppose that the sale in favour of the purchaser has been confirmed, after objection has been disallowed under S. 312, and the judgment-debtor appeals to the **[398]** Judge, cannot the purchaser appear in appeal and defend the order made in his favour? It would be very hard if he could not appear. Again, if it is part of the Court's duty where an objection has been disallowed to confirm the sale as regards the parties to the suit and the purchaser, it is surely a part of the Court's duty to hear the purchaser if he appear to answer the judgment-debtor or decree-holder's objection to the sale, and if he be heard in the first Court, may he not be heard in the second, and, if so, why not as appellant as well as respondent?

In this case the judgment-debtor made the objection. The auction-purchaser put in a statement refuting the grounds upon which the objection was made. The statement was admitted by the Court, and he was allowed to examine four witnesses. The order of the Court was against him. An appeal is allowed by law, and he appeared before the Judge as appellant. We can find no illegality in the Court's entertainment of this appeal on the merits, in that we hold that, though the auction-purchaser may not be the *applicant* under S. 311, he yet may be a party to the proceedings after the application has been made, and then if there is an order against him he can appeal under letter *m*, S. 588 of the Code.

CRIMINAL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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CRIMINAL JURISDICTION.

EMPRESS OF INDIA *v.* LACHMAN SINGH.

[11th June 1879.]

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2 A. 398.

1. *Crim. Pro. Code, 1872, S. 472—Powers of commitment of Court of Sessions.*

Where a Sessions Judge directed the commitment to the Sessions of a person, under S. 472, Crim. Pro. Code, for trial on charges under Ss. 193, 195, 211, I.P.C., *held*, that the order of commitment was not bad, merely because it included the charge under S. 193, I.P.C., an offence not exclusively triable by a Court of Sessions.

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2. *Crim. Pro. Code, 1872, Ss. 297, 472—Order of commitment by Court of Sessions—Revisional powers of High Court.*

Held by STUART, C.J., (SPANKIE, J., *doubting*) —The High Court has power under S. 297 to set aside the commitment made by a Sessions Judge under S. 472, before the trial.

JUDGMENTS.

[399] STUART, C. J.—In this case the accused Lachman Singh was, by an order of the Sessions Judge of Aligarh, directed to be committed, under S. 472 of the Criminal Procedure Code, for trial before the Sessions Court on charges under S. 193, as well as under Ss. 115 and 211 of the Indian Penal Code, and as an abettor under S. 109. In revision it is objected before us, on behalf of the accused, that this commitment is bad, because it includes the charge under S. 193, such an offence although triable by, not being exclusively triable by the Court of Session, and that thereby the whole commitment was vitiated and rendered invalid. It is further contended on behalf of the accused that the commitment being bad it can be quashed by this Court under the powers of revision given to it by S. 297 of the Criminal Procedure Code.

On the other hand it is argued for the prosecution that such a commitment by order of the Sessions Judge was regular and valid, but that whether it be so or not, this Court has no power to interfere with the Sessions Judge's order, as the only section of the Criminal Procedure Code which provides for the quashing of a commitment is that in the case of one made by a "competent Magistrate." It would appear that there was some mistake in stating **[400]** that the petitioner had been expressly committed under S. 193, an examination of the record showing that even if the Judge had ordered it, no such commitment was actually made, for the record shows no charge against Lachman Singh under S. 193, and the case, therefore, against Lachman Singh rests on his commitment and charge under Ss. 195 and 211, and contingently as an abettor under S. 109.

I am, however, clearly of opinion, against the contention of the accused's counsel, that even if the commitment by the Sessions Judge had included S. 193, it was perfectly regular and according to law. If the charge on which the order of commitment was made related exclusively to that section, the objection might have been allowed, seeing that an offence under, S. 193, although triable by, is not one exclusively triable by a Court of Session. But in the present case the order of the Sessions Judge for the commitment of Lachman Singh, not only directed a charge under S. 193, but also two other charges of greater magnitude under Ss. 195 and 211, the offences defined in which being exclusively triable by a Court of Session, a commitment on them necessarily carried with it and involved the right to inquire into and try the offence under S. 193. From the nature of the case there is one set of facts relating to all the charges, and it cannot be anticipated under which of them a conviction may take place. That will be ascertained when the trial is over, and either the innocence of the accused or the nature and extent of his guilt has been determined. But for the purposes of the accused's commitment it is perfectly competent to the Sessions Judge, while committing on the graver charges, to include the less, and, indeed, if the latter offence was excluded, the sentence on either of the other more serious offence might not be greater than that allowed under S. 193.

As to the power of this Court to interfere in such a case in revision, I have no doubt whatever. It was argued on behalf of the prosecution that the only section of the Code which provides for the quashing of a commitment by the High Court is that relating to a commitment by a "competent Magistrate," and no doubt such a power is provided for by

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S. 197. But we are not to understand that this was done and intended in any exclusive sense, and it cannot be **[401]** read as depriving the High Court of its large powers of revision under S. 297, and which powers in my judgment clearly cover such a case as the present.

The present application, therefore, for revision and quashing of the Sessions Judge's order of commitment must be refused, and the record will be returned to the Sessions Court for trial of the accused according to law.

SPANKIE, J.—Sundar Lal, patwari, was tried on the 2nd May, 1879, by the Sessions Judge of Aligarh, under S. 218 of the Indian Penal Code, and acquitted under the following circumstances: On the 1st October, 1877, Baldeo Singh, karinda and agent of Lachman Singh, zemindar, accused Sundar Lal of making alterations in his diary and khata regarding certain sums received from cultivators. The entries in the diary on the 27th April showed the payment of the sums marginally noted (*a*) by the tenants whose names are given. These figures were said by the karinda to have been altered, and to have been originally entered as they appear in the margin (*b*). Sundar Lal at this time was patwari of Lalpur, but was about to be transferred to another village, of which Ratan Lal was patwari, both villages belonging to the same zemindar. On the 8th May Sundar Lal complained to the Collector that the zemindars of Lalpur would not sign his diary, which was sent to the Tahsildar, and reached him on the 10th May. The diary had thus passed out of the patwari's possession. On the 11th May Sundar Lal and Ratan Lal exchanged papers, and Ratan Lal gave Sundar Lal a receipt for his, stating that he had compared and found them all correct. On the 13th May Ratan Lal wrote a petition informing the Tahsildar that he had received the papers on the 12th and that he found erasures in them. Inquiry followed, and finally, there was the complaint of the 1st October, and the patwari Sundar **[402]** Lal was discharged in December, 1877. Then an application was made to the Sessions Judge to direct a commitment, on the ground that Sundar Lal had been improperly discharged. This application was made by Baldeo Singh, karinda and agent of Lachman Singh, aforesaid, and was granted by the Sessions Judge on the 8th April, 1879. After the case had been gone into in the Sessions, and Sundar Lal had been acquitted, the Sessions Judge, under S. 472 of Act X of 1872, committed Lachman Singh, Baldeo Singh, Ratan Lal, and Dip Chand, witnesses, to the Sessions Court on various charges.

(*a*) Bijay Ram, Rs. 184.
Dip Chand, Rs. 200.
Murli, Rs. 200.
(*b*) Bijay Ram, Rs. 104.
Dip Chand, Rs. 240.
Murli, Rs. 240.

Lachman Singh, the petitioner now before us, was charged in the calendar in that he on the 1st October, 1877, "with intent to cause injury to Sundar Lal, instituted, or caused to be instituted, a criminal proceeding against him, knowing that there was no just or lawful ground for such proceeding against him, and that such criminal proceeding was instituted on a false charge of an offence punishable with imprisonment for seven years, *viz.*, forgery of a document purporting to be kept by a public servant as such; and thereby committed an offence punishable under S. 211 of the Indian Penal Code." He was also charged with abetment of the offence. In the order for the commitment of Lachman Singh, dated 17th May, it is stated that Lachman Singh and Baldeo Singh are charged under Ss. 193, 195, 211, and 211 and 109. Baldeo Singh was charged in a similar way, Ratan Lal under S. 195, and Dip Chand under Ss. 193 and 195 of the Indian Penal Code.

It is contended that the Sessions Judge exceeded his powers: a charge under S. 193 is not exclusively triable by the Sessions Judge, nor

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had Lachman Singh ever given any deposition in the case: a charge under S. 211 was not exclusively triable by the Court of Session: any charge under S. 195 is groundless as regards petitioner, inasmuch as the charge in support of which the offence under S. 195 is alleged to have been committed was a charge made under S. 218 of the Indian Penal Code, in which the punishment prescribed does not exceed three years' imprisonment: these are the main contentions into which we can go. We cannot enter into the merits of the case which involve either the guilt of Sundar Lal, or rather the truth of the charges preferred against him by Lachman [403] Singh and Baldeo Singh, or the guilt or innocence of these persons on the charges upon which they are to be tried. The minor objections may be good or bad; they might be properly pleaded on the trial.

I entertain doubts myself whether we are at liberty to cancel a commitment made by a Sessions Judge under S. 472 of Act X of 1872. No provision has been made in the Code which expressly gives us power to do so, whereas there is a provision by which a commitment once made by a competent Magistrate can, under S. 197, be quashed by the High Court only, and only on a point of law. On the other hand if a Court of Session which is competent, under S. 472, to charge a person for certain offences committed before it, or under its own cognizance, if the offences be triable by the Court of Session exclusively, charges a person for offences not triable by itself exclusively, the commitment might, perhaps, be regarded as "a material error in a judicial proceeding," and be set aside under the first paragraph of S. 297 of Act X of 1872. We are told in the Statement of Objects and Reasons of the draft Bill as now prepared for the amendment of Act X of 1872, that S. 477 has been framed so as to allow a Court of Session to charge a person for giving false evidence before itself,—"a power of which such Courts were unintentionally deprived by S. 472 of the present Code." If the commitment had been made solely on a charge of giving false evidence, the charge would not have been one exclusively triable by the Court of Session and I should have then felt a very pressing difficulty as to my power of cancelling the commitment before trial, though I should have found no difficulty in doing so *after* trial, if the case had come before the Court in any shape of appeal or revision. Happily it is not necessary now to consider whether I have power under S. 297 before trial to set aside the commitment made by a Sessions Judge under S. 472 of the Code.

I have already noticed the charge actually preferred against the petitioner Lachman Singh. It is a charge under S. 211, and the offence charged was one punishable with imprisonment for seven years and upwards. Such an offence is exclusively triable by a Court of Session—S. 211, column 7, Sch. IV, Act X of 1872. The complaint of the 1st October, 1877, disclosed what [404] if true, would have been forgeries on the part of the patwari Sundar Lal and would have amounted to an offence under S. 466 of the Indian Penal Code, which is an offence punishable with imprisonment for seven years. It is true that the complaint of the 1st October, 1877, was headed under Ss. 193, 218 of the Indian Penal Code. But the offence disclosed in the body of the complaint went beyond these sections, and, as observed above, placed the patwari in a position which might have resulted in his commitment and conviction under a charge punishable with imprisonment for seven years. It is also true that the patwari was committed under S. 218, and that the Sessions Judge had directed the commitment. But the Sessions Judge was not bound to go so minutely into the case, under S. 296, as to order an inquiry into other offences of which the accused might have been guilty. He had to

see whether he had been improperly discharged on the charge preferred against him. When the case was tried under S. 218, and what appeared to the Sessions Judge to be the true facts came under his notice, and very serious offences, exclusively triable by himself, appeared to have been committed by the original complainants and others, he had, under the terms of S. 472, the power to charge them with these offences. They were not committed before the Court of Session but came under its cognizance. The words adopted in the amended Act are "committed before it or brought under its notice in the course of a judicial proceeding." But the words in S. 472 "committed before it or under its own cognizance" will bear the same interpretation as "brought under its notice in the course of a judicial proceeding," and in point of fact these words appear to have been adopted in consequence of the ruling of the Calcutta High Court in *Reg.* v. *Nomal* (1), and which is also marginally cited opposite S. 477 of the proposed amended Act. In this way Mr. Justice Norman's remarks refer to S. 172 of Act XXV of 1861, but the same words are used in that Code as in S. 472 of Act X of 1872.

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I now pass on to the actual wording of the order of commitment, dated 17th May. I would say that as S. 211 involves an offence which in the latter part of the wording of the section is exclusively triable by the Court of Session, and which from the proposed charge was evidently the offence which the petitioner was considered by **[405]** the Court of Session to have committed, the Sessions Judge was not acting illegally in adding other charges for offences which, had they stood alone, would not have been exclusively triable by him. The graver charge carried the others into Court with it. But the offence under S. 195 is also triable exclusively by the Court of Session, and if this was an offence which came under the notice of the Court of Session, when trying the charge under S. 218, he was at liberty under S. 472 to charge the petitioner with it. Whether the charge can be supported on the trial is not for us to determine before trial.

The offence under S. 193 is not exclusively triable by a Court of Session, but, as already insisted on, when the Court of Session had already ordered the commitment under S. 211 (the latter part of the section) and S. 195 for offences which were exclusively triable by him, there was no illegality in adding the other charge under S. 193. He might have omitted to do so in the order of commitment, and have added the charge after the commitment had been actually made and during trial.

If the petitioner, as he alleges, never committed this offence, he can obtain a good deliverance for himself by proving his innocence. I would dismiss the petition.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* SUKHARI. [13th June 1879.]

2 A. 405.

1879 JUNE 13. CRIMINAL JURISDICTION. 2 A. 405.

Penal Code, S. 174—Power of Magistrate, before whom offence under section committed, to try case himself—Crim. Pro. Code, 1872, Ss. 471, 473.

An officer should not try himself an offence under S. 174, I.P.C., in his capacity as a Magistrate, when the offence has been committed before him in his capacity as a Settlement Officer.

[F., 9 C.P.L.R. 26 (Cr.); **R.**, 27 P.R. 1903 (Cr.) = 21 P.L.R. 1904.]

(1) 4 B.L.R., A. Cr. 9.

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CRIMINAL JURISDICTION.

2 A. 405.

ORDER.

[406] OLDFIELD, J.—I am of opinion that the conviction (1) is illegal with reference to the provisions of Ss. 473 and 471 of the Criminal Procedure Code.

By the former section no Court shall try any person for an offence committed in contempt of its own authority, and an offence under S. 174 of the Indian Penal Code is such an offence, and the procedure prescribed in S. 471 shows that it was not intended that an officer should try such an offence in his capacity as Magistrate when committed before him in his capacity as a Settlement Officer. It is enacted that the Court may, after making such preliminary inquiry as may be necessary, either commit the case itself or send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged.

When the officer presiding over the Court exercises revenue as well as Magistrate's jurisdiction, it will not be a proper compliance with these provisions for the officer presiding to make the case over to himself as Magistrate; that will not be sending the case to any Magistrate within the meaning of the section. The obvious intention of the law is that the officer before whom the offence was committed shall not charge and try the accused person on his own charge.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

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APPELLATE CIVIL.

2 A. 407.

NARHAR SINGH AND ANOTHER (*Defendants*) *v.* DIRGNATH KUAR (*Plaintiff*). [16th June 1879.]

2 A. 407.

1. *Hindu law—Widow's right to maintenance.*

That a Hindu widow had a son, who died after his father, is no reason for reducing the maintenance she would be reasonably entitled to, if she had been a childless widow.

2. *Maintenance—Ratio it must bear to family property.*

The amount of a widow's maintenance must be fixed with reference to the amount of the family property or income, and upon equitable considerations based upon the circumstances of each individual case.

[R., 12 A. 558 (581), 24 B. 386 (392), 1 N.L.R. 33 (37).]

JUDGMENT.

[408] STRAIGHT, J.—This case resolves itself into a mere question of what is a reasonable amount to fix as the allowance for maintenance to the respondent. It must be taken that, with the exception of the first, all the other grounds of appeal are abandoned, in fact while admitting the liability of his clients to the payment of maintenance to the respondent, the whole of the argument and observations of the pleader for the appellants (2) were adduced to the question of amount and to the extravagance of the sum fixed by the Subordinate Judge. It being

(1) by the Settlement Officer appointed under Act XIX of 1873, who was also a Magistrate of the first class, of Sukhari who neglected to attend his Court on the day specified in the summons issued by him, for an offence punishable under S. 174, I.P.C.

(2) the brothers of the deceased husband of the plaintiff-respondent.

conceded, therefore, that the respondent is entitled to maintenance at the hands of the appellants, the duty cast upon this Court is to determine, as a matter of equity, whether, having regard to all the circumstances of the case, the amount decreed in the Court below is unreasonable. It was urged on the part of the appellants, that the position of a "Hindu mother" of a child deceased since her husband's death is, so far as concerns the principle upon which allowance of maintenance has to be computed, a very inferior one to that of a "Hindu widow" without a child or children. As a childless widow, it is said, many ceremonial duties devolve upon her, entailing expenses which ought to be taken into account, whereas if she bear a son, most if not all of those pass over to him or to his representatives. In plain terms it amounts to this, that a "childless widow" is entitled to allowance on a higher scale than a "widowed mother."

There was nothing either in the argument addressed to us nor in **[409]** the circumstances of this case itself to induce us to draw such a distinction here, and it is impossible to avoid remarking that if matters of feeling can be admitted, and we are not sure they should not in arriving at the amount of what is a reasonable allowance, the case of a "widowed mother" deprived of her only son and the contingent advantages that might have accrued to her had he survived seems the more deserving of sympathy and consideration. It is a fact not to be lost sight of in this case that, down to the death of the respondent's son, Ruda Mani Singh, on the 2nd December, 1876, the appellants made due provision (1) for her and her child according to their position and the family custom, but immediately after the latter's decease they stopped the allowance not only for the one but as to both. Such a proceeding appears indefensible and altogether inconsistent with the position they now take up. They are actually in enjoyment of the profits of the share of the villages to which, had the respondent's husband lived, he would have been entitled, and it is relatively to the amount of these profits that the sum to be allowed here should be calculated. No precedents were quoted to us fixing any principle of computation to apply to a case like the present, and it may well be that there are none, for the question that now arises involves equitable considerations that must of necessity be affected by the peculiar circumstances of each individual case. In our opinion this appeal should be dismissed and the order of the Subordinate Judge (2) be affirmed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

LACHMI NARAIN LAL AND ANOTHER (*Defendants*) *v.* SHEOAMBAR LAL AND OTHERS (*Plaintiffs*). [20th June 1879.]

2 A. 409.

Pre-emption—Limitation—Act XV of 1877, Sch. II, Art. 10.

A suit for pre-emption, where the property sought to be pre-empted has been purchased by the mortgagee in possession, is within time, if brought within

(1) (*i.e.*), at Rs. 150 per mensem.
(2) The Subordinate Judge decreed Rs. 60 per mensem for the maintenance of the plaintiffs.

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APPELLATE CIVIL.

2 A. 409.

one year from the date when the contract of sale became completed by payment of the purchase-money, and not from the date of the sale-deed; for, the purchaser must be deemed to have obtained physical possession under the sale when the contract was completed.

JUDGMENT.

[410] OLDFIELD, J.—The plaintiffs sue to obtain possession of a certain share in property sold under a deed of sale, dated 15th October, 1873, to the defendants by right of pre-emption under the conditions of the administration-paper of the mauza. It appears that the vendees are mortgagees in possession of the property, and, under the terms of sale, Rs. 200 were to be paid in cash to the vendor (mortgagor), and Rs. 98 to go in redemption of the mortgage. The plaintiffs brought a suit asserting their right to recover the property sold by pre-emption, but it was dismissed on 31st March, 1875, by the Court of first instance, on the ground that the sale contract had not become complete so as to give a right of pre-emption by reason of the vendor not having received the purchase-money, and this decision was affirmed in appeal. The vendor subsequently sued to recover the purchase-money with interest from the vendees, and obtained a decree on the 13th March, 1877, for Rs. 298, the consideration of the sale, and Rs. 70 interest. The plaintiffs have now brought the present suit, and the lower appellate Court has decreed their claim, subject to their depositing in Court, within thirty days of the decree becoming final, Rs. 200 payable as purchase-money, and Rs. 98 for redemption of the mortgage. The objections taken in second appeal are invalid. The limitation law which governs this case is Act XV of 1877, and the period will run from the date on which the purchaser takes under the sale sought to be impeached physical pos-[411]session of the property sold. As the purchaser in the case before us was also the mortgagee in possession, he must be held to have taken physical possession under the sale from the date when the contract of sale became complete; his possession as mortgagee became then possession as proprietor under the sale, and with reference to the former decision between the parties, the contract only became completed on the payment to the vendor of his purchase-money, and it is not urged that a year has elapsed from that date so as to bar the suit. There is nothing to show that the lower appellate Court has misconstrued the terms of the administration-paper which support the plaintiffs' preferential right of pre-emption. The second objection fails, as we cannot re-open a question decided between the parties in the former suit. The fourth and fifth pleas have no force. The plaintiffs cannot be liable to pay to defendants the interest decreed against them in the suit brought by the vendor to recover his purchase-money; it was no part of the purchase-money, which is all the plaintiffs can be called on to pay, and the former suit brought by the plaintiffs will be no bar to the present suit, as with reference to the decision in the former suit, the plaintiffs have now obtained a new cause of action.

The appeal is dismissed with costs.

FULL BENCH.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice. Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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2 A. 411.

GAURI SHANKAR AND ANOTHER (*Plaintiffs*) *v.* MUMTAZ ALI KHAN (*Defendant*). [26th June 1879.]

2 A. 411.

Government Ferry—Lease—Regulation VI of 1819—Illegal contract—Act IX of 1872, S. 23.

A partnership entered into with another person, by a lessee of a Government ferry, who has covenanted not to underlet or assign the lease without the leave or license of the Magistrate who granted it, is not void or voidable as between the partners, by reason of the covenant not to underlet or assign the lease. [S. A. No. 119 of 1872, Unrep , *overruled.*]

[F., 14 C.P.L.R. 67 (69) ; **Appr.**, 24 B. 622 (627) ; **Appl.**, 26 M. 156 (157) ; **D.**, 10 A. 577 (579) = 8 A.W.N. 215.**]**

ORDER OF THE HIGH COURT REFERRING THE CASE TO THE FULL BENCH.

[412] OLDFIELD, J.—Mumtaz Ali, the defendant and respondent, held a farming lease of certain ferries from Government, from 1st October, 1875, to 30th September, 1878, and by agreement, dated 13th October, 1875, admitted one Badal to partnership in the said lease. It is asserted by the appellant that one Khushali Ram obtained a decree against Badal, and caused his share in the farm to be attached, and that a sazawal was appointed to make collections, the income remaining in the hands of defendant, respondent. Subsequently defendant, respondent, brought, in the name of Khwaja Hasan, the said decree, and advertised for sale Badal's interest in the farm, and on 29th September, 1877, Badal sold his interest to plaintiff, who satisfied the decree. Plaintiff now seeks to have his right declared to receive profits under the terms of the agreement, dated 13th October, 1875, and to superintend and keep an account, as before, of the income : also to recover his share of the profits, under the terms of the agreement, from 1st October, 1876, to September, 1877, a period of one year, with interest. The defendant, respondent, does not dispute that he admitted plaintiff to partnership in the farm under the deed, dated 13th October, 1875, but pleads that the contract is absolutely void with reference to the provisions of S. 23 of Act IX of 1872, as it was illegal to admit a *shikmi* partner in the ferry farm, or to sub-lease it, under the provisions of S. 2, Regulation VI of 1819, and paragraphs 11 and 12, Circular Order No. 22 of 1874, and paragraph 11 of the conditions of the ferry farm granted by the Magistrate.

There were other pleas to the effect that, under the deed of 13th October, 1875, Badal obtained no right of possession or power of superintendence, &c. ; that, during the first year of the partnership, the boats and other things belonging to Badal were sold in execution of the decree, and during the second year he could not collect the said materials for the bridge, and committed a breach of contract ; and on defendant's petition the Magistrate, on 16th October, 1876, declared the *shikmi* partnership and sub-farm to be invalid, and disallowed it, and held defendant, respondent, respon-**[413]**sible for everything ; and in consequence of the Magistrate's order defendant, respondent, cancelled the contract with Badal from October, 1876. There are also pleas to the effect that the account of profits is wrong, that defendant, respondent, did not realise the profits as alleged,

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and a considerable sum of money is due to defendant, respondent, from Badal and his representatives on account of profits, expenses, and losses relating to the first year of Badal's partnership. The above are the principal pleas taken by defendant, respondent, in the Court below. The lower Court dismissed the suit, holding that the contract on the part of Mumtaz Ali, defendant, and Badal is absolutely void, upon the grounds taken by the defendant which have been referred to above, and a decision of this Court (1) has been cited in support. In my view the decree of the lower Court cannot be maintained. There is nothing in Regulation VI of 1819 which makes a contract of the nature of that between defendant and Badal illegal, nor has the Circular Order No. 22 of 1874 of the Executive Engineer, Allahabad Division, the force of law, assuming that the contract is forbidden by that Circular; so we cannot say that this contract is void under the two first grounds in S. 23 of the Contract Act, and we cannot hold it to be void under any of the other grounds which render a contract absolutely void. Its object is not fraudulent. We cannot say that it involves or implies injury to the person or property of another, or that the Court can regard its object as immoral or opposed to public policy. There will be nothing, therefore, to render this contract void absolutely under the Contract Act; and though Mumtaz Ali in making it, may have transgressed the terms of his lease from Government, the contract as between him and Badal will be valid and an action on it maintainable, which may be enforced for damages, if not for specific performance. But if the lease is perused, it is not clear that a partnership contract of the kind was contrary to the conditions of the lease. The only section pointed out as disallowing it is S. 11; but that would appear to refer to a sub-lease or a transfer and not to a co-partnership, and the remedy is, under it, in the Magistrate's own hands, by cancelling the original lease and fining the farmer; and when this has not been done, and there is knowledge of the lease, it may be presumed the authorities did not object.

[414] The grounds, therefore, on which the lower Court has dismissed this suit cannot be sustained, and the suit should be tried on the merits. It may be noticed that it is asserted that the Magistrate on defendant's, respondent's petition of the 16th October, 1876, disallowed the partnership, and defendant, respondent, in consequence cancelled it: whether or not it ceased to have effect validly is a point which must be tried with the other points raised in the pleadings. Since the lease to defendant, respondent, Mumtaz Ali has come to an end, so much of the relief sought as asks for supervision of the farm cannot be granted, assuming this relief was otherwise allowable.

I would reverse the decree and remand the suit for trial on the merits; costs to follow the result.

SPANKIE, J.—I am quite of the same opinion, and would make the order proposed. But before doing so, as the judgment of this Court (1) appears to support the judgment of the lower appellate Court, it would, perhaps, be better to refer the case to the Full Bench in order that the point may be considered, whether or not the agreement made with the plaintiff in this case is null and void for the reasons assigned by the lower appellate Court.

OLDFIELD, J.—I concur in making the proposed reference.

JUDGMENTS OF THE FULL BENCH.

STUART, C. J.—The opinions expressed in the order of reference in this case appear to me to be substantially sound. Badal's claim under his

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agreement with Mumtaz Ali could not be made good against the Government, or in any way against the profits of the ferry, but only against Mumtaz Ali himself personally, and in that light could only be measured in damages, and a contract between him and Mumtaz Ali to any other effect could not be enforced. I am clear, therefore, that Badal had no claim for specific performance, **[415]** so far as the subject-matter of the Government lease to Mumtaz Ali Khan was concerned. This, however, does not exclude Badal's claim against Mumtaz Ali for damages. As to the case decided by this Court in 1872 (1), I am not prepared at this distance of time to say that it is exactly in point. I observe that the judgment in that case states that it was admitted by the appellant's pleader that the claim for possession of a share of the ferry in suit was unmaintainable, and it clearly was so; but if so, the claim there was different from that pleaded in the present case, which is that of a *shikmi* partner suing for his rights under his personal sub-contract. I cannot say more about the judgment of 1872 (1), as the record has long since gone back to the district, Banda, from whence it came. I would answer in accordance with the referring order.

PEARSON, J.—The view taken by the learned Judges who have made this reference appears to me on consideration to be more correct than that taken in the former decision of 1872 (1).

OLDFIELD, J, (SPANKIE, J., concurring)—We adhere to the view already expressed in our order of remand.

The Division Bench, following the judgment of the Full Bench, decreed the appeal, and remanded the case to the Court below for trial on the merits.

PRIVY COUNCIL.

PRESENT:

Sir James Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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=Bal. 308.

On Appeal from the High Court of Judicature, North-Western Provinces.

DWARKA DOSS AND OTHERS (*Appellants*) *v.* RAI SITA RAM (*Respondent*). [27th June 1879.]

5 C.L.R. 430=Bal. 308.

Execution of decree—Insolvency - Decree, right of purchaser under, to recover property deposited with creditors—Evidence—Burden of proof.

A member of a firm of Native Bankers which had become insolvent, with a view to protect his property from the general body of his creditors, deposited, in March 1870, property to the value of Rs. 30,000 with the appellants, another firm of Bankers, to whom he owed Rs. 1,500. The respondent who had a decree against him brought this property to sale in execution of his decree and purchased it. In a suit by the respondent for recovery of the property from the appellants who denied the deposit, held (affirming the decision of the High Court,) that the respondent was entitled to recover the property.

JUDGMENT.

[430] SIR MONTAGUE E. SMITH.—This was an action brought by the respondent against the appellants, a firm of bankers at Jaunpore, to recover a quantity of gold, said to consist of 1,000 gold mohurs, 500 guineas, and five ingots of gold, which are alleged to have been deposited with them by one Luchman Dass, or the value of the gold. The

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plaintiff claims as the purchaser of the right of Luchman Dass in the deposit under an auction-sale held in pursuance of execution proceedings upon a decree which he had obtained against Luchman Dass. The claim is founded upon the following case :—

Luchman Dass was one of a firm of native bankers carrying on business at Gazeepore and Jaunpore, certainly at Gazeepore, and apparently also at Jaunpore where he lived. The firm had got into difficulties, and in February, 1870, had become bankrupt. In what particular way [431] it had become so is not stated, but there seems to be no doubt, and some evidence is to be found in the record of the fact, that Luchman's firm was largely indebted at that time. The case alleged is that Luchman Dass, with a view to protect the property from his creditors, on the 15th March, 1870, deposited the gold in question with the appellants. Evidence was given to the effect that the gold had been kept at Gazeepore, and was brought on the 15th March, 1870, or the day before, to Jaunpore, and placed in the house of Luchman Dass, and that it was taken on the following morning to the appellants and deposited with them. It is said that a *surkut* or receipt was given for the gold, which was signed by one of the appellants, Luchmee Narain. The *surkut* is set out in the record, and is in these terms :—" Receipt '*surkut*' granted to Baboo Luchman Dass, Khettree, resident of Mahra Tollah.

" *Cr.* *Dr.*

" Dated Phagoon Soodee, 13th Sumbut, 1826, 1,000 gold mohurs, 500 guineas, 5 gold ingots weighing 500 tolahs.

" Firm of Madun Gopal, Ram Charun," (which appears to be the appellants' firm), and it is signed " Luchmee Narain."

The next fact which appears in the evidence is, that about the 8th June, 1870, Luchman Dass made a demand upon the appellants for the gold, or the value of it. At that time the appellants did not deny the deposit, but said that when the settlement with the creditors took place—and it had been suggested that a settlement with the creditors was the reason for the demand—they would deliver it back. It is stated that after that demand, on the 30th June, 1870, Luchman Dass deposited a pearl necklace with the appellants for sale. On the following day he demanded the necklace or the price of it, and the appellants denied having received it. On the following day, the 2nd July, a demand was again made on the part of Luchman Dass for the gold, and on that occasion the appellants repudiated the transaction and denied all knowledge of it. Luchman Dass proceeded criminally against the appellants for fraudulently withholding the necklace, under S. 409 of the Criminal Code, and it appears that the case was heard before the Magistrate of the district, who convicted two of the appellants and sentenced them to two years' imprisonment. There was an appeal from the Magistrate's decision to the Judge, who affirmed [432] it; and a subsequent appeal to the High Court, upon the question of law, who also affirmed the decision. Their Lordships mention these proceedings as a part of the history of the case, but they have not allowed the fact that the appellants were convicted to influence their judgment in the present case. It is, however, impossible not to notice the fact, because the story of the necklace was more or less connected with that of the deposit in question in this suit, and the learned Counsel for the appellants drew an inference adverse to the respondent's case from that prosecution, suggesting that it was probably done to influence the minds of those who had to decide the question as to the gold adversely to the appellants.

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With regard to the deposit of the gold, the first proceeding was taken by Luchman Dass himself. On the 15th July, 1870, he filed a petition praying to be allowed to sue the appellants for the gold *in forma pauperis*. In his plaint he does not mention the *surkut*, but in his deposition, made three days after the filing of the petition, he refers to the *surkut*, and he refers to it as having been made on plain paper. The petition to sue *in forma pauperis* was ultimately dismissed, the Judge having come to the conclusion that Luchman Dass had not established to his satisfaction that he was entitled to sue as a pauper.

The next step in the case was the purchase by the respondent of Luchman Dass's interest in the gold, at the auction-sale already referred to. The date of his purchase was the 6th April, 1871. The proceedings in the suit which led to the decree under which that purchase was made are not in the record; but it has been admitted by the learned Counsel for the appellants that there is no evidence whatever on the record to show that that suit was other than a hostile suit, or that there was any collusion in it between the respondent and Luchman Dass. Nor is there any evidence whatever in the case that the present action of the respondent as such purchaser is brought in collusion with Luchman Dass. Indeed there are some indications in the proceedings that Luchman Dass was reluctant to assist the plaintiff in the prosecution of this suit.

It may be observed that Luchman Dass was indebted to the appellants at the time of the deposit in a sum of Rs. 1,500, and **[433]** on the 17th April, 1871, the appellants brought an action against him and his partners for Rs. 500, the balance of that debt, and obtained judgment against him. It has been said that it was an improbable circumstance that Lutchman Dass should have deposited this gold with the appellants who were admitted creditors of his at the time of the deposit. That circumstance scarcely creates an improbability. Upon the hypothesis Luchman Dass was about to put away property of the value of Rs. 30,000 in order to keep it from the general body of his creditors. Unless he had kept it in his own possession he must have placed it with bankers or some other persons for safe custody. It appears that two of the partners of the appellants' firm were his relatives; they had had business transactions together; and if such a scheme was to be carried into effect, there seems to be no improbability, on the contrary, some probability, that the defendant's firm would have been selected for that purpose. The small debt due from Lutchman Dass to them was not likely to be an obstacle to his selecting them for the deposit.

The present action was brought in July 1873. The witnesses examined on the part of the plaintiff to prove the case were agents and servants of Luchman Dass or of his firm, and they prove, in distinct terms and circumstantially, that this gold was brought from Gazeepore, deposited in the house of Luchman Dass at Jaunpore, and taken to the appellants, and that the receipt was obtained in the manner which has been mentioned. Upon an examination of their evidence there are some inconsistencies and contradictions to be found in it. Those inconsistencies and contradictions have raised considerable doubt in the minds of their Lordships as to the truth of the case represented by the witnesses, which would have led them to give further consideration to it than they have already done if there had not been corroboration of their evidence in the *surkut* which is alleged to have been given by Luchmee Narain, and they think that this case, at the point at which it has now arrived, must be determined principally by the view which ought to be taken of that *surkut*. If the *surkut* is genuine, and was really given, there can be little

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room left for doubt. It would corroborate in the strongest way the parol evidence.

[434] The Subordinate Judge who heard the witnesses, both as to the fact of the deposit and as to the handwriting of the receipt, came to the conclusion that the receipt was not in the handwriting of Luchmee Narain, and he disbelieved the case of the plaintiff. Undoubtedly, having come to the conclusion that the *surkut* was not in the handwriting of Luchmee Narain, and necessarily, therefore, to the conclusion that it was a forgery, he was obviously right upon that view of the *surkut* in disbelieving the evidence of the plaintiff. But on the appeal to the High Court the Judges of that Court thought that the mode in which the Subordinate Judge had proceeded in testing the credit of the witnesses upon the question of handwriting was one likely to mislead, and their Lordships agree with the High Court in that opinion. Having come to that opinion, the Judges of the High Court determined to go into an original inquiry as to the genuineness of that document. Accordingly they gave the parties liberty to adduce evidence so that there might be, before themselves, the fullest possible investigation into the genuineness of that receipt. The plaintiff called all the witnesses he had examined before the Subordinate Judge and one additional witness ; and the defendant, in like manner, called the witnesses he had before examined. The Judges of the High Court evidently took great pains in the investigation ; they saw the witnesses and the documents, and could observe the way in which they were submitted to the witnesses ; and they have gone in a very careful judgment minutely into the various documents prepared or used to test the knowledge and credit of the witnesses as to the handwriting of Luchmee Narain, into the way the witnesses dealt with them, and into the opinions which were elicited from the witnesses in their own presence. It is obvious that an opinion can be formed with much greater accuracy and certainty by those who hear the witnesses examined, and who see the papers and observe the manner in which the witnesses receive and deal with them, and give their opinion respecting them, than by those who only see the result of the inquiry when it is committed to paper ; and therefore, in all inquiries of this kind, the Court, which has not the advantage of hearing the witnesses and seeing the documents, must be in a position far less able to judge of the genuineness **[435]** of the document which is impeached than those who heard the evidence and saw and watched all that took place. The High Court, having made the inquiry, delivered a judgment marked by extreme care, and the result of their examination of the evidence is stated at p. 113 of the Record. After giving an analysis of the evidence, interspersed with their observations upon it, they say :—" These considerations lead us to the conclusion that on the parol evidence alone the appellant established a *prima facie* case which the respondents were bound to have answered. It makes in favour of the credit due to the witnesses, Hashmut Ali and Sarju Pershad, Ram Dass and Ramsurrun Lall, that they all mentioned other persons who were present and the occurrences to which they respectively speak, whom the respondents might have called to contradict them had they been so minded. Luchmee Narain contended himself with a simple denial of the deposit and of the execution of the *surkut*. Sheodurshun, who is said to have been present when the deposit was made, and when its return was demanded and refused, was not examined." Then they say :—" Beharee and Madho were mentioned as having been present at the deposit, Hurruck Narain and Beharee at the second demand, and Nurthra Mahraj when the demand was made by Ram Dass to the Collectorate ; yet the respondent called none of these persons to contradict the evidence of the appellant's

witnesses." It seems that the High Court were accurate in saying that the respondent called none of those persons; but the appellant had called three of them, and it appeared that they could give no information. They go on:—"We are not, therefore, prepared to say that even on the parol evidence, apart from the *surkut*, the appellant would not be entitled to a decree."

It is unnecessary for their Lordships to say whether or not they would have agreeed with that conclusion of the High Court upon the parol evidence if the *surkut* had not existed. The *surkut* having been found by the High Court to be a genuine document, it is not necessary for them to say what would have been the effect of the parol evidence upon their minds if it had stood alone. They cannot however but think that the High Court was right in giving considerable weight to the omission on **[436]** the part of the appellants to call witnesses whom they might have called. It is inconceivable that if Sheodurshun was able to contradict the fact of the deposit, he should not have been called to do so. He is said by the appellant's witnesses to have been present at the time of the deposit. He is not only one of the defendants, but it appears from the proceedings that he was attending to the defence in Court; yet he did not tender himself to be examined as a witness to contradict the fact of the deposit which was proved by the plaintiff's witnesses to have taken place in his presence It may also be observed that Luchmee Narain is examined in the most general way. He simply denies the fact of the deposit and of his having given the receipt; he is not examined circumstantially as to the relations of his firm with Luchman Dass, the position in which Luchman Dass was, though he must have known of these things, nor even as to the demands which were said to have been made for the gold, and no other witness from the bank or from any other quarter is called to show that there was no truth in the plaintiff's case. It certainly seems to their Lordships that there was a *prima facie* case made by the plaintiff, and that it has not been so fully answered as it might have been, if it were untrue, by the appellants.

Then, the High Court having gone into the inquiry as to the handwriting, came distinctly to the conclusion that the *surkut* was in the handwriting of Luchmee Narain, and they state their conclusion in these terms:—"To us Beni Pershad appears to be by far the most reliable and capable witness called to speak to the handwriting,"—that is. the most reliable and capable on either side,—"And having ourselves compared *surkut* A with other documents admittedly written or signed by Luchmee Narain, we have no hesitation in accepting Beni Pershad's statement that *surkut* A is in the handwriting of Luchmee Narain."

Their Lordships have already pointed out the extreme difficulty in which they are placed by being invited to say, without having seen the documents or the witnesses, that this conclusion is wrong. They think, adverting to the considerations already alluded to, that it is not possible for them to say, in the circumstances of this case, that upon this point the High Court is wrong; and that being so, they are unable to come to the conclusion that **[437]** the case of the respondent is untrue. It is a case proved in its circumstances by witnesses, supported by a written document found by the High Court, who heard the witnesses, to be a genuine document, and insufficiently answered on points where, if untrue, it might have been refuted by better and stronger evidence than that adduced by the appellants.

There are no doubt points of difficulty in the way of the respondent's case which have been ably commented upon by the learned Counsel for

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the appellants. One circumstance is, that Luchman Dass, in his deposition in the pauper suit, speaks of the receipt as having been given on plain paper. Undoubtedly, although originally so given, according to the evidence, a stamp had been afterwards affixed to it. But although this description is a circumstance adverse to the plaintiff's case, it is only one to be weighed with the others, and it is possible that Luchman Dass was thinking of the receipt as it was originally given. It had not been in his possession for some time. Here again the appellants have chosen to leave the case without contradictory evidence. The witnesses on the part of the plaintiff state circumstantially that they went to the appellant's bank, and that the stamp was affixed, and Luchmee wrote lines upon it. Luchmee is not asked a question upon it, and the plaintiff's case upon this fact stands unanswered.

Another circumstance which was strongly relied upon by the learned Counsel was, that there was no evidence to show how this gold had come into the possession of Luchman Dass, or how long he had it. The witnesses for the plaintiff say it was at Gazeepore, which would have been a place where it would naturally have been kept if Luchman Dass had really possessed it; and there was no cross-examination upon the point so as to put the respondent upon further proof than he had given. It is obvious that if Luchman Dass had contemplated the scheme of secreting a part of his property in order to preserve it for himself and to defraud his creditors of it, this gold would have been collected from time to time, and would probably not have found its way into his books.

Then observations were made upon the fact that the defendants' books contained no entry of the transaction. Assuming **[438]** the transaction to be that which it is supposed throughout to be, it is not likely that entries would have been found in the regular books of the appellants regarding it; and, although a discrepancy has been attempted to be fastened upon the evidence of the witnesses—some of them stating that there was an entry in a book, whereas no such entry has been found,—that may be explained by the circumstance that the entry is said to have been made in a small hand-book which would not be one of the regular books of the firm.

Their Lordships have given full consideration to all these circumstances; indeed they have considered the case with some anxiety, feeling that there were circumstances in it which should induce a Court to hesitate before coming to a decision upon it; and having done so, they have come to the conclusion, for the reasons above stated, that they are unable to reverse the decision of the High Court.

They will, therefore, humbly advise Her Majesty to affirm it, and to dismiss this appeal.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

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THAMMAN SINGH (*Plaintiff*) *v.* GANGA RAM AND OTHERS (*Defendants*).

[8th July 1879.]

2 A. 342.

Contents of decree—C.P.C. (1877), S. 206.

S. 206 of the C.P.C. (1877) requires, among other things, that a decree "shall specify clearly the relief granted or the determination of the suit." *Held*, accordingly, in a suit on a hypothecation bond, in which the property hypothecated

was detailed and the property itself impleaded as a defendant, that a "Decree for plaintiff in favour of his claim and costs against defendant" was to be regarded as a simple money-decree, and not as one for the enforcement of the lien.

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[**F.**, 2 A. 345, 3 A. 388 (392) (**F.B.**)=1 A.W.N. 43; **D.**, 11 B. 177 (179).]

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Suit by the plaintiff for possession of certain land by setting aside the auction-sale of the same in favour of the defendants on the ground that he had purchased the property in suit, and that, after his purchase, Ganga Ram, one of the defendants, caused the same to be sold by auction in execution of his decree against one Azim-ud-din, at which sale the other defendants, Ahmad Husain and others, purchased the same; that the decree in favour of Ganga Ram was a mere money-decree and could not be regarded as one for enforcement of a lien, and therefore the property was not liable to be sold in execution thereof, as previous to the sale, it had passed to the plaintiff. Both the Courts below dismissed the plaintiff's claim. Whereupon the plaintiff preferred an appeal to the High Court.

JUDGMENT.

[343] STRAIGHT, J.—The simple point in this case is whether the decree obtained by the defendant Ganga Ram against his judgment-debtor is to be regarded as one for enforcement of lien or simply for money. It is true that, in the claim itself, the hypothecated property is detailed and the property itself is impleaded as a **[344]** defendant, but the decree is quite silent about it and thus disposes of the suit: "Decree for plaintiff in favour of his claim, and costs against defendant." It was urged for the respondents, auction-purchasers, that a liberal construction should be placed upon the terms of the decree, and that it may reasonably be read as carrying relief against the property hypothecated. We think this argument should not be allowed to influence us and is inapplicable, where the Legislature has in the most specific terms directed how a decree should be shaped and what details it should contain.

(i)—The number of the suit.
(ii)—Names and description of parties.
(iii)—Particulars of the claim.
(iv)—*Shall specify clearly the relief granted or the determination of the suit.*
(v)—The amount of costs incurred in the suit, and by what parties and in what proportion they are to be paid.

It is admitted by the respondents that the decree in this case is vague and defective; but they urge that read by the light of the claim, its intention is obvious, and that it may fairly be interpreted as being one for the enforcement of lien. There are certain broad rules by which construction of Acts is guided, that are prefectly well known and recognised, but it does not appear to us that they could be applied here, nor do we think that we have any right to treat this as a question of construction at all. The S. 206 of Act X of 1877 has, in the details already set out, laid down in the most explicit way, what the contents of a decree are to be: "Shall specify clearly the relief granted," and if there be an omission in the decree so that the relief given by it does not in terms go to the extent asked, we do not think it is part of the duty of this Court, or, indeed, of any other, to import words for the purpose of stretching its operation. The Court making the decree must be presumed to have expressed the relief it was prepared to give, and the words "Decree for plaintiff in favour of his claim and costs against defendant" have, in our judgment, nothing about

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them specifying clearly, as required by the Act, any relief in the shape of enforcement of lien against property [345] hypothecated. The argument for elasticity in construction of the terms of a decree urged by the respondent would, if admitted, be productive of the greatest confusion and inconvenience, and involve a continued conflict of decisions. We must take the decrees as we find them, and not embark into speculation as to what was the intention of the Court passing the decree. Under these circumstances we decree the appeal and plaintiff's claim with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

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HARSUKH (*Defendant*) *v.* MEGHRAJ (*Plaintiff*). [8th July 1879.]

2 A. 345.

Contents of decree—C.P.C. (1859), S. 189—C.P.C. (1877), S. 206.

Where, in a suit for money and enforcement of the lien on the property hypothecated in a bond, the decree was for the "claim as brought," without any specification as to the relief sought by the plaintiff for the enforcement of the lien, *held*, that this was only a money-decree and not one enforcing the lien. It is not for the Court to construe the relief granted by a decree by reference to the particulars of the claim set forth in it. These are required to be set forth in the decree, but it is also obligatory to set out clearly the relief granted or other determination of the suit. [H.C.R.N.W.P., 1870, p. 29—R.A. No. 75, 1873 (1876) (**F.B.**) Unrep; 2 A. 342, F—S.A. No. 155 of 1877 (1878) Unrep. not followed].

[F., 3 A. 388 (392) (F.B.) = 1 A.W.N. 43.]

JUDGMENT.

[345] SPANKIE, J.—In this case the facts were admitted. The only question for decision is, whether the original decree obtained by appellant charged the property in suit for the satisfaction of the amount decreed.

The Subordinate Judge held that the property was so charged. The suit was one to enforce a lien. The judgment declared the **[346]** lien good and valid. The claim was decreed as brought. The Subordinate Judge allows that the decree was not properly prepared, but there can be no question as to what was granted by the decree. It was not a part but the whole of the claim which was decreed, and this included the enforcement of the lien against the property. The Subordinate Judge did not consider the precedent *Muluk Fuqueer Bakhsh* v. *Lala Manohur Das* (1), which was brought to his notice, to be applicable to the case. In appeal the Judge held that the words "decreed virtually" do not amount to a specific decree that the plaintiff may recover the amount of his claim by the sale of the property hypothecated. He therefore decreed the appeal and reversed the decision of the Subordinate Judge.

The defendant, appellant, relies upon the decision of the first Court.

The wording of the sections bearing upon decrees is the same both in Act VIII of 1859, and Act X of 1877, as regards the points which relate to the case before us. The particulars of the claim are stated in the body of the decree, the subject of dispute, but "the relief granted" is not specified clearly. The claim is "decreed virtually" is not a clear specification of the relief granted. In this respect I have no hesitation in agreeing with the Judge. The Subordinate Judge does not consider that the case cited (1) is

(1) H.C.R., N.-W.P., 1870, p. 29.

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applicable to the present case. But in that case the plaintiff in a former suit had not confined himself to asking for relief in the shape of what is called a mere money-decree, he sought also to enforce his charge against the land. The decree, which was passed *ex parte*, after reciting the substance of his plaint, was clearly confined to giving him a decree for the money against the person. The Court (Morgan, C. J. and Ross, J.) held that they were bound to give effect to the decree according to the plain meaning of the language used, and this clearly gave relief merely against the person for the debt. The Court added: "If the plaintiff, from negligence or other cause, omitted to prefer the portion of his claim which sought to charge the land, or, having preferred it, was content to accept an imperfect adjudication, or one which awarded him only part of the relief claimed, he cannot now bring forward **[347]** in a fresh suit matter which might well have been disposed of. The decree made was not questioned either in appeal or by review."

The principle upon which the ruling proceeds appears to be very applicable to this case, and to the decree in which the particulars of the claim are stated, and the suit was one in which the plaintiff certainly desired to enforce his lien against the hypothecated property, but the decree is silent in respect to this particular relief. It states that the claim is virtually decreed against the defendant. There is no addition of the words by sale of the property hypothecated in the bond. The decree therefore was imperfect and did not give the relief asked for, and the plaintiff should have got it amended, or have applied for a review, or should have appealed against the decree in order to have it brought into agreement with the judgment.

A majority of the Court in Regular Appeal, No. 75 of 1873, decided by the Full Bench on the 30th June, 1876 (1), held upon a reference to the Court at large that, in a case decided in accordance with a confession of judgment, in which the following words appear, "The whole of the property as entered in the deed will remain hypothecated and mortgaged till payment of the entire demand," but in which the operative part of the decree was one "for the amount claimed with costs and interest against the defendants, who have promised to pay the amount within two years, on their confession of judgment admitted by the plaintiff," the decree was merely a money-decree. One of the learned Judges who formed the majority observed: "It seems to me impossible to hold that it is more than a mere money-decree: the relief granted is money only, nor is it provided that the money may be realised by the sale of any particular property, by reason of its hypothecation for the purpose. No doubt it appears that the decree was passed in accordance with a confession of judgment, and does not include all the purport thereof. There is reason to believe that it was imperfectly drawn out, and that its imperfection is detrimental to the decree-holder. It was competent to him to have applied for its correction, but it is not competent to us to rule that it is other than a mere money-decree, in the terms in which it has been drawn."

[348] We are, I think, bound to follow the opinion of the majority of the Full Bench in 1876 (1). A judgment, however, of a Division Bench of this Court in *Azim-ul-lah Khan* v. *Kishen Lal* (1) was shown to us in which the learned Judges took a different view, and one of them seems to have changed his opinion. In that case, according to the memorandum of appeal, the decree in words was to the effect that "the claim be decreed

(1) Unreported.

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with costs and interest," and the Subordinate Judge held that in the decree there was no order respecting the enforcement of the lien, nor is there an order that the money would be realised by an auction-sale of the property. There was no order in the decree referring even in the most distant manner to the hypothecated property. The Subordinate Judge admitted that this might have been carelessness in preparing the decree, but considered that the decree-holder should have had it amended. In appeal the learned Judges held that the first Court "had rightly construed the decree to be not merely a money-decree, but a decree also for the enforcement of the lien, and the claim was for the recovery of the bond-debt, by the enforcement of the lien."

This decision is quite opposed to the opinion of the majority of the Court in 1876 (1) and it may have been that the Subordinate Judge misapprehended what the decree did recite. The Munsif, however, admitted in his judgment that the word "*kifalat*" (pledge) had been omitted in the decretal order owing to an error on the part of the decree clerk. The former decisions refer to the time when Act VIII of 1859 was in force, but under the current Act, X of 1877, the wording of S. 206 is still more stringent; now it says that the "decree must agree with the judgment," words not found in the corresponding section of Act VIII of 1859, and the section further provides means for the amendment of a decree, if it is found to be at variance with the judgment, so as to bring it into conformity with the judgment. Appeals also are admissible under the new Act not only from decisions but from any part of them, so that every facility is offered for the correction of decrees. This being so, I think that we should not in any way show tenderness to any indifference on the part of a decree-holder, who consents to take a decree loosely drawn out, or which grants him incomplete relief, and in doing so is **[349]** not in accordance with the judgment. It is not for us to construe the relief granted by the decree, by reference to the particulars of the claim. These are required to be set forth in the decree, but it is also obligatory to set out clearly the relief granted or other determination of the suit. The decree which gave rise to the present suit does not fulfil these conditions, and as it is expressed, it is in my opinion nothing more than a money-decree against the defendant. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—I entirely agree in the views of Mr. Justice Spankie, which are in accordance with the opinion I entertained in a case of a similar kind (2), involving like considerations, before Mr. Justice Oldfield and myself.

(1) Unreported.

(2) 1 A. 342.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Straight.

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APPEL-LATE CIVIL.

BASANT RAI AND OTHERS (*Defendants*) *v.* KANAUJI LAL (*Plaintiff*).

[8th July 1879.]

2 A. 455 = 4 Ind. Jur. 583.

1. *Usufructuary mortgage followed by sale—Revival of mortgage by cancelment of sale.*

When a sale, made to a mortgagee in possession, is cancelled, the mortgage is revived, and the possession of the property becomes one under the mortgage.

2. *Attachment in execution of decree—Claim to attached property—Effect of order under C.P.C., 1859, S. 246.*

Where, in such a case, after the cancelment of the sale at the suit of his sons, the vendor, a Hindu father, sued the mortgagee for possession of the property on the ground of such cancelment, and his suit was dismissed, on the ground that he could not be allowed to retain the purchase-money and eject the mortgagee-purchaser, and that he was also estopped from setting up the invalidity of his own sale; and the property, which thus continued to be in the possession of the mortgagee, was attached in execution of a decree held by a third party against the mortgagor and his sons; and the mortgagee objected on the ground that the judgment-debtors had no saleable interest in it, and his objections were overruled under S. 246 of the C.P.C., and the property was sold to the decree-holder; *held*, in a suit by the decree-holder as purchaser of the equity, for redemption of the mortgage, that he was entitled to such relief, and that the mortgagee, not having prosecuted, by means of a suit, his disallowed claim, could not urge, in this suit, the plea of *res judicata*, or his claim for a lien for his purchase-money, or any other plea to the effect that he was anything more than a mortgagee.

3. *Annual payments due from the mortgagee—Mortgagor's claim for deduction.*

Where the mortgagee has undertaken to make certain annual payments to the mortgagor, the latter or the purchaser of the equity of redemption is entitled to a deduction, from the amount due to the mortgagee, of such annual payments not made by him.

JUDGMENT.

[457] The plaintiff, respondent, is the auction-purchaser of the ten biswas zamindari share of Zalim Singh, the subject of dispute. He avers that the share was mortgaged on the 17th June, 1859, to the defendants for Rs. 2,200, and for a term of five years, and that on the 21st May, 1861, Zalim Singh executed a deed of sale of the property in favour of the mortgagees, giving them credit for Rs. 2,000, the mortgage-money, Rs. 250 in cash, and retaining 5,800 to be paid on account of debts to the plaintiff: Lalta Prasad and others, sons of Zalim Singh, sued to set aside the sale and succeeded in obtaining a final decree in their favour from the Sudder Dewany Adawlat, North-Western Provinces, on the 22nd August, 1864: the defendants, however, continued in possession of the share as mortgagees: there was a stipulation in the mortgage-deed that Zalim Singh was to receive Rs. 75 yearly as "*malikana*" or proprietary allowance: this sum the mortgagees deducted yearly from the principal sum advanced on the mortgage, leaving now a balance of Rs. 925 due to the mortgagees: the plaintiff claims to redeem the share of Zalim Singh on payment of Rs. 925 or such sum as the **[458]** Court shall declare to be due. The defendants contend that the purchase of the interest of the sons of Zalim Singh by the plaintiff at auction gave him no right of suit: they had no right during their father's life time: Zalim Singh had admitted the

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sale to defendants and he had ineffectually endeavoured to recover possession of the share, but the High Court, North-Western Provinces, on the 27th May, 1867, rejected his claim: the plaintiff's suit to redeem the mortgage on the ground that the sale of the 21st May, 1861, was invalid was barred by S. 13, Act X of 1877, and the admission of Zalim Singh. They also contend that they were entitled to repayment of the sale consideration and that the allowance of Rs. 75 ceased from the date of the sale, and that there was no condition in the mortgage-deed for the deduction of this sum yearly from the principal sum advanced on mortgage: Zalim Singh himself realized this sum prior to the sale. The Subordinate Judge held that the defendants, who objected to the sale of the share in execution of decree and against whose objection an order was passed on the 15th November, 1867, ought to have contested that order in a regular suit within the period prescribed by law: they had not done so, and the order became final, and they could not now contend that Zalim Singh had no rights that could be sold: the plaintiff therefore had a clear right of suit. He also held that the property in dispute could not be considered liable for the consideration of the sale-deed, that deed having been set aside by the Sudder Dewany Adawlat in 1864: the defendants themselves have admitted all along that they were mortgagees: as they had failed to show that the proprietary allowance of Rs. 75 had been paid yearly, the sum should be deducted from the amount of the mortgage-loan. He accordingly gave a decree to plaintiff as claimed. The defendants appealed and repeat their original pleas. The Judge held that the mortgage of 1859, which had merged in the sale of 1861, revived when that sale was cancelled under the decision of the Sudder Dewany Adawlat of 1864: the sale was set aside because it was invalid under the Hindu law. He accepts the argument of the Subordinate Judge in regard to the finality of the order under S. 246, Act VIII of 1859, and he further holds that defendants were not entitled to any refund of Rs. 8,000, as sale-consideration, before redemption could be allowed: if they are entitled to that sum, they could only claim it from Zalim Singh **[459]** personally: they could not claim it from the plaintiff who had purchased the equity of redemption: the defendants had never brought a suit for the recovery of the money. The Judge also allowed the deduction of Rs. 75 yearly from the mortgage-loan as there was no proof that the allowance had been paid.

In second appeal the same pleas are urged. The decision of the Sudder Dewany Adawlat of the 22nd August affirmed that of the Judge, dated 1st March, which set aside the sale of 1861 as not having been made for legitimate family purposes but for the gratification of the personal extravagance of Zalim Singh. It was therefore invalid under the Hindu law. But though the sale was set aside, possession was not given to the plaintiffs, the sons of Zalim Singh. The defendants remained in possession as mortgagees. The sale having been declared altogether inoperative, and having been completely set aside, it cannot be said that the mortgage was extinguished by the execution of the sale-deed. The defendants were simply left in possession as mortgagees. The mortgage transaction has never been impugned, and the plaintiff as the representative of the original mortgagor has certainly a right to redeem the mortgage.

The Courts below appear to have rightly held that, as the defendants objected to the sale by auction of the rights of Zalim Singh and an order was passed against them on the 15th November, 1867, which they had never contested in a regular suit, they could not now deny that the plaintiff had purchased whatever rights still remained to Zalim Singh and his sons. In holding this to be the case the lower appellate Court has

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followed the ruling in *Badri Prasad* v. *Muhammad Yusuj* (1) of this Court in Full Bench.

The lower appellate Court has not, as urged by the appellant, misunderstood this Court's decision of the 27th May, 1867. That decision ruled that, although the sale by Zalim Singh was set aside, yet Zalim Singh (then plaintiff) could not equitably be allowed to retain the purchaser's money and to eject the purchaser from the property sold. He must be held estopped by his own act from pleading the invalidity of the sale. But this decision was passed as against Zalim Singh himself, who on the strength of the Sudder Dewany Adawlat's decision of the 22nd August was seeking to obtain possession of the property from the defendants. But it does not follow [460] that the defendants have a lien on the property to the extent of the purchase-money. They are not in possession under the sale-deed, but were in possession as mortgagees, and as such have continued to be recorded in the Collector's books. The sale had already been declared invalid, when the plaintiff purchased Zalim Singh's rights at auction and acquired by his purchase the right of redeeming the mortgage. If the purchase-money had been received by Zalim Singh who is no longer alive, the purchasers might have sued to recover the purchase-money from him during his life, and might possibly in execution of their decree have proceeded against Zalim's rights and interest in the property. They did not adopt this course, though the sale was, as has been observed, completely set aside by the judgment of the Sudder Dewany Adawlat in 1864. Any claim to recover the money now would appear to be barred by time, and the defendants, mortgagees, can have no right now to make the property responsible for the repayment of the purchase-money on account of the sale in 1861, which was held to be altogether invalid, as against the plaintiff who has purchased the equity of redemption of the mortgage in 1859, and that too after the objections of these defendants had been overruled, and the order made against them on the 15th November, 1867, had become final.

The finding of the lower appellate Court regarding the Rs. 75, "*malikana*," is one of fact, with which we cannot interfere. The Judge in deducting this yearly allowance from the principal of the mortgage-loan has not acted contrary to law, and the plea that he should not have done so, because the term of the mortgage had expired, has no force, inasmuch as the mortgagees have continued to hold possession under the mortgage and as long as they do so are bound by its conditions. We dismiss the appeal and affirm the judgment with costs.

(1) 1 A. 381.

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APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

HIRA LAL (*Plaintiff*) *v.* GANESH PRASAD AND OTHERS (*Defendants*). [10th July 1879.]

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2 A. 415. *Act XIX of 1873 (N.W.P. Land Revenue Act), Ss. 43, 83 and 241, Cl. (b)—Vendor and purchaser—Agreement exempting land from revenue, effect of—Cause of action—Assessment of revenue—Jurisdiction of Civil Court.*

An agreement between the vendor and purchaser of a portion of an estate paying revenue to Government, that the latter should pay to Government the proportionate revenue due on the portion of the estate retained by the former, cannot be enforced against the representatives in title of the purchaser, and beyond the period of Revenue settlement then current, in the absence of proof that it was intended to have such extended operation.

Per SPANKIE, J. When, at a fresh settlement, the purchaser or his representative in title moves the Settlement authorities to settle directly with the vendor or his representative for his portion of the estate, this gives the latter a cause of action to sue for the enforcement of the agreement.

A decision of the Sudder Court, upholding such an agreement, though it may have been regarded by the Settlement authorities as binding on the parties to such decision, during the currency of the then settlement, could not prevent such authorities from settling with the vendor or his representative, who was the proprietor of the estate.

A suit for a declaration of liability for revenue as between the parties only, without prejudice to the Government Revenue, is not barred by S. 241, Cl. (*b*), of Act XIX of 1873, and is cognizable by the Civil Courts.

Per OLDFIELD, J. The Civil Courts cannot relieve a proprietor from liability to pay revenue on his estate (Ss. 43 and 83, Act XIX of 1873).

JUDGMENT.

[416] SPANKIE, J.—The plaintiff, appellant, alleges that Sheo Ghulam Singh, Beni Singh, and Maidan Singh were the owners of a six annas share in taluka Mawaiya in the district of Allahabad: they, **[417]** joining with the owners of a five-annas share in the same estate, sold under a deed of sale of which the correct date is not known, their zamindari rights to one Ghulam Muhammad, on condition that the vendors should remain, in perpetuity, in possession of 1,845 bighas of land as their "*malikana*," without payment of rent, and the rateable Government demand, the latter being payable by the vendees, along with the revenue of the remaining portion of the estate sold: Ghulam Muhammad sold his right to Ghulam Ali, who again sold it to Dulhin Begam, the wife of Ghulam Ahmed, and she transferred it to the defendants: the original vendors sold, on the 7th January, 1851, one half share of the resumed *malikana*, also called "*nankar*" land to Lala Madho Prasad: in the course of time after his death this share passed into the hands of Lala Makhan Lal by auction, in execution of a decree, held on the 20th January, 1873: Makhan Lal died on the 15th June, 1877, and the present plaintiff is his brother, and the proprietor and in possession of the lands in dispute: in the recent settlement the defendants prayed the Settlement Officer to exempt them from the payment of the rateable revenue of these lands, and to make the plaintiff responsible for it: the Settlement Officer on the 28th January, 1875, rejected their prayer: on appeal to the Commissioner, that officer, on the 15th August, 1875, held

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the plaintiff responsible in future for the rateable revenue payable on the land: the Board of Revenue, on the 1st September, 1875, and again in review on the 23rd December, 1875, affirmed the Commissioner's order.

The plaintiff desires to enforce the original contract between the vendors and vendees, whose representatives the parties to the suit are, as against the defendants, and he avers that on the 14th March, 1853, a similar claim regarding this "*nankar*" land was decided by the late Sudder Dewany Adawlat in appeal (1): that decision was final in the case, and is binding upon the present defendants. The relief sought by the plaintiff is as follows: (i) That in accordance with the original contract entered into between the contracting parties, the plaintiff be exempted from paying the rateable revenue as against the defendants without any injury to Government: (ii) That the defendants be ordered to pay, as here-[418] tofore, the revenue of those lands: (iii) That the defendants be ordered never to claim and demand from the plaintiff the revenue they may have to pay for those lands.

The defendants contended that the suit was not cognizable by the Civil Court, and the Settlement Courts had full power to assess the revenue upon the plaintiff, the revenue being payable by the person in proprietary possession of the land, whether or not it has been held as "*nankar*" and rent-free. They also contend that the plaint discloses no cause of action against them: the settlement orders are not an award of right in favour of defendants with respect to the land: the Commissioner and Sudder Board of Revenue simply declare the Government right. They further urge that the original vendees never remitted the rent in perpetuity (*naslan bad naslan*), and if they did, the remission could only be legally in force as against the grantor personally, it cannot be enforced against his heirs and representatives: the decree of the Sudder Dewany Adawlat (1) referred to by plaintiff cannot control the authority and powers of settlement officers whose orders are final and conclusive. They also state that the extent of the "*nankar*" land has been wrongly given in the plaint.

The Subordinate Judge laid down two issues: (i) Whether the settlement order holding the plaintiff liable to pay the Government revenue gives rise to a cause of action against the defendants or not, and whether a suit for a cancelment of such a settlement proceeding is cognizable by the Civil Court or not: (ii) Whether the defendants' predecessors, having remitted in perpetuity the rent of the land in suit, had taken on themselves the payment of it, and whether that act can be enforced in the plaintiff's favour as against the defendants or not. On the first issue the Subordinate Judge held that, if the plaintiff claims to have been originally in possession of the land as "*lakheraj*" without payment of revenue, and that the Settlement Officer had assessed it with revenue, the Settlement Officer's order might be the ground of an action, but the suit should be instituted against Government; but if the plaintiff means that the original vendees had taken upon themselves to pay the revenue of the land in dispute, the cause of action would accrue on the date on [419] which the plaintiff was compelled to pay the revenue for defendants: it might be assumed that when the defendants presented this petition that the plaintiff should be made to pay the revenue, their proceeding gave a cause of action to plaintiff: but the Settlement Officer was competent to cancel the *maafi* grant by a zamindar, and to make the settlement with any one, and although the plaintiff does not ask that his land should continue free of rent, yet his prayer, that the liability for payment of the rent of the land in suit

(1) *Sheo Ghulam Singh* v. *Dulhin Begam*, 8 S. D. A. Rep., N. W. P., 138.

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which has been imposed on him by the Settlement Officer may be removed from him and transferred to the defendants, is one opposed to the terms of S. 241 of Act XIX of 1873. On the second issue the Subordinate Judge's decision is not quite clear. He appears to think that the plea of defendants was based on S. 81 of Act XIX of 1873, and he cites it as in the margin: the defendants had stated that the agreement was entered into in 1830, when the term of settlement expired: none of the parties to the contract were alive, and the performance of the contract could not be enforced against the defendants. This plea, however, the Subordinate Judge considers that he is not called upon to determine, because he finds that the suit in the shape in which it has been brought is not cognizable. He, therefore, dismissed the plaintiff's claim with costs. It is now urged in appeal that the order of the superior settlement authorities declaring that the plaintiff was liable to pay rent on his holding having been made at the instance of the defendants, the lower Court is wrong in finding that there was no cause of action at the date of the suit. The second plea urges that the land being held rent-free under a valid and subsisting contract, and the defendants having ignored that contract in their petition to the Settlement Officer, plaintiff was compelled to sue them in order to establish their liability to himself to continue to pay to the Government the rent due on the holding under the terms of the contract. The third plea insists that as the land had been held rent-free for years prior to the passing of Act XIX of 1873, under a judicial decision, the Settlement Officer had no power to assess the [420] said land with revenue: the lower Court had applied S. 241 erroneously to this suit: the plaint raises no question in or by which the interests of Government are concerned or prejudiced: the purpose of the suit is to have it declared that, as between plaintiff and defendants, the latter are liable for the payment of the rent of the former's holding: the present claim in no way tends to weaken the security for the payment of the Government revenue: it is not denied that the land is liable for the Government demand.

> Grants of land held under a written instrument (whether executed before or after the passing of this Act) by which the grantor expressly agrees that the grant shall not be resumed, shall be held valid as against him (but not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate, which was current at the date of the grant.

On the assumption that the plaintiff can sue to enforce the original contract of sale, as made between the original vendors and vendees, it must, I think, be held that the act of defendants in moving the Settlement Officer to assess the revenue of the land against the plaintiff, and to relieve them of all the liability on account of it, did give a cause of action to the plaintiff. I would, therefore, determine the first plea in his favour. I would also say that the object of the suit appears to be one for the purpose of obtaining a declaration that, as between plaintiff and defendants, the latter are bound to pay the rateable revenue assessed upon the land, and, therefore, it is not one which is barred by S. 241, clause (*b*), Act XIX of 1873. The plaintiff does not sue to set aside the order of the Revenue Courts. Nor does he deny that the Government is entitled to its revenue upon the land. But he prays that the defendants may be ordered for the future to pay the amount themselves in accordance with the terms of the contract. With such an order in his favour plaintiff believes that he would be able to recover annually from the defendants whatever he may have been obliged to pay to the Collector as Government revenue. The circumstances of this case are not those of a grant of rent-free land by a

proprietor. The vendors sold all their rights and interest in their property to the vendees, reserving to themselves the possession of 1,845 bighas of land to be held by them rent-free as "*nankar*," and the vendees bound themselves to pay the *malguzari* of these lands to the Government. It appears to have been part of the sale consideration, or of an "*ikrar-nama*" or deed of agreement, dated the 26th April, 1831, executed after the sale-deed. I fail, therefore, to see that these lands can be regarded as rent or revenue free grants by the proprietor or any other unauthorised person to which the provisions of the Bengal Regulation XIX of 1793, Act X of 1859, or of Act XIX of 1873 could apply. There was no application made by a [421] proprietor to resume a rent-free grant, or to assess rent, as payable to the proprietor, on land held rent-free previous to the passing of Act XIX of 1873 under a judicial decision. Nor was there any claim to hold land free of revenue not recorded as revenue-free. The lands were held rent-free by a private arrangement between the original vendors and vendees, and by the same private arrangement, or one executed shortly afterwards, the vendees bound themselves to pay the revenue rate on the lands to the Government. This, therefore, is not a case in bar of which it might be pleaded that S. 79, and other sections of Act XIX of 1873, applied. The payment of the Government revenue has always been made, and the arrangement made in 1831 did not endanger it. These remarks dispose of the fourth and fifth pleas in appeal.

With regard to the third plea, I cannot say that the Revenue Courts were bound by the decision of the late Sudder Dewany Adawlat (1), dated the 14th March, 1853. The Commissioner, whose order of the 15th April, 1875, was affirmed by the Sudder Board of Revenue, states in his order that the decree was not with the papers in the record before him, but he did not think that it could have been intended to extend beyond the time of the then existing settlement, and irrespective of all the proprietary changes that might take place in these particular lands. But with reference to the terms of S. 83 of Act XIX of 1873 he considered that the land was chargeable with the payment of the Government revenue. This section provides that no length of rent-free occupancy of any land, nor any grant of land by the proprietor, shall release such land from its liability to be charged with the payment of Government revenue. The defendants moved the Settlement Officer to make it so chargeable as they were not the proprietors, whereas the plaintiff was the proprietor.. Indeed, he now mentions that he is so. It is the rule of the Settlement Department to make under S. 43 of Act XIX of 1873 the settlement with the proprietor of the land. In this instance, the defendants did not deny the plaintiff's title to the land, and the judicial decision on which so much stress is laid is, as will be presently seen, not one declaring the land revenue-free as against the Government, but one that declares the defendants then could neither claim rent nor revenue from the plaintiff in [422] that suit. I cannot, therefore, hold that the Commissioner and Sudder Board of Revenue were debarred by that decision from assessing the proprietor in possession of the lands with the Government revenue charged upon it, and in exempting the defendants who were not the proprietors of the land, and were not so recorded in the new settlement record, from all liability with respect to it. In the suit before the Sudder Dewany Adawlat in 1853, the Settlement Officer had enhanced the jama of the taluka, and had been induced by the defendants to charge the rateable rent of the increase upon the plaintiff's predecessors. The

(1) *Sheo Ghulam Singh* v. *Dulhin Begam*, 8 S. D. A. Rep., N. W. P., 138.

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Settlement Officer by an order dated the 15th January, 1839, did so. The Judges of the Sudder Dewany Adawlat certainly do find that the conditions of the sale-deed were that the vendors should be allowed to retain possession of 1,845 bighas of sir-land free of either rent or revenue. But the Court also held that the Settlement Officer was of course justified in assessing the jama of the taluka with reference to the produce of every bigha which was not held rent-free under a recognised Government grant, but he was not at liberty to demand payment from those who had been by private contract exempted from payment of either rent or revenue, contrary to the agreement entered into between the parties. The Court's judgment goes on to show that in 1831 the Benares Court of Appeal, by order dated the 6th May, distinctly ordered the *malguzari* of the 1,450 bighas should be taken from the purchasers, Shah Muhammad Khan and others, and *not* from the old zamindars. But this Ghulam Muhammad was one of the original vendees whose names were recorded in the sale-deed, though the real purchaser was Ghulam Ahmed, whose dependents they were, and as the Judges of the Sudder Dewany Adawlat found that these vendees had admitted their liability to pay the revenue, and in fact had paid it after the sale had fully operated, they very reasonably would and did hold that the defendant in that suit was not at liberty to take rent in any shape from the then plaintiffs, for the defendant was Dulhin Begam, the widow of Ghulam Ahmed referred to above as the real purchaser. During the current settlement at least she could not divest herself of the liability to continue to pay the Government revenue on these lands. When the settlement had expired and Act XIX of 1873 came into operation, S. 83 of which declares that **[423]** no length of rent-free occupancy, nor any grant of land made by the proprietor, shall relieve such land from its liability to be charged with the payment of Government revenue, the judicial decision of the Sudder Dewany Adawlat in 1853 might readily be regarded by the Revenue Courts as binding on the parties then before the Court, and for the term of the current settlement, and as not in any way controlling their power to assess the land and settle it with the admitted proprietor. So far then as the third plea contends that the superior Revenue Courts had no power to assess the land in dispute with revenue, and if it is meant to urge that they exceeded their jurisdiction in doing so, it fails altogether.

I am now brought to the consideration of the most important plea in the case, and that is the second. If the alleged contract is valid and still subsisting between the parties, it may be that the plaintiff is entitled to the declaration for which he prays. There is no doubt that there was a deed of sale, and that there was subsequently on the 26th April an "*ikrarnama*" or agreement between the original vendors and vendees, which latter instrument the Judges of the Sudder Dewany Adawlat believed to have been executed because the vendors doubted the good faith of the vendees. The Court also has held that this "*nankar*" land was included in the sale. The judgment states that "in a proceeding of the Benares Court of Appeal under date 6th May, 1831, the Court find it stated that Shah Muhammad Khan and others, petitioners, had represented to the Court that Mehdu Singh and other zamindars had sold their eleven-anna share to them with the reservation (ba istasnai) of 1,450 bighas *sir do biswe nankar malikana haq-i-khud*, and that as the *malguzari* of this excepted land was payable by them (the petitioners) and not by the sellers, they prayed that the revenue might be demanded from the petitioners, and not from the sellers, and that the *dastaks* which had been issued against the latter might be recalled, and an order to the above effect was passed

accordingly: the obvious meaning of the passage in the vernacular above quoted is that the old zamindars had stipulated that they should be allowed the 1,450 bighas *free of rent*, and the Court cannot accept the construction which the respondent would put upon the words, *viz.*, that the land was altogether excepted from the sale, nor that suggested by the Principal Sudder Amin, *viz.*, that **[424]** all the petitioners meant was that the revenue of the 1,450 bighas should be paid by the old zamindars through them, and not direct into the Government treasury."

We must, therefore, accept the Court's judgment as final as to the fact that the land in suit was included in the sale in 1831, and this, indeed, is not denied by the defendants. We must also admit that the vendees remitted the rent of 1,450 bighas, and also that they bound themselves to pay the Government revenue on the land.

But the Court's judgment is by no means clear as to the exact conditions of the deed and *ikrar-nama* on certain very material points, and if the decision is obscure on these points, the decree is not clearer. The Court decreed in favour of the appellants (before the Court) for possession of the land exempt from the payment of revenue and *wasilat* to the amount claimed by them. But the decree is silent as to the duration of this exemption from paying revenue. Neither the sale-deed nor the *ikrar-nama* were before the Court; the latter instrument, indeed, was filed in appeal, but was not produced in the Court of first instance. The Court, therefore, would not admit it in evidence, considering that it would be improper and opposed to judicial usage to do so. At the same time, however, they state that they "are enabled to form an opinion regarding its contents and purport from the secondary evidence adduced by the appellants." This admission of secondary evidence to prove the contents of a document which they might have allowed to be filed, if they pleased, would now be regarded as equally opposed to judicial usage and practice. It is most unfortunate that the document was not considered, as the excuse assigned by the appellants for not producing it before the Subordinate Judge was not to my mind at all satisfactory. They said that the opposite party had by a ruse contrived to get temporary possession of it, and that while it was thus in their custody they fraudulently made certain alterations in it, which rendered its production in a Court of Justice impossible. Yet they did produce it before the Sudder Dewany Adawlat, and they do not explain how they again got possession of it. The other side might have said with some show of reason that it was not produced in the first Court, because it bore marks of fraudulent alteration, and that its production before the Appellate Court was with a view to prejudice the case against respondent.

[425] However, the Court accepting the secondary evidence has not gone further in declaring the nature and conditions of the deed of sale, or after-agreement, than this that the sellers were to be allowed to retain possession of 1,450 bighas of sir land free from either rent or revenue. The decision does not say whether the arrangement is one solely between the parties and to have force during the current settlement, or whether it is binding for ever on the parties or their heirs and successors. I cannot find in the judgment any trace of a condition making the arrangement one that was to last for ever. I can understand the vendors receiving for their own support a certain extent of sir lands, but no plausible reason is assigned why the vendee should pay the rateable revenue on the land beyond the term of settlement, apparently then about to commence and lasting for thirty years. We meet with cases where indulgence is shown for a term of settlement, but I have not found it usual in my experience that vendees, in leasing a plot of land to the vendors and remitting the

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rent, have also undertaken to pay the rateable Government demand on the land for ever.

I would also add that there seems to have been contention from the very first regarding the transaction. We have the authority of the Sudder Dewany Adawlat for the fact that a deed of agreement was executed in April, 1831, to make matters clearer, because the vendors had commenced to doubt the good faith of the vendees. If this were so, the conditions could not have been very fully stated in the deed of sale. It may be urged that the circumstance that the defendants and their predecessors have continued to pay the revenue for so many years is in favour of the assumption that they were bound by the contract, and must do so for ever, as long as they were simply transferees by private sale. But I would answer to this, that so far back as 1831 litigation commenced in regard to the plot, that it recommenced in 1853, when the opportunity presented itself, and that when the settlement had expired, and a new settlement and record were in progress, the defendants at once endeavoured to relieve themselves of any liability for the revenue of this land. These circumstances show that the liability was not at first readily accepted, and has not been admitted subsequently. There was little expectation after the judicial decisions in 1831 and 1853 that any attempt to impose rent upon the land would be successful, and since 1853 **[426]** and during the currency of the settlement any attempt to make the plaintiff responsible for the revenue would have been hopeless. But when Act XIX of 1873 had come into force, a new settlement was in progress. an opportunity was offered whereby, when the proprietary nature of the plaintiff was admitted and recorded, the latter should be treated as proprietor and made responsible for the revenue. If the defendants are to be made liable to plaintiff for the revenue assessed upon his holding, it must be shown that they are so liable under the terms of the contract and deed of agreement. These instruments are not before us. The decision of 1853 was binding on the parties then before the Court, one of whom was the widow of the real purchaser of the zamindari rights of the vendors. That decision binds those parties, but as pointed out it nowhere declares the extent of the liability of the successors of the original vendors. In the absence of the deed of sale and of agreement I cannot say whether or not the arrangement was to go beyond the current settlement, and whether or not the contract bound the present defendant. I have advanced reasons for believing that the arrangement was not one that bound the parties "*naslan bad naslan*," and in the absence of the original documents and of any evidence of a conclusive character that the arrangement was intended to be something more than a personal liability attaching to the vendors during the current settlement, and that it was to be regarded as imposing a charge on the property of the vendors in future, I could not decree the present claim, which is one of unusual character. unsupported by the evidence which a Court ought to have before it when declaring any liability under a contract, and resting solely upon a decision passed more than twenty years ago, and which appears to be conclusive solely as between the parties then litigating.

Entertaining this view of the case, I would dismiss the appeal and affirm, though for different reasons, the decision of the lower Court with costs.

OLDFIELD, J.—Upon the questions which arise in this appeal, I am of opinion that the plaintiff, who is proprietor of the land, cannot escape his liability to the Government for the revenue assessed on this land, with reference to the provisions of Ss. 83 and 43, Act XIX of 1873, since by S. 83 no length of rent-free occupancy of any land, nor any grant of land

made by the proprietor, [427] shall release, such land from its liability to be charged with the payment of Government revenue, and by S. 43 it is obligatory on the Settlement Officer to make the settlement with the proprietor of the land. The effect of these sections appears to me to be to render the plaintiff liable to pay revenue to the State upon this land, and the Court cannot give the relief sought, as it would in effect annul the settlement and relieve the plaintiff of a liability for revenue to the State, which the law imposes, nor could it be granted in this suit to which the Government is no party.

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The plaintiff further seeks substantially to have it declared that as between him and defendants the latter are bound to make good to the plaintiff the rateable amount of revenue assessed on the land and payable by plaintiff to the State; and he seeks to impose this liability with reference to a breach of the terms of the original contract by which the original vendors, now represented by plaintiff, sold their property to the original vendees, from whom it has passed to the defendants; one of the conditions of the sale being that the original vendors should not be liable to pay revenue on a certain quantity of land, exempted from the sale, and which is part of that now in suit. But I am not of opinion that this liability for breach of the original contract is shown to be incurred by defendants. There is nothing to show that that liability was other than one personal to the parties to the original contract. The defendants are some of a series of purchasers of the property sold, and the circumstance of their purchasing the property will not suffice to saddle them with a liability for breach of the conditions of the original contract.

The decision of the Sudder Dewany Adawlat on which plaintiff relies was one in which Dulhin Begam from whom the defendants have obtained the property was defendant, but it cannot be said to have gone so far as to fix this liability on these defendants, by determining that the possession and ownership of the property sold under the original contract, carries with it a liability on the part of whoever is owner to make good loss to the original vendors or their representatives incurred by a breach of the original contract. I therefore concur in dismissing the appeal with costs.

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PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

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HUSAIN SHAH AND OTHERS (*Plaintiffs*) *v.* GOPAL RAI AND ANOTHER (*Defendants*). [14th July 1879.]

2 A. 428.

Landlord and tenant—Act XVIII of 1873 (N.W.P. Rent Act)—Application under S. 39—Decision of title under lease—Res judicata.

The decision of a Revenue Court on a question of title under a lease, on an application under S. 39 of the Rent Act, is not *res judicata* in a subsequent civil suit where the question is one peculiarly within the jurisdiction of a Civil Court, and not one which a Revenue Court is competent finally to decide on an application under S. 39, however sufficient the decision may have been for the purpose of disposing of such application.

Held, accordingly, in a suit to have the terms of a lease corrected, by the cancelment or removal of a word fraudulently inserted in it, so as to alter its intended character, that a decision of the Revenue Court, upholding the claim of the defendants on the deed, as it stood, was not *res judicata*.

[F., 20 A. 241 (245) = 18 A.W.N. 29; R., 18 A. 270 (272) (F.B.), 26 A. 468 (471) = 24 A.W.N. 109.]

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JUDGMENT.

[428] OLDFIELD, J.—The relief sought by the plaintiffs is to have the word "*istimrari*," or perpetual, cancelled in a deed of lease executed on the 19th July, 1864, on the ground that this word was fraudulently entered in the deed by the defendants in collusion with the writer of the deed. It appears that the lessees, who are the defendants, respondents, before us, applied in the Revenue Court, under S. 39 of Act XVIII of 1873, to contest a notice of ejectment which the plaintiffs, appellants, had served on them, and in that matter they pleaded that they had a right of occupancy and held under a perpe-[429]tual lease. The Revenue Court decided that no right of occupancy had accrued, since twelve years had not expired since the expiration of the ten years which was the term of the lease, *i.e.*, from 1864 to 1874, but it went on to decide that, with reference to the entry of the word *istimrari*, the lease must be held to have been given in perpetuity. There is clearly some inconsistency in the finding, which makes the lease out to be at the same time for a term of ten years and in perpetuity, but we are not concerned with the point now. The lower appellate Court has dismissed the suit on the ground that it is barred with reference to the decision of the Revenue Court. The decision of the lower appellate Court cannot be maintained. The question in this suit is the fraudulent insertion in a deed of a word by which the intended character of the deed is altered, and the object of the suit is to have the terms of the deed corrected. This is a matter peculiarly within the jurisdiction of a Civil Court, and was not one of those which a Revenue Court was competent finally to decide in the matter of an application made under S. 39, Act XVIII of 1873, however sufficient the decision may have been for the purpose of disposing of that application. We reverse the decree of the lower appellate Court and remand the case for trial on the merits. Costs to follow the result.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

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JULY 15.

KANAHIA AND ANOTHER (*Plaintiffs*) *v.* RAM KISHEN AND OTHERS (*Defendants*). [15th July 1879.]

APPEL-LATE CIVIL.

2 A. 429.

Jurisdiction of Civil and Revenue Courts—N.W.P. Rent Act (XVIII of 1873).

Where, in a suit by the landlord for declaration of proprietary right and possession, the tenant (defendant) while professing to admit the plaintiff's title as owner, pleads that he pays the revenue on the land, and denies the plaintiff's right to rent, and calls himself a tenant at a fixed rate, he virtually denies the plaintiff's title as owner and sets up his own; the matter is one for the Civil Courts to decide. Assuming the defendant's tenancy is established, the Revenue Court will then have jurisdiction to decide upon the plaintiff's claim for rent and for ejectment of the tenant.

[Appl., 2 A.W.N. 58; **R.**, 18 A. 270 (272) **(F.B.)**; **D.**, 7 A. 148.**]**

JUDGMENT.

[430] OLDFIELD, J.—The plaintiffs sue to obtain possession and a declaration of their proprietary right in respect of 37 bighas, 13 biswas of land, alleging that defendants are their tenants and liable to pay rent for the

land. The defendants, while professing to admit the plaintiffs' title to be owners, say that they pay the revenue on this land, pay no rent, and deny the plaintiffs' right to rent, and they cali themselves tenants at fixed rates, and they aver that the case is not one cognizable by the Civil Court. The Munsif has disallowed this objection: he holds that their defence substantially amounts to a denial of the proprietary title of the plaintiffs and sets up their own title, and he proceeds to decide in favour of the plaintiffs' title and right to demand rent from the defendants, while he refers the plaintiffs to the Revenue Court to eject the defendants and to recover rent from them. The lower appellate Court has reversed the decree and dismissed the suit on the ground that the Civil Court has no jurisdiction to try it. We are of opinion that the view taken by the Munsif is correct. The defendants do in substance deny the plaintiffs' title as owner and set up their own, when they aver that they have a right to pay the revenue on the land to the Government, and are not liable to pay rent to the plaintiffs. The latter have clearly a cause of action for obtaining a declaration of their right to be owners and to demand rent from the defendants, and this matter is one which the Civil Court must decide, leaving the plaintiffs to have recourse to the Revenue Court to eject the defendants, and to recover rent from them, supposing their position as tenants is established. We reverse the decree of the Subordinate Judge, and remand the case for trial on the merits. Costs to follow the result.

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APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Spankie.

1879 JULY 17. — APPELLATE CRIMINAL. — 2 A. 336.

EMPRESS OF INDIA v. MURLI. [17th July 1879.]

2 A. 336.

Crim. Pro. Code, 1872, S. 297—High Court—Powers of revision.

The High Court is not precluded from the exercise of the powers of revision in a case where there has been a conviction on evidence which has received no sifting, and which in many respects is so transparently false that, if it had been at all tested, its falsehood could not have escaped notice.

[R., 14 B. 331 (345).]

JUDGMENT.

[337] SPANKIE, J.—The petitioner, convict No. 21013, Murli, is undergoing sentence of transportation for life in the penal settlement of Port Blair. He was convicted on the 27th April, 1875, by Mr. H. G. Keene, the Sessions Judge of Agra, on a charge of dacoity, under S. 395 of the Indian Penal Code. Six other persons, Harphal, Dipa, Bhawani, Dhan Singh, Bhima, and Jhentar were tried at Agra with him. Jhentar was discharged by the Sessions Judge, and the others, including Murli, were transported for life. The five persons appealed to this Court, and on the 26th June, 1875 were acquitted, and it was directed that they should be released. Murli did not appeal at the time, but does so now in a petition received through the Chief Commissioner of the Andaman and Nicobar Islands and Superintendent of Port Blair and Nicobars, that officer following the instructions conveyed to him in the letter of the Secretary to the

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2 A. 336.

Government, Home Department (1). Murli states that he was undergoing imprisonment for two years, on conviction of the offence of being in possession of stolen property, knowing the same to have been acquired by theft, when he was named by Pita, an informer, as having been one of the persons concerned in dacoity. He was put on his trial before the Sessions Judge of Agra, and convicted and sentenced to transportation for [338] life. Five persons appealed and were released. But he (Murli) was unable to represent his case at that time, having neither funds nor friends. Since his arrival in the penal settlement he has succeeded in obtaining a copy of the judgment of the Sessions Judge of Agra, and now appeals from the order passed by him. The prisoner ought to have appealed to this Court in sixty days from the date of the sentence, the 27th April, 1875. The period of limitation has so long expired, and the explanation of the delay in appealing, though there may be some truth in it, is not altogether satisfactory, that I feel compelled to disallow the appeal. It is the case that all convicts have a right of appeal once, but that right is subject to the law of limitation, and I think that it would be unwise so to apply S. 5 of this law as to encourage the idea amongst the convicts of a penal settlement that they can at any time, as in this case, five years after the date of their conviction, appeal to this Court. At the same time, being well acquainted with the facts of the case, as I decided the appeal of the five other persons who had been transported for life, I am quite prepared to admit the petition as one for revision of the proceedings.

The case of Murli is on all fours with that of Harphal and others, and the same reasons which influenced my decision with respect to those appellants, lead me now to say that there is no satisfactory evidence to justify the conviction of Murli, and he ought to be released. My reasons will appear from the copy of my judgment in the case of Harphal and others which I have directed should be put up with this proceeding. I cannot at this time remember how it happened that I did not consider, as a Court of Revision, the case of the petitioner. I can only attribute my not having done so to the uncertainty that prevailed in this respect as to whether the Court was at liberty to interfere with the conviction of a prisoner who had not appealed, (when dealing with the case of any person tried with him who had appealed) simply on a question of credibility of evidence. Later decisions both of this and of other Courts for years past have not tended to remove this uncertainty as to what is or is not a material error in a judicial proceeding. I am myself inclined, indeed I have acted in other cases in this view, to regard great laxity in weighing and testing evidence as a material error in a judicial-proceeding [339] and looking at the trial in this case, it would seem to me that there had been great indifference and laxity on the part of the Sessions Judge in this respect. Accepting, however, the judgment of this Court in Full Bench in the matter of *Hardeo* (2) I believe that I have the power of interfering now with the conviction of Murli. If we are not precluded by a judgment of acquittal from exercising the power of revision under S. 297 of Act X of 1872, we cannot be precluded from doing so, where there has been a conviction on evidence which has received no sifting, and which in many respects is so transparently false that, if it had been at all tested, its falsehood could not have escaped notice. And in this opinion I am fortified by the amended new Code of Criminal Procedure of 1879.

(1) Mr. Officiating Secretary Bernard, C.S.I., dated 14th April, 1879, to Superintendent of Port Blair and Nicobar Islands.

(2) 1 A. 139.

It seems that the dubious character of S. 297, Act X of 1872, has now been fully admitted. S. 439 of the amended Code, if it stand in the Act when passed, provides that the High Court as one of Revision may exercise all the powers of an Appellate Court with regard to appeals from convictions. Being of the opinion that I have the power of revision in this case, in which opinion my honorable colleagues, to whom the papers have been circulated, acquiesce, I have no hesitation in saying that the conviction of Murli ought not to be maintained, but that he ought to be at once released. I therefore annul the conviction of Murli and the sentence passed upon him and direct his release.

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CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* THOMPSON. [18th July 1879.]

2 A. 339.

1879 JULY 18. — CRIMINAL JURISDICTION. — 2 A. 339.

Crim. Pro. Code, 1872, S. 188—Charge of adultery—Compounding of offence—Penal Code, S. 497.

Where, after the conviction by a Sessions Judge of a person charged with adultery, and during the pendency of the appeal in the High Court, the complainant who had taken his wife back to live with him, had asked the High Court to be allowed to compound the offence, *held*, that the sanction for compounding could not be given at that stage of the proceeding.

JUDGMENT.

[340] OLDFIELD, J.—Since the conviction (1) by the Sessions Judge the complainant has taken his wife back to live with him, and has asked this Court to be allowed to compound the offence, a sanction which cannot be given at this stage of the proceedings, but looking to the existing relation between the parties and the fact that the prisoner Thompson has been in custody since the 5th May, the Court is of opinion that the punishment already undergone will suffice, and his release is directed.

PRIVY COUNCIL.

PRESENT :

Sir Montague E. Smith, Sir Robert P. Collier, and Sir Henry S. Keating.

1879 JULY 19. — PRIVY COUNCIL. — 3 Suth. P.C. J. 690 = Bal. 335.

On Appeal from the Court of the Commissioner of Roy Bareilly in Oudh.

RAJAH BIJAI BAHADUR SINGH *v.* BABOO BHYRON BUX SINGH.

[19th July 1879.]

3 Suth. P.C.J. 690 = Bal. 335.

Grant by the father—Confirming grant by the son.

Where the appellant's father granted a pottah of a certain village mortgaged to him, in favour of the respondent, promising, in the event of the mortgagor redeeming the same, to make over to him in lieu thereof other villages yielding an equal revenue, and subsequently the appellant confirmed that grant but making no reference to the provision in the earlier grant as to substitution : *held*, that the appellant was bound by his father's agreement to make over to the respondent villages yielding a revenue equal to that of the village granted to him, when the latter village was redeemed by the mortgagor.

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(1) of the appellant on a charge of adultery.

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3 Suth. P.C. J. 690 = Bal. 335.

JUDGMENT.

[690] SIR MONTAGUE E. SMITH.—Their Lordships, after giving full consideration to the arguments of Mr. Arathoon in support of his appeal, do not see their way to disturb the concurrent judgments of the two Courts below.

[691] The action was brought by the respondent Bhyron Bux Singh, who is the illegitimate son of Rajah Shumshare Bahadur Singh, against the appellant Rajah Bijai Bahadur Singh, who is the legitimate son of the late Rajah, and his claim was to obtain villages or shares of villages in talook Behlolpur, yielding an annual jumma of Rs. 3,650, in lieu of a village called Sawansa which had been given to him by various pottahs executed by his father, and by other pottahs which were executed by the present Rajah.

The first pottah is one which by the English date was made on the 14th June, 1846. It seems that the village Sawansa was under mortgage to the late Rajah, who appeared to entertain a doubt whether the mortgagor would redeem it; but in the grant of it to his illegitimate son he made a provision for the event of the mortgagor redeeming the estate. The grant is in these terms: "I, Rajah Shumshare Bahadur Singh, do hereby declare that I, having obtained talooka Sawansa by mortgage, have given it as a zemindary grant to Baboo Bhyron Bux Singh and relinquish my claim in his favor." Then, "In the event of the mortgage being redeemed, I will make over to him in lieu of the Sawansa estate villages from talooka Behlolpur yielding an equal revenue. I have therefore executed this as a zemindary grant lease." That is a clear provision that in the event of the village Sawansa being redeemed, other villages of equal value shall be substituted for it.

The next grant from the father is on the 27th November, 1847, which is in confirmation of the former grant, but gives the estate on more favorable terms: "I, the Rajah, give the entire talooka of Sawansa, etc., including land revenue and cesses, as rent free nankar to Baboo Bhyron Bux." It is given rent free, and, therefore, on terms more favorable to the son.

Then there is a further grant in the lifetime of the father on the 28th August, 1850. It seems to have been made by the Rani on behalf of the Rajah. It is stated in the Record to be "executed by Rani Bulraj Kinwar"; but the grant is in the following terms:—"Rajah Shumshare Bahadur Singh. I execute this as an ancestral zemindary lease of Ghatampur, Raepur, Muarpur, and Manyarpur, in favor of Bhyron Bux Singh. He is to have these villages rent free." That is a grant of other villages than Sawansa, and is only material as part of the history of the gifts made by the father to the illegitimate son. These grants were all made in the time of the Nawab, and before the conquest of Oudh by the British. That conquest having taken place, and Lord Canning's proclamation confiscating the estates in Oudh having been made on the 15th March, 1858, the present appellant obtained the sunnud of the Behlolpur talook from the British Government; but before he got the sunnud, and presumably after the British Government had settled the talook with him, he granted two pottahs to his brother, which are material in considering the position in which the two brothers stood at the time when the present dispute arose between them.

The first of these pottahs is dated the 9th August, 1858, and is in these terms: "I, Rajah Bijai Bahadur Singh of Pergunnah Partabgarh, have given talooka Sawansa to Baboo Bhyron Bux Singh as a zemindary for his maintenance. I will take Rs. 2,501 as rent by usual instalments."

He grants to his brother the talooka Sawansa, but reserves a rent of Rs. 2,501. By a postscript to the grant the rent is virtually reduced by Rs. 500. This is the postscript: "He is to receive further Rs. 500 nankar annually, leaving the rent payable to be Rs. 2,001. I will have no objection to having the said amount deducted." That grant does not refer to the provision in the original grant by the father for the substitution of other villages in case Sawansa should be redeemed; but in a subsequent grant, which is of the date of 17th November, 1861, there is a passage, the construction of which has been disputed, and to which reference will presently be made. That grant is: "I, Rajah Bijai Bahadur Singh, of Pergunnah Partabgarh, do hereby execute this as a lease of the whole of talooka Sawansa, including land [692] revenue and sayer, and of the villages of Raepur, Kalan, and Ghatumpur in talooka Behiolpur," which were the villages mentioned in the subsidiary grant of the father, —" in favor of my brother Bhyron Bux Singh, at an annual rent of Rs. 2,001 Queen's coin, which he will pay by usual instalments. This lease is given to him in perpetuity." Then there is this passage: "Whatever Dadwa Sahab, my father, had granted, I have maintained also." These words were obviously inserted with reference to something beyond what had been contained in the previous part of the grant; and their Lordships think it may reasonably be inferred that it was intended by the Rajah to confirm by these words that part of the father's grant which provided for the substitution of villages in case Sawansa was redeemed and taken away from his illegitimate son. There is nothing else shown to which these words could refer. These are the grants on which the plaintiff founds his case.

What happened was, that after the Act XIII of 1866 had been passed, by which it was understood that the rights of mortgagors were set up and the bar of limitation removed, the mortgagor of the estate of Sawansa took proceedings to redeem it, and obtained a decree for redemption. That decree was obtained in a suit against the Rajah and his illegitimate brother; both were bound by it, and the estate of Sawansa passed from the hands of the illegitimate son into the possession of the mortgagor. He was therefore deprived of the estate which his father had given, and his brother had confirmed to him.

That being his position, he brought this suit in order to obtain other villages in the talook in substitution for the estate which he had thus lost. The first and great defence of the present Rajah is that he was not entitled to anything; that the agreement in the father's original grant that the estate should be substituted was not continued in the father's subsequent grants, and was not contained in the grants made by himself. Their Lordships, however, think that the father's subsequent grants did not abrogate this agreement, and they have already declared their opinion to be that in the last grant, which he himself made, he confirmed it. They are, therefore, clearly of opinion that the plaintiff was entitled to this substitution, unless something has occurred subsequently between the brothers to deprive him of that right.

Now it is said that there was an agreement made at the time of the settlement of this talooka before the Settlement Officer which destroyed the plaintiff's right altogether; or, if it did not destroy his right, altered the terms upon which he was entitled to get a substituted estate. The settlement proceedings are, unfortunately, not set out at length in the Record. So much as appears of them is to be found at page 10. It would seem that at the time of the settlement the present plaintiff put forward a claim—this was before the redemption of the Sawansa estate—to have

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Sawansa settled with him as an under-proprietor. This claim is not upon the Record, and what we have is a petition of the Rajah, which recites it. His petition is: "That the claim brought in your Court by Baboo Bhyron Bux Singh to under-proprietary right of talooka Sawansa is just. The estate has all along been in his possession, under a zemindary grant made by Rajah Shumshare Bahadur Singh, petitioner's father, as well as under the grant made by petitioner himself; the petitioner, therefore, prays that the name of Baboo Bhyron Bux be recorded as under-proprietor of Sawansa estate included in talooka Behlolpur, Pergunnah Partabgarh, without any condition, to which I have no objection, and I admit the claim in every way, but the estate should remain included in talooka Behlolpur."

Now, although we have not the claim, it may be presumed from the Rajah's petition that the plaintiff based it upon the grants to which reference has been made, and therefore that the claim was to have this estate upon payment to the Rajah of, at most, a rent of Rs. 2,001; and if the Record had shown no more than this petition, there would be nothing to show an intention to alter the plaintiff's [693] right to have an estate substituted in the event of Sawansa being taken away, or the terms on which he was to hold either Sawansa or the substituted estate.

But it is said that what follows, although it may not displace the plaintiff's right to have an estate substituted, does interfere with his right to have it upon the old terms, that is, upon the terms of paying the rent of Rs. 2,001. It is contended that it creates an arrangement by which he was to hold the Sawansa estate upon the terms of paying Government revenue and a malikhana of 5 per cent. to the Rajah. The whole of that contention is based upon the order of the Settlement Officer, which is in these terms:—"Rajah Bijai Bahadur Singh personally filed this to-day,"—that is, referring to his petition,—"and admitted its contents. As Baboo Bhyron Bux is to be recorded under-proprietor of the Sawansa estate without condition, it is desirable, for the security of the talooka, that his liability to pay the talookdary allowance at the rate of 5 per cent. besides the jumma, which may be fixed, should be noted; and as the Rajah and Baboo Bhyron Bux assent to this: Ordered, that the name of Baboo Bhyron Bux be entered as under-proprietor of all the villages in talooka Sawansa." That is a note of the Settlement Officer. It, no doubt, is stated to have been assented to by the Rajah and by Bhyron Bux, but it would be unreasonable to come to the conclusion from this unexplained note of the Settlement Officer, which he has inserted in his order, that the brothers intended so materially to change the arrangements which had existed up to that moment, and which were recognized in the petition filed by the Rajah,—so materially that the plaintiff, instead of paying a rent of Rs. 2,001, would have to pay a rent, including the Government revenue and the malikhana, of Rs. 3,650. It may be that this note was only intended for the purposes of the Government; but however that may be, there is nothing which is so clear and free from ambiguity that it can be relied on to establish that the brothers intended to alter the rights as they existed between themselves at the time when the settlement was made, and when the petition of the Rajah was filed assenting to the plaintiff's claim in all its terms.

Their Lordships would have been glad to know what was actually done, and what was the rent really paid by the plaintiff after the settlement was made, but the Record is entirely silent upon these things. That this question could not have been overlooked in the Courts below is plain, for an issue was framed in order to raise the question whether these settlement proceedings did alter the arrangement as it existed between the

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brothers. That issue is the fifth: "Were the conditions of the pottah of 15th Katik, 1269 Fusli, or of the pottah of 5th Par Buddi, 1255 Fusli, affected by the settlement decree of the 22nd March, 1862 to the detriment of the plaintiff's present claim." The Officiating Deputy Commissioner, without giving any reasons, records a verdict for the plaintiff on that issue. But the attention of the Commissioner was expressly directed to this question, and in his judgment their Lordships find this paragraph: "The decree of the Settlement Court does not, I think, affect the merits of the claim. That decree goes no further than to record the status of the plaintiff." Their Lordships apprehend the meaning of that to be the status of the plaintiff as an under-proprietor, and are disposed to think that if the effect of the order had been that for which Mr. Arathoon contends, these Judges—the Assistant Commissioner and the Commissioner—would have known that that was so. They are much better acquainted with what is meant by the orders of the Settlement Officers than their Lordships can be, and they had the means of satisfying themselves as to what this order really meant by reference to the proceedings or by directing enquiries. Their Lordships think that credit must be given to the Judges below who had their attention called to the issue and to the decree which is referred to in it, that they did not form their opinion without due investigation and consideration.

On the whole, therefore, their Lordships think that it would be exceedingly dangerous for them to act upon the speculation that this note embodied in the **[694]** order of the Settlement Officer was intended to override the former arrangement of these parties. They will therefore humbly advise Her Majesty that the judgments appealed from should be affirmed, and this appeal dismissed.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

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APPELLATE CIVIL.
2 A. 460.

KAMAL SINGH (*Plaintiff*) *v.* BATUL FATIMA (*Defendant*).

[25th July 1879.]

2 A. 460.

Entry in record-of-rights—Whether amounts to trust—Purchaser without notice.

An entry in a village record-of-rights, caused by the recorded proprietors of a share to be made therein, to the effect that a certain person claimed a portion of such share, and that they were willing to admit his right, whenever he paid them a certain amount of money, does not amount to a declaration of trust in favour of such person, and cannot be regarded as evidence of any such trust. Even if it could be held to be a trust, the property cannot be followed in the hands of a purchaser for value without notice.

[R., 9 A. 97 (101)=6 A.W.N. (303)].

JUDGMENT.

[462] SPANKIE, J.—The property in suit was recorded in the name of Kesri Singh, who fell into arrears in 1838 to the amount of Rs. 108. In 1839 Ratan Singh and Dirgpal Singh bought the rights and interests of Kesri Singh, and in 1840 they paid up the arrears of the entire share of four biswas. It is now alleged that Bal Singh, a brother of Kesri Singh, was

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also the owner of half the land, and the plaintiff relies upon an entry (1) in the settlement record of 1840, which it is contended not only amounts to a recognition of Bal Singh's title by Ratan Singh and Dirgpal Singh, but shows that they continue to hold Bal Singh's share in trust, and plaintiff now seeks to pay the share of arrears due by Bal Singh and to take over the share. We are far from satisfied that [463] the acknowledgment can be regarded as evidence of a trust as between Bal Singh and the original purchasers of Kesri Singh's rights. The entry is to the effect that a petition had been presented by Bal Singh claiming to be the owner of half of the four biswas in possession of Ratan Singh and Dirgpal Singh, and that the latter are willing to allow his share, when he pays the arrears due on it. We doubt whether these words are sufficient to raise a valid trust such as that which the plaintiff is endeavouring to set up. There is no undertaking on the part of Ratan Singh and Dirgpal Singh that they would continue to hold Bal Singh's share in trust for him and his heirs, over any extent of time, until some one of them was able to recover the land. In effect they did not do more than express their willingness, if Bal Singh chose to pay up his arrears, to give him up the land. Bal Singh might have availed himself of this opportunity, but he never did. There does not appear to have been any promise to give up the land at any future time after long years of enjoyment of it to any other person than Bal Singh. If there was any agreement at all, it was a present one between the parties, but beyond the entry already referred to there is no sufficient evidence of any agreement, and Ratan Singh and Dirgpal Singh continued to be recorded as the owners of the entire four biswas. They were not the first purchasers of Kesri Singh's rights, which had been brought previously by one Pitambar Singh, and had been sold by him to Ratan Singh and Dirgpal Singh on the 7th June, 1839, and it was probably owing to this circumstance, and not caring to litigate the point whether Pitambar Singh had bought four or two biswas, when he purchased Kesri Singh's rights, they, who had paid up the arrears due to Government on the entire share, which was recorded in the name of Kesri Singh alone, were willing to release two biswas to Bal Singh, if he chose to discharge the arrears that would be payable by him. Beyond what has been stated there is nothing to show that the transaction had any of the characteristics of a trust. Pitambar Singh was put in possession of the share; Ratan Singh and Dirgpal Singh purchased it from him, and had to pay Rs. 108, Government arrears, on account of it, and certainly obtained possession of the four biswas as Kesri Singh's. They continued to hold them as owners, being recorded as such in the settlement record, until Dirgpal Singh [464] died, and subsequently Ratan Singh and his brother Mardan Singh sold the four biswas on the 20th November, 1843, to the defendant's husband, in whose possession and that of his family the property remained for twenty-nine years before the plaintiff made any claim to it in 1874, to the Settlement Officer, who in October, 1874, rejected his claim. The plaintiff then allowed two years and a half to elapse before he brought the present suit (2). The lower appellate Court, after reviewing the old Regulations which related to transfers by the Collector of a defaulting share or patti of an estate, distinguishes the alleged transfer in this case from those made by authority,

(1) "We Ratan Singh and Dirgpal Singh have purchased Kesri Singh's share: Bal Singh claims a moiety of it: he owes us Rs. 54 on account of the revenue we have paid: whenever he pays that amount with interest, he shall become the proprietor of his share." The four biswas share was then specified in manner following: "Our exclusive share (one moiety)", "on account of Bal Singh (one moiety)."

(2) in April, 1877.

and if we understand him aright, he appears to regard it as one made by agreement or mutual understanding between Bal Singh and Ratan Singh and Dirgpal Singh, and accepting that view, he looks upon their possession as that of trustees or mortgagees. But as already observed there is no other evidence of a mutual understanding or agreement than the entry in the settlement record, by which, as we are advised at present, no trust was raised. All the circumstances point to a different conclusion from that at which the Judge has arrived. There was a sale in execution of a decree, and very soon after a sale by the auction-purchaser to Ratan Singh and Dirgpal Singh, and immediately, or very soon afterwards, the latter obtained full possession of the four biswas and paid up all the arrears due upon the share, and at this time the lower appellate Court itself admits "that there is no record to show that Bal Singh's rights and interests were recognised as then existing, and that an assignment of them was made to Ratan Singh and Dirgpal Singh by authority," though, strange to say, he adds that the presumption is that they were so transferred as in similar cases of default of land revenue. The presumption would appear to be the other way, assuming it to be the fact, as stated by the Judge, that Bal Singh's rights were not even recognised by the revenue authorities. It is also inconsistent with the other view of the case which he immediately adopts, that by private agreement or mutual understanding Ratan Singh and Dirgpal Singh held as mortgagees or trustees. Assuming however that the Judge is right in this view, we are of opinion that he was justified in holding that the claim was barred by limitation, for there is nothing whatever to prove, nor is it alleged, that the purchasers from Ratan **[465]** Singh and Mardan Singh in November, 1843, took the property with any notice of the trust, and it is certain that the purchasers in 1843 bought for a valuable consideration and have been holding ostensibly as proprietors from that date. Under these circumstances, limitation would run from the date of that conveyance. So that this suit fails altogether, whether or not we admit a trust in 1839-40, and we therefore dismiss the appeal and affirm the judgment with costs.

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2 A. 460.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

WHYMPER AND Co. (*Plaintiffs*) *v.* BUCKLE AND Co. (*Defendants*).

[31st July 1879.]

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JULY 31.
APPELLATE CIVIL.
3 A. 469.

Contract—Formal agreement—Condition precedent.

When two parties have come to a final agreement, it would by itself be binding upon them, even though they contemplate reducing the terms of such agreement to a written contract; and the absence of such a written contract would not affect the binding character of the agreement, unless, by mutual consent of the parties, a condition precedent has been imposed to the effect that there should be no binding agreement until a written contract should have been executed.

3 A. 469.

JUDGMENTS.

[469] SPANKIE, J.—This was a suit to recover Rs. 32,284-12-0 on the part of Messrs. Whymper and Co. of the Crown Brewery, Mussoorie, against Messrs. Buckle and Co., merchants of Saharanpur and Mussoorie,

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3 A. 469.

for whom the senior partner, Mr. Stowell, one of the defendants, is agent at Mussoorie. The action is brought upon an alleged contract made between the parties on or about the 20th December, 1877. The defendants deny that any contract was actually made, but admit that Rs. 2,539-8-6 are due by them as regular customers of the plaintiffs. The main issue between the parties was whether, as averred by the plaintiffs, there was a binding and complete contract, or, as contended by the defendants, there was a precedent condition that the contract should not be considered complete and binding until a written agreement had been formally executed by the parties? The issues in the entire case were thus settled by the lower Court:—"(i) Was such a **[470]** contract as that alleged by the plaintiffs to have been made ever entered into between the plaintiffs and defendants? (ii) If so, is its validity affected by any representations made by the plaintiffs to induce defendants to enter into it? (iii) If entered into, and if valid, has there been a breach of the contract, and if so, by whom was the breach effected? (iv) Should the sum of Rs. 6,000 stated as liquidated damages be awarded, and to whom? (v) If there was a contract, what was the amount of beer supplied under it, and what was the value of it"? The lower Court thus sets out the whole circumstances that led up to the point at which it is alleged a contract was made between the contending parties.

The Crown Brewery was started by Messrs. Whymper and Co. in the latter half of the year 1876, and Messrs. Buckle and Co., even before the Brewery was established, had some desire to become agents for the sale of the beer. Nothing however came of the first proposals made in 1876, and Whymper and Co. disposed of the first year's brew, that of 1876-77, themselves. Buckle and Co. bought considerable quantities on their own responsibility as general dealers. In the beginning of November, 1877, there was a conversation between J. W. Whymper and Stowell of which the result was a letter from the plaintiffs embodying the terms of a proposed agreement. The defendants after some delay sent a reply declining the terms proposed. On the 7th December, J. W. Whymper and Stowell had another conversation, in the course of which it would appear that the latter remarked that he was afraid to take so large a quantity as one hundred hogsheads a month, as had been suggested by the former. On being re-assured by Whymper as to the quantity of the sales made by him in the previous year, Stowell thought that he might take sixty hogsheads or a little more. This interview led to another letter, written by the defendants, dated the 8th December, to the plaintiffs, saying that they were prepared to take sixty hogsheads for six months, and ninety hogsheads for the second period of six months, monthly. This letter the Judge rightly calls an important one. It contains a clause that before signing any covenant Stowell and Co. would like a more explicit agreement about beer that may be returned, &c. There was also another to this effect: "We would also ask you to insert a clause saying **[471]** &c." The plaintiffs on the 9th December, 1877 (not 1878 as stated in the printed books) replied agreeing to certain points mentioned in the letter of defendants, and proposing to consult Mr. Quarry (a pleader) as to the liquidated damages in case of failure to carry out the contract by either party. On the 20th December, Whymper and Stowell met at the office of Buckle and Co. in Mussoorie, and Whymper gave to Stowell a letter containing a guarantee that the beer supplied should stand sound and saleable for twelve months from delivery, and agreeing that Quarry should settle the liquidated damages. At the same time Stowell wrote

to plaintiffs :—" We will at once have the agreement made out on the terms proposed." On the 21st Stowell wrote to Whymper saying that he had seen Quarry and had given instructions as to the drafting of an agreement. This letter must have been in reply to one of the same date from Whymper asking that the guarantee as to the beer standing good should be modified, so as to refer to that supplied in hogsheads only and kept at Rajpur, Dehra, or Mussoorie. From this letter, the lower Court observes, it is quite evident that Whymper considered that he was at liberty to modify or alter agreements subject to the signing of an agreement. On the 22nd December Whymper went to Dehra and had an interview with Stowell and Quarry, and Rs. 6,000 were fixed as liquidated damages, and Qu arry was instructed to draw up an agreement. Whymper left for Murree. On the 4th January, immediately on his return from Murree, Whymper wrote to defendants, asking for a list of agencies which defendants proposed to st art, as he wished to alter the advertisements in the papers. Defendants reply on the 7th January, saying that they think it will be as well to let matters remain as they are until Quarry has made out the necessary deed. On the 12th January Whymper sent an order for beer from Umballa to defendants saying : "We should supply it direct ourselves, but for our agreement with you." He also sent a letter to the effect that he had altered his advertisement in the "Pioneer" and "Delhi Gazette." Stowell replied to these letters that until they had "actually entered into an agreement they would much prefer letting matters stand as they are." On the 13th January plaintiffs wrote that they were losing business in not supplying orders, and "they presumed that defendants[472] would have no objection to their supplying orders in stations in which defendants had not yet established agencies." Defendants replied at once on the 16th January : "By all means supply any orders you may get, for we do not consider we have entered into any agreement until we have actually signed the one Mr. Quarry is making out." On the 16th January plaintiffs wrote to defendants : "We are very much surprised at the view you express : we consider the agreement as already entered into &c., &c." On the 17th January Whymper received a rough draft of the agreement drawn up by Quarry with Stowell's remarks on it. Whymper made remarks on the draft agreement, as well as Stowell, and the Judge observes that it is evident from their remarks that several important points required further consideration ; one of these was whether the guarantee regarding the beer standing good should hold generally or only in respect to beer kept in Dehra, Rajpur, and Mussoorie. Whymper wrote on the 18th January denying Stowell's sight to make any alteration in the agreement, and again on the 21st January saying that he considered "a contract was now existing." Up to this time the Judge considers that Stowell most undoubtedly had been anxious to enter into an agreement, but complaints received in the latter end of January led him to believe that the brew of the year was not very good. The correspondence between the parties almost ceased from the 20th January to 1st February, and it is evident that there was a period of indecision in Stowell's mind as to the advisability of entering into a contract. After the 1st February Stowell appears to have recovered his former temper with regard to the contract, and the correspondence through February and March points to a mutual desire on the part both of plaintiffs and defendants to do business as though a contract would be eventually entered into, though for some reason, which does not clearly transpire in the evidence or in the correspondence, the draft deed was never finally made into a deed for signature by the contracting parties. Complaints during March became a little more

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frequent as to the quality of the beer. On the 2nd April Stowell wrote to plaintiff "reluctantly declining to receive any more beer." All negotiations were closed on the 11th April by a letter from Quarry in the character of the legal adviser of defendants. Such, remarks the lower Court, **[473]** is a resumé of the whole negotiation between the plaintiffs and defendants, as shown by a lengthy correspondence and sustained by the evidence of the two principals. The lower Court now proceeds to its judgment. The Judge observes that it is admitted by plaintiffs as well as by defendants that from the first it was agreed that the agreement should be reduced to a formal deed, and moreover that this was the subject of their conversation on the 7th December, 1877. Whymper, however, in his oral evidence says that he did not make this agreement as a condition precedent to the acceptance of the agreement, though he admits that he alluded to this deed in that correspondence. Stowell on the contrary most distinctly says that on the 7th December he gave Whymper to understand that he considered the execution of a formal deed a necessary and vital preliminary to the completion of the contract. As both those gentlemen are parties to the suit and interested in this important point, it was necessary to note how far their statements are borne out by the correspondence and probabilities of the case. For this purpose the lower Court refers to Stowell's letter of the 8th December, to Whymper's letters of the 14th December and 20th December, and to the letter of the defendants dated the 20th December, which in the opinion of the Court was a most important one. These letters are referred to above. The plaintiffs' counsel contended that this letter of the 20th December was an acceptance of all the previous proposals, including the guarantee, and that it was the final agreement and acceptance of the contract. But the Judge thought otherwise, as the very wording of the letter—"We will at once have the *agreement* made out on the terms *proposed*"—shows that it alludes to the *agreement* or covenant or deed which had been in the defendant's mind from the date of his letter of the 8th December. The word "agreement" is the word that has been used by both parties when alluding to a written deed. The lower Court then refers to Whymper's letter of the 4th January, which it calls Stowell's first opportunity of saying that he considered a deed necessary to the agreement in the correspondence, and he at once took advantage of it. The Judge also remarks that defendants are still insisting upon the necessity for a written agreement as was shown from Stowell's letter of the 16th January. It is evident, the Court observes, that Stowell from the very first con-**[474]**sidered the signing of an agreement as essential to the completion of the contract and took every opportunity of pointing this out to Whymper in his letters. Whymper disregarded the first two or three expressions of this opinion made by Stowell, and it was not until Stowell, in so many words, wrote that he did not consider that he had entered into an agreement that he expressed his surprise at the opinion. The lower Court then says:—"So far this Court is of opinion that the correspondence and evidence both point to the conclusion that the signing of an agreement was antecedent to the completion of a contract. Taking the probabilities of the case, the same opinion must be arrived at. Mr. Stowell is an old man of business, having had 20 years' experience; he knew well the importance of a definite agreement on all points, and was not likely to commit himself to an agreement rashly. If this contract is to be looked upon as entered into and in operation from the 1st January, 1877, we must imagine Mr. Stowell rushed into it, without a single agency open in the down-country stations, and prepared to receive sixty hogsheads a month without any immediate means of disposing of his beer. Again the

draft agreement is open to objection to both contracting parties from their own point of view, and it is evident from their memoranda that the agreement was neither definite nor complete. Mr. Whymper, a young, pushing, but inexperienced man of business, was naturally eager to conclude the agreement and to consider it concluded, having, as he thought, got rid of a large quantity of his year's brew, and from the first his sanguine view of the matter led him into this belief. But taking the probabilities of this question into consideration, it appears improbable that Mr. Stowell should have so committed himself as it is urged by the plaintiffs he did by his letter of the 20th December." In order to convert a proposal into a promise the acceptance must be (i) absolute and unqualified, (ii) expressed in some usual and reasonable manner unless the proposal prescribes the manner of acceptance. As to the first condition it was evident that the acceptance of the 20th was qualified by the plaintiff's letter regarding the guarantee, which was a qualification of an essential character, and though the qualification was embodied in the draft agreement, this was quite consistent with the defendant's position that the draft agreement was open to discussion and amendment. As to **[475]** the second condition, the lower Court referred to a case in the House of Lords in which it was held that "the sending of an agreement to a solicitor to reduce it into form is rather evidence that the parties do not intend to bind themselves until it is reduced into form (1)." He also cites Mr. (now Mr. Justice) Cunningham's edition of the Indian Contract Act, in which it is stated that the reasonable rule seems to be that the intention to reduce terms into a formal writing is some evidence that the parties do not consider the contract concluded. These rulings the lower Court accepts and holds that the facts of the case are such that the rule applies to them. In regard to the good faith of the parties the Judge entertained no doubt. He states that the only point that could be open to misconstruction throughout the proceeding was the delay between the 21st January and the final breaking off the negotiations in April, and in signing the agreement. Mr. Stowell had explained this delay, saying that he got complaints as to the quality of the beer, and the smallness of the sales led him to hesitate. The Judge remarks that he was particularly struck by the straightforward manner in which Mr. Stowell gave his answers throughout his examination. The lower Court thus states its conclusion on the point that "there was no final contract entered into by the plaintiffs and defendants, inasmuch as it was agreed from the first that the agreement should be reduced into a formal deed and be signed by the contracting parties, as a condition antecedent to the completion of a contract." This conclusion, the Judge observes, practically disposes of the remaining issues. But on the second issue the lower Court gives its opinion that Stowell made his modified offer to take sixty hogsheads and ninety hogsheads on Whymper's assurance that the previous year he had disposed of forty hogsheads a month. The plaintiff (Whymper) thinks that he said thirty hogsheads a month. But the Court had very little doubt that Stowell was right and Whymper said forty hogsheads. For Whymper had actually written a memorandum in which he entered his sales to the public as three hundred and ten hogsheads in ten months; whereas the issue book of the plaintiffs shows by an abstract made by defendants this was more than three times the amount of the actual sales to the public, which in reality amounted **[476]** to ninety-two hogsheads only. So that even if there had been a contract this misrepresentation would have been sufficient to render it void. There remained for consideration the value of the beer actually

(1) *Ridgway* v. *Wharton*, 6 H.L.C., 238.

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taken by the defendants as customers of plaintiffs under the former arrangements. In spite of Stowell's repeated declarations that he wished matters to remain as they were till a deed was signed, the plaintiffs without orders in accordance with the terms of the agreement continued to send down beer in hogsheads to Rajpur, without sending an invoice or notice to defendants, addressed to the defendants, at the rate of sixty hogsheads a month. The beer was stored in Whymper's godown, and delivery of it was never given to or taken by defendants. The despatch of beer continued from the 1st January to the 15th April, and the plaintiffs have claimed the value of this beer, supplied as it had been in an irregular way. The Court could not allow the value of this beer to plaintiffs. It was in their godown and they could resume it. As regards beer supplied outside the contract, and for which defendants are willing to pay, it appeared to the Court inconvenient to fix (?) any specific price, as there had been no separate accounts filed by plaintiffs, and any decree that could be given would be on the one-sided statement of defendants. The lower Court dismissed the claim altogether and with costs.

The plaintiffs contend in appeal (i) that the Judge has erred in holding that no contract subsisted between the parties to the suit; (ii) that the Judge has erred in holding the execution of a written agreement to have been a condition precedent to the formation of a contract between the parties; (iii) that the Judge has erred in finding that the agreement between the parties was based upon misrepresentations made by the plaintiffs to the defendants; (iv) that, assuming the contract between the parties to have been based upon misrepresentation, the defendants were not justified in refusing to perform their part of the contract; and (v) that the Judge was wrong in finding that there had been no effectual delivery of the beer supplied under the contract. The learned counsel on behalf of appellants has cited various authorities (1) in support of his agreement, that the mere mention of a deed of agreement in the written acceptance of a tender **[477]** would not relieve the parties from the obligation to carry out the terms of an agreement once come to, if they had the intention of entering into an agreement, and if the object of a subsequently prepared written contract was simply for the purpose of putting the agreement already arrived at into formal shape. He regarded the letter of the 20th December as the acceptance, pure and simple, of the proposal made by plaintiffs. The written agreement was to embody those minor points, which it would be convenient to have recorded for future guidance, being either ancillary to the main agreement already reached, or explanatory of the way in which it was to be carried out. He relied on the authority (2) of the Master of the Rolls to the effect that, where a proposal or agreement made in writing is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail. Mr. Justice Fry has remarked that a long series of cases (3) had established the proposition that the mere reference to a future contract is not enough to negative the existence of a present one. In all the cases cited to us the principle is

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(1) *Lewis* v. *Brass*, L. R.. 3 Q. B. D., 667; *Winn* v. *Bull*, L. R., 7 Ch. D., 29; *Bonnewell* v. *Jenkins*, L. R., 8 Ch. D., 70; *Crossley* v. *Maycock*, L. R., 18 Eq., 180; *Jones* v. *The Victoria Graving Dock Co.*, L. R., 2 Q. B. D., 314; *Rossiter* v. *Miller*, L. R., 5 Ch. D., 648; *Chinnock* v. *Marchioness of Ely.*, 4 D. J. & S., 638.

(2) *Winn* v. *Bull*, L.R., 7 Ch. D., at p. 32.

(3) *Bonnewell* v. *Jenkins*, L.R., 8 Ch. D., at p. 72.

substantially the same. We notice in *Rossiter* v. *Miller* (1) that Lord Chief Justice Coleridge refers to some remarks of Lord Westbury upon some cited cases which, he said, "establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual consent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his [478] agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

It was also urged that circumstances in the conduct of the parties may establish a binding contract between them, although the agreement reduced to writing in a draft has not been formally executed by either. This argument is supported by the authority cited (2), and it would apply to the case before us if it be shown by evidence that defendants had by their course of dealing during the continuance of their correspondence practically acted under the contract alleged by the plaintiffs. In the case cited Lord Cairns remarks:—"I must say that having read with great care the whole of this correspondence, there appears to me clearly to be pervading the whole of it the expression of a feeling on the one side and on the other that those who were ordering the coals were ordering them, and those who were supplying the coals were supplying them, under some course of dealing which created on the one side a right to give the order, and on the other side an obligation to comply with the order * * * * * Those are the grounds which lead me to think that there having been clearly a *consensus* between these parties, arrived at and expressed by the document signed by Mr. *Brogden*, subject only to approbation, on the part of the company, of the additional term which he had introduced with regard to an arbitrator, that approbation was clearly given when the company commenced a course of dealing which is referable in my mind only to the contract, and when that course of dealing was accepted and acted upon by Messrs. *Brogden & Co.* in the supply of coals."

With all this authority before us we may safely conclude that, unless the defendants can show that by mutual consent there was a condition antecedent to a contract to the effect that there should be no binding agreement until a written contract had been executed by the parties, or that the assent communicated in their letter of the 20th December, 1877, was subject to the provision as to a written contract, then, assuming that any agreement has been proved, [479] that agreement would be binding upon the parties. The case therefore must stand or fall to pieces on the evidence. We must look to the evidence, the correspondence which passed between the parties, and to their conduct and course of dealing as shown by the evidence and during the correspondence, in order to determine the propriety of affirming or reversing the decision of the Court below on the merits. * * * * * * * * * There cannot, with all the evidence before us, be, I think, any reasonable doubt that there was no antecedent condition to a binding treaty that there should be a

(1) L.R., 5 Ch. D., 648.
(2) *Brogden* v. *The Directors of the Metropolitan Railway*, L.R. 2 Ap. Ca. N.S., 666.

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written deed of contract executed by the parties, and that any assent to the proposed terms, even if agreed to, should be subject to the proviso that there must be a written instrument signed before the contract would begin to operate. Applying therefore the authorities already cited to this case, I must hold that defendants have failed to establish their defence that there was no subsisting agreement between themselves and plaintiffs on and after the 1st January, 1878. I will now show that, whilst one party is doing all he can to carry out the contract, the other is hanging back and throwing difficulties in the way of a faithful performance of it. * * * * * Thus far I have established that there was no condition antecedent to the contract; that there was a binding agreement made on the 20th December; and that it was acted upon; and finally that it was repudiated by defendants altogether. We have now to consider whether there was any misrepresentation on the part of the plaintiffs which induced defendants to accept the proposals of the former, and if there was, whether the defendants were or were not justified in refusing to perform their part of the contract. * * * * * * As I find that defendants broke the contract, and I consider that plaintiffs have fully established their case, I think that they are **[480]** entitled to a decree as claimed with costs against the defendants. Since I prepared this judgment I have had an opportunity of seeing that of the Hon'ble the Chief Justice which appears to agree with the conclusion at which I have arrived.

STUART, C. J.—In this case the Subordinate Judge has gone clearly wrong. He appears to have been of opinion that no contract of the kind alleged in the plaint could be made and completed without a formal agreement in writing, and that such writing, and nothing else, was the contract itself. This mistaken notion on the part of the Subordinate Judge unfortunately took strong possession of his mind, and it not only colors but explains his judgment. For instance, the first issue he framed was this:—"Was such a contract, as is alleged by the plaintiffs to have been made, ever entered into between the plaintiffs and defendants;" and in reference to this issue his first observation is:—"The first of these issues is the point on which the case turns, and to consider it properly it is necessary to analyse and bring together the whole circumstances that led up to the transaction which it was alleged formed the contract between the contending parties as it is shown in the evidence." It would have been more correct if he had said that it was necessary to consider the evidence of the circumstances not that led up to, but actually constituted, the transaction which was the contract. The contract was evidently something which in his mind was yet to come, and he could not see that the agreement or contract relied upon by the plaintiffs had been made and was a complete contract in itself. That such a view of the law of contracts is altogether erroneous cannot be doubted. The Indian Contract Act, IX of 1872, embraces the greater part of the recognized law of contracts, but it does not, within itself, adopt the whole body of that law, for true to its preamble, which declares that, "whereas it is expedient to define and amend *certain parts* of the law relating to contracts," it excludes from its provisions all those subtleties to which the English Statute of Frauds has given rise, and certain classes of contracts which are scarcely necessary for the business of this country, but which, should occasion so require, might be applied here, and which this preamble clearly saves. In fact the Indian Contract Act may be said to deal with two large classes of **[481]** transactions, those which fall under the wide and general definition contained in S. 2 and the first part of S. 10,

and those other transactions or agreements in writing referred to and saved by the latter portion of S. 10, and those written agreements which have to be considered under S. 25. S. 2 defines a contract to be an agreement enforceable by law, a rather wide definition, which if taken by itself does not add much to our information on the subject, but if read in connection with other parts of the same section it can be seen that that contemplates such a contract as we have in this case, and which is also an agreement and contract within the meaning of the first part of S. 10 of the Act, which provides that "all agreements are contracts if they are made with the free consent of parties competent to contract for a lawful consideration and with a lawful object," what in fact is known as one of that large class of agreements which in the law of England go under the definition of simple contracts. The contract in the present case is such a simple contract, not an express contract in writing, but *rebus ipsis et factis*, in other words, a contract made by the conduct of the parties, by their correspondence, by evidence of their personal intercourse on the subject of the contract, and by any facts and circumstances showing an agreement of mind in the matter. And any formal or written agreement which may have been ultimately intended is to be looked at merely as the record of that which had already been agreed upon, and not as the agreement or contract itself. Several cases in support of this view of the law were referred to at the hearing. In the case of *Brogden* v. *The Directors of the Metropolitan Railway* (1), decided on the 16th July, 1877, the law on this subject is very clearly laid down by the Lord Chancellor (Cairns) in the following terms:—"My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most **[482]** solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form." To the same effect is the ruling in *Lewis* v. *Brass* (2). In this case it was held that a tender and letter of acceptance formed a complete contract although a written deed of agreement was contemplated by the letter conveying the acceptance. The same was ruled in *Bonnewell* v. *Jenkins* (3). In *Jones* v. *The Victoria Graving Dock Co.* (4) it was held that a draft agreement modified by another paper was a valid contract within S. 4 of the Statute of Frauds, although a resolution was at the same time adopted that the said agreement be endorsed in duplicate, signed, sealed, and executed. In *Crossley* v. *Maycock* (5), before the Master of the Rolls (Sir George Jessel), the agreement between the parties was qualified by certain conditions, and the Court accordingly held that no final agreement had been made which could be enforced, but in delivering judgment Sir George Jessel laid down the principle of the law of contracts entirely in accordance with the other cases to which I have referred. He said:

(1) L.R., 2 Ap. Ca., N.S., 666.
(2) L.R., 3 Q.B.D., 667.
(3) L.R., 8 Ch. D., 70.
(4) L.R., 2 Q.B.D., 314.
(5) L. R., 18 Eq., 180.

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"The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at." In *Winn* v. *Bull* (1), before the Master of the Rolls, a written agreement relating to a lease of a dwelling-house and premises for a term of seven years was made "subject to the preparation and approval of a formal contract," and applying that condition to the case Sir George Jessel held that no final agreement had been made. But in delivering judgment His Lordship referred with approbation to the decision in the case of *Chinnock* v. *Marchioness of Ely* (2) of Lord Westbury in which His Lordship said :—"I entirely accept the doctrine * * * that, if there had been a final agreement and the terms of it are evidenced in **[483]** a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties." In *Winn* v. *Bull* (1) the case of *Rossiter* v. *Miller* (3) was referred to. Lord Coleridge, Chief Justice, laid down with the approbation of Lord Justice James and Lord Justice Baggallay, who heard the case with him, that, "as soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract." The law therefore on the subject of these contracts is perfectly clear, and applying it to the present case we have to consider whether on the facts and evidence before us there is to be found a contract or agreement binding on the parties. * * * * There being therefore no room for objection on the score of the inferior quality of the beer, nor any sufficient ground for the plea of misrepresentation, the only question for serious consideration is whether the facts and the evidence which I have detailed show a legal contract between the parties which may be enforced. I am clearly of opinion that such a contract is shown and that the facts come within the principle of the authorities to which I have already adverted. I would therefore allow the plaintiff's claim with interest thereon at twelve per cent. up to the date of the decree of this Court and thereafter and till realization at six per cent. per annum, the particulars of which appear to be correctly stated in the plaint, and Rs. 6,000 as the liquidated damages agreed to be paid by the party guilty of breach of the contract, and reversing the judgment of the Subordinate Judge decree the present appeal with costs in both Courts.

(1) L. R., 7 Ch. D. 29.

(2) 4 D. J. & S. 638.

(3) L. R., 5 Ch. D., 648.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Straight.

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EMPRESS OF INDIA *v.* BANNI. [4th August 1879.]

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Penal Code, Ss. 304, 317—Exposure of child knowing that death was likely to ensue.

Where a mother exposed an infant child, knowing that such abandonment by her was likely to cause its death, and death ensued in consequence thereof, *held*, that she was properly convicted of culpable homicide under S. 304, but she could not be convicted under Ss. 304 and 317.

JUDGMENT.

[350] STRAIGHT, J.—In disposing of this appeal (1), it is necessary I should correct a mistake of procedure into which, according to my judgment, the Sessions Judge has fallen, by making two convictions of the appellant for offences against Ss. 304 and 317 of the Indian Penal Code, and passing sentence for each. As long as the child remained alive the charge under S. 317 of "exposure with intent to abandon" could have been properly sustained, and had Musammat Banni (2) been tried before its death for this offence, she could rightly have been convicted, and as provided by the explanation at the end of S. 317 such conviction would have been no bar in the event of the child's death to a prosecution for culpable homicide. To give an analogous case, *A* commits an assault upon *B* and undergoes his trial for an assault before *B's* death, which ultimately takes place in consequence of the injuries inflicted by *A*. *A's* conviction for the assault is no bar to an indictment for manslaughter. But if before *A's* trial *B* dies, then *A* must be tried for manslaughter, the lesser crime having merged into the greater, and the offence committed relating to one and the same transaction. In the present case when the child died the offence of Musammat Banni, under S. 317, became absorbed in the more serious charge of culpable homicide, and the unlawful act of exposure having directly caused the death, and being done with the knowledge it was likely to cause death, brought the accused within the operation of S. 304. It seems to me that the maxim "*nemo debet bis puniri pro uno delicto*" applies, and that in this case two separate sentences can no more be passed than they could for murder and wounding with intent to murder, where the death of the party attacked had taken place, and the death and the wounding involved one and the same transaction. The criminal exposure under S. 317 was the direct cause of the death of the child, and therefore the crime, instead of stopping at S. 317, death being caused, took the more serious shape under S. 304. It was, of course, perfectly proper to frame a charge upon S. 317, because had any question arisen about the cause of death being the **[351]** exposure, the transaction would have resumed its character under S. 317. For the preceding reasons I therefore think it safer to quash the conviction and sentence upon S. 317, but agreeing as I do in the view taken as to the proper punishment for the conduct of the accused by the experienced Sessions Judge, I order that so far as the appeal against the conviction on S. 304 is concerned it be dismissed, and that the sentence in respect of the conviction on that section be increased to one of four years' rigorous imprisonment.

(1) by Mussammat Banni.

(2) the mother of the child.

1879

AUG. 5.

APPEL-LATE CIVIL.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.

GANGARAM, GUARDIAN OF KUARGIRPRASAD, A MINOR (*Defendant*) *v.* BANSI AND ANOTHER (*Plaintiffs*). [5th August 1879].

2 A. 431 = 4 Ind. Jur. 524.

Optional and compulsory registration—Act VIII of 1871—Act III of 1877, S. 50.

A registered document, compulsorily registrable under Act III of 1877, takes effect, as regards the property comprised in it, against an unregistered document of a prior date relating to the same property, optionally registrable under Act VIII of 1871, which was then in force.

[**F.**, 7 C. 570 (573) ; **Cons.**, 6 A. 164 (167) = 4 A.W.N. 29 ; **R.**, 6 B. 168 (192) (**F.B.**), 20 B. 158 (164), 1 N.L.R. 158 (163).]

Suit for money charged on certain immoveable property, the claim being based on a bond dated the 20th August, 1875, given by the owners of the property to the plaintiffs.

JUDGMENT.

[432] STUART, C.J.—The Munsiff was clearly right in holding that the registered sale-deed, although subsequent in date, had preference over the unregistered bond, and the Subordinate Judge was clearly wrong in deciding to the contrary. In stating this conclusion it is at the same time difficult to resist a certain feeling of its injustice, for it seems unreasonable to allow a discretion, and at the same time to impose a penalty or disability on its exercise. That is plainly what has been brought about. The last Registration Act, III of 1877, not less than its predecessors, allows a discretion as to the registering or not registering certain documents of which the bond in this case is one, and if such an instrument has been legally and validly prepared and executed, and is effectual for its purpose, it might be justly contended it should be so as from its date. Yet one can appreciate the policy, and, in a real sense, the convenience, of compelling, as far as may be, the registration of the contracts of the people of this country. The Subordinate Judge's remark that " agreeably to the principle of the law no law can have retrospective effect," is generally correct, and a right once conferred by law cannot be taken away by implication, and if we had nothing but S. 50 itself, we might possibly have applied these principles of law to the present case, and have held that the sale-deed of 1877, although registered, had no priority over the mortgage of 1875. But the " explanation " appended to S. 50 removes all doubt, and may be said to have a repealing effect by expressly negativing the application of the principles of law referred to. On the other hand, Act III of 1877 does not affect, in the sense of invalidating, the class of instruments mentioned in S. 18. It simply says that such instruments, if registered, shall have preference over any other unregistered document relating to the same property, and such a law it was quite competent to the Legislature to pass. The meaning, however, of S. 50 of Act III of **[433]** 1877, together with the explanation appended to it respecting the three preceding Registration Acts, is too clear, and as that section provides the law to be applied to the present case, we cannot do otherwise than hold that the sale-deed of the 27th September, 1877, has preference over

the previous mortgage-bond of the 20th August, 1875. We must, therefore, reverse the judgment of the Subordinate Judge on this point, and, with this decision, send back the case to him for disposal on the merits, costs to abide the result.

SPANKIE, J.—The ruling of the Subordinate Judge appears to be wrong. Under the provisions of S. 50, Act III of 1877, the defendant's instrument, which is registered, would take effect as against the plaintiffs', which might have been, but was not registered under Act VIII of 1871. The defendant's instrument was executed after Act III of 1877 came into operation. The plaintiffs' deed was executed after the 1st day of July, 1871, and was not registered under Act VIII of 1871. It is therefore "unregistered" within the meaning of the explanation appended to S. 50 of the new Act III of 1877. The appeal on the part of the defendant was not decided by the lower Appellate Court on the merits. I feel, therefore, the necessity of reversing the decision of the Subordinate Judge on the point of law and would remand the case to him for trial on the points regarding which the parties are at issue. Costs to abide the result of a new trial.

1879
AUG. 5.

APPELLATE CIVIL.

2 A. 431 = 4 Ind. Jur. 524.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Straight.

1879
AUG. 9.

EMPRESS OF INDIA *v.* RAGHUBAR AND OTHERS. [9th August 1879.]

CRIMINAL JURISDICTION.

2 A. 351.

Crim. Pro. Code, 1872, S. 489—Security to keep the peace on conviction for criminal intimidation—Penal Code, Ss. 503, 506.

Upon a mere conviction under Ss. 503, 506, I.P.C., the accused person cannot be called upon under S. 489, Crim. Pro. Code, to find recognizances to keep the peace.

2 A. 351.

JUDGMENT.

[351] STRAIGHT, J.—The point here is whether upon a conviction under Ss. 503 and 506 of the Penal Code, the accused person can be called upon, under S. 489 of the Criminal Procedure Code, to find recognizances with or without sureties to keep the peace. The defendants in the present case were convicted by the Magistrate of intimidating the complainant by threatening to bring false charges against him, and the question seems to be whether the words "taking other unlawful measures with the evident intention of committing a breach of the peace" can be said to include an offence of this kind. I do not think that the operation of S. 489 is limited to riot, assault, actual breach of the peace, or abetting the same, or unlawful assembly, but that it is intended to comprehend a wider range of offences, and it must be for the Magistrate or Court to decide in each case whether, from the nature of the charge upon **[352]** which conviction takes place, there has been direct force or violence to the person, or conduct inducing an apprehension of force or violence, or a direct threat of force or violence, or a provocation to the commission of force or violence. Intimidation, for example, as in the present case, may have none of these elements about it. The threats used here are "to make charges" against the complainant, and involve no suggestion of personal physical injury, but one can readily understand the possibility of a case of intimidation arising

1879 AUG. 9. — CRIMINAL JURISDICTION. — 2 A. 351.

in which there might be the strongest indication of an evident intention to commit a breach of the peace. As far as I have been able to ascertain there are only three cases bearing upon the point, two of these decided by the Calcutta High Court (1) upholding the taking of recognizance on conviction for criminal trespass, and a decision of the Full Bench of this Court in the matter of *Chamru*, decided 8th December, 1876 (2). These bear out the view I have expressed, and though I think in the present instance that the Magistrate was wrong in requiring recognizance, because there is nothing about the conduct of the accused threatening the peace, the mistake he has fallen into is perfectly excusable. The recognizance of the defendants must therefore be discharged.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

1879 AUG. 11. — APPELLATE CIVIL. — 2 A. 352 = 4 Ind. Jur. 468.

GOPAL SINGH (*Auction-purchaser*) *v.* DULAR KUAR (*Judgment-debtor*). [11th August 1879.]

2 A. 352 = 4 Ind. Jur. 468.

Execution of decree—Sale of immoveable property—Application to set aside under S. 311, C.P.C. (1877)—Auction-purchaser made party thereto—Right of appeal.

Though an application to set aside a sale, under S. 311, C.P.C., is confined to the decree-holder and the person whose immoveable property has been sold, still an auction-purchaser, who has been made a party to the proceedings under Ss. 32 and 647 of the Code, has a right, when the sale is set aside, to appeal against such order, S. 588 (m) (2 A. 396, *F.*)

JUDGMENT.

[353] SPANKIE, J.—There was some preliminary argument, though the objection cannot be said to have been distinctly raised by respondent's pleader, as to whether the auction-purchaser was in a position to appeal. By S. 311 of Act X of 1877 the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting the sale. In this case the judgment-debtor objected, and notice was served upon the decree-holder and the auction-purchaser. Upon the judgment-debtor's objection the sale was set aside. An appeal against the order setting aside the sale is admissible under letter (*m*), S. 588 of the Civil Procedure Code. The auction-purchaser appeals. It is true that the auction-purchaser as such cannot apply under S. 311 to set aside a sale on the ground of irregularity. That application is confined to the decree-holder and the person whose immoveable property has been sold. But if the auction-purchaser has been made a party to the proceedings under Ss. 32 and 647 of the Code, and if he has appeared on service of notice and has shown cause why the sale should not be set aside, then if the order be against him, I see no bar to his availing himself of the appeal allowed by law. I would say that the appeal is admissible, and in this view I follow a ruling to which I was a party in the case of *Kanthi Ram* v. *Bankey Lal* (3) decided on the 11th June, 1879. If, however, **[354]** my hon'ble colleague has a doubt upon this point, I am willing

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(1) 7 W.R. Cr. 14, and 20 W.R. Cr. 37.

(2) & (3) Unreported.

that it should be referred for the consideration of the Court at large. On the merits this appeal should be decreed.

* * * * *

STRAIGHT, J.—I am glad to have had an opportunity of carefully looking at the several sections of Act X of 1877 relating to the setting aside of sales in execution of decree, and to the title of the parties who may be heard upon the applications of that kind. In the present case the appellant is to be found in the person of the auction-purchaser, and although in Ss. 311 and 312 he is not specifically referred to as one of the persons who may go to the Court for relief, yet in the proceedings in the execution department he was made a defendant under S. 32, I presume upon the ground that his presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved, so that he became to all intents and purposes a party to the proceedings, and as such I think entitled to all the rights that there were in the litigation either in the judgment-debtor or the decree-holder. Consequently, as they would both of them have a right of appeal against an order setting aside or confirming a sale under S. 588, I think that the auction-purchaser, having been made a party to the proceedings, may as in the present case, lodge an appeal. Therefore agreeing with the views of Mr. Justice Spankie in this matter, and with those expressed by him and Mr. Justice Oldfield in a case decided by them on the 11th June, 1879, of *Kanthi Ram* v. *Bankey Lal* (1), I see no reason for referring the point as to the right of appeal of an auction-purchaser to the Full Bench. * * *

1879
AUG. 11.
APPEL-LATE CIVIL.
2 A. 352 = 4 Ind. Jur. 468.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

1879
AUG. 12.
APPEL-LATE CIVIL.
2 A. 354.

BHAWANI KUAR AND ANOTHER (*Plaintiffs*) *v.* RIKHI RAM AND ANOTHER (*Defendants*). [12th August 1879.]

2 A. 354.

Suit for damages—Suit for money received to plaintiff's use—Limitation Act, 1877, Sch. II, Art. 62.

When the auction-purchaser at an execution sale of a decree for money, realizes the amount of such decree, and, on such sale being set aside, the holder of the decree sues the auction-purchaser for the recovery of the money realized by him under the decree, the suit is not one for damages but is for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, to which the period of limitation applicable is three years. (1 A. 333, *F.*)

A decree for money obtained by the plaintiffs in this suit against one Madho Singh and certain other persons on 23—8—1875, was sold in execution of the decree held by Gulab and certain other persons against the plaintiffs, on 11—4—1876, when it was purchased by the defendants in this suit. On 7—6—1876, the defendants recovered Rs. 1,796-10 as. under the decree. On 22—8—1877, the appellate Court set aside the sale of the decree. The plaintiffs on 23—8—1878 sued the defendants for the sum recovered by them under the decree together with interest thereon. The first Court disallowed the defence that it was barred by limitation, and on appeal the lower appellate Court held, having regard to the case reported in H.C.R., N.-W. P., 1875, p. 174, that the suit was one for

(1) Unreported.

1879 AUG. 12. APPELLATE CIVIL. 2 A. 354.

damages, for which the period of limitation applicable was one year, and such period running from the date the defendants received the money claimed, the suit was barred by limitation. Whereupon the plaintiffs appealed to the High Court.

JUDGMENT.

[355] SPANKIE, J.—We are of opinion that the decision of the Judge is erroneous. The suit is not one for damages, but, under the circumstances, rather one for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The later decisions of this Court, and notably the one marginally noted, take this view of the law. The limitation would be three years. We reverse the decision of the lower appellate Court, and remand the appeal for re-trial on the merits; costs will abide the result.

1 A. 332.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

1879 AUG. 12. FULL BENCH. 2 A. 356.

DARBO (*Plaintiff*) *v.* KESHO RAI (*Defendant*). [12th August 1879.]

Dismissal of declaratory suit—Subsequent suit for possession—C.P.C., 1859, S. 7.

The dismissal of a declaratory suit on the ground that the plaintiff could sue for possession, does not bar a subsequent suit for possession.

[F., 5 A. 345 (353) **(F.B.)**; **R.**, 14 B. 31 (50)**]**.

A suit by the plaintiff on the death of her husband against Kesho Rai for a declaration of her title to succeed as her husband's heir to certain property, and for a declaration that the defendant was not the adopted son of her deceased husband, was dismissed by the first Court on the ground that the plaintiff was not in possession of a large portion of the property, and should therefore have sued for possession, and the High Court on appeal on the 23rd July, 1874, held that the plaintiff was entitled, for the protection of the property in her possession, to a decree that the defendant was not the adopted son of her deceased husband, and in respect of the property of which she was not in possession, referred her to a suit for possession. On the plaintiff subsequently bringing the present suit against Kesho Rai for the possession of this latter property, the first Court held that the claim was barred under the provisions of S. 7 of Act VIII of 1859. The plaintiff appealed to the High Court.

REFERENCE TO THE FULL BENCH.

STUART, C. J., and OLDFIELD, J., referred to the Full Bench the question whether the suit was or was not so barred.

JUDGMENT OF THE FULL BENCH.

[357] In so far as the appellant now claims possession of property to which she formerly claimed a declaration of title, we are of opinion that the suit is clearly not barred; she is seeking a different relief, and the relief she formerly sought was refused her in respect of this property, on the ground that the Court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Straight.

1879
AUG. 15.

APPELLATE CIVIL.

ABDUL SAMAD AND ANOTHER (*Plaintiffs*) *v.* RAJINDRO KISHOR SINGH (*Defendant*). [15th August 1879.]

2 A. 357 = 4 Ind. Jur. 469.

2 A. 357 = 4 Ind. Jur. 469.

Return of plaint – Act X of 1877 (C.P.C.), S. 57 (c).

Though S. 57 of the C.P.C., 1877, contemplates a return of the plaint, should on error as to jurisdiction be patent, when it is first presented, there is nothing in the language of the section which forbids the return of the plaint at a later stage in the case, when the Court finds it has no jurisdiction.

[R., 8 B. 313 (322) (F.B.).]

JUDGMENT.

[358] SPANKIE, J.—A preliminary objection (1) was taken that the Subordinate Judge (2) had dismissed the suit, and that there should have been an appeal as from a decree in an original suit, whereas the present appeal had been entered as a first appeal from an order. The Subordinate Judge has certainly made use of the word "dismiss," but it is clear from his direction that the plaint was to be given back, that he stopped and intended to stop from further hearing of the suit, when he discovered that he had no jurisdiction. He, therefore, when he returned the plaint to be presented in the proper Court, was acting under S. 57, Cl. (*c*), Act X of 1877. It may be that the section contemplates a return of the plaint, should error be patent, when it is first presented, but there is nothing in the wording of the section which forbids the return of the plaint at a later stage in the case, and it has been so held in former cases. An order returning a plaint under S. 57 of the Act is appealable under S. 588 of the Code, and it does not come within the definition of the decree in the amended Act, which appears to have come into force on the 29th July last. We see no reason to doubt that the appeal has been properly instituted as a first appeal from an order.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

1879
AUG. 21.

APPELLATE CIVIL.

KIRATH CHAND AND OTHERS (*Defendants*) *v.* GANESH PRASAD (*Plaintiff*). [21st August 1879.]

2 A. 358.

2 A. 358.

Suit for "haqq-i-chaharam" based on custom—Act XV of 1877 (Limitation Act), Sch. II, Arts. 62, 120, 132.

A suit for "haqq-i-chaharam" (one-fourth of the purchase-money due to the proprietor of a mohalla on the sale of a house situated in it) based upon custom, is not one for breach of contract, to which Art. 62, Sch. II of the Limitation

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(1) by the respondent.

(2) The decision of the Subordinate Judge ending thus :—"The plaintiffs' suit is therefore dismissed; the plaint is to be returned to the plaintiffs."

1879

AUG. 21.

APPELLATE CIVIL.

2 A. 358.

Act applies, nor one to enforce a charge on immoveable property, to which Art. 132 applies. It is a suit of a class, for which there is no limitation expressly provided, and is, therefore, governed by Art. 120, Sch. II of the Limitation Act, 1877.

[Appr., 18 A. 430 (432) = 16 A.W.N. 140.]

In execution of a decree held by them, the defendants in this suit purchased a house in a mohalla on 10—7—1875 and on the same date acknowledged as decree-holders the receipt of the whole amount of the purchase-money. On 28—10—1878, the plaintiff, the owner of the mohalla, sued the defendants for one-fourth of the purchase-money, basing his claim on an ancient custom obtaining in the said mohalla, under which, when a house situated therein was sold, whether privately or in execution of a decree, the proprietor thereof received one-fourth of the purchase-money. The lower Court having decreed the claim, the defendants appealed to the High Court.

JUDGMENT.

[359] SPANKIE, J.—The Judge remarks that the cause of action in respect of two of the houses arose in 1873, and of one in 1875. But he holds, on the authority of a decision of this Court (1), that the period of limitation is governed by Art. 120, Sch. ii of Act XV of 1877. Art. 120 provides a limitation of six years in suit for which **[360]** no period of limitation is to be found in Sch. ii of the Act. It is contended by Babu Dwarka Nath Banerjee, the Junior Government Pleader, on behalf of appellants, that Art. 62, Sch. ii of the Act, applies. He urges that the claim must be viewed as one for money payable by the defendant to the plaintiff for money received by defendant for the plaintiff's use. On the other hand, Pandit Bishambhar Nath for the respondent, contends that Art. 132 is strictly in point, and that the plaintiff has a charge on the property for the amount claimed; and he refers to the explanation below that article that the allowance and the fees respectively called "*malikana*" and "*haqqs*" shall, for the purpose of the clause, be deemed to be money charged upon immoveable property, in support of his contention. If the appellants' pleader be right, the limitation would be three years from the date of the receipt of the money by defendants, whereas if the pleader for the respondent has applied the proper article, the limitation would be twelve years from the date when the money sued for became due.

I am not prepared to accept as correct the contention of either of the learned pleaders. If we apply Art. 62, then this claim would take the English form of an action for breach of contract, and if this be so, as between the proprietor of the mohalla and the vendor and the vendee, the component parts of a contract appear to be wanting, both as regards consideration and promise to pay money to the proprietor of the mohalla, express or implied. If this were a suit for money had and received, the sum claimed being under Rs. 500, the claim was one for a Small Cause Court. But this Court in Full Bench has decided (2) that suits of this nature are not cognizable by a Court of Small Causes. The Court observed that such a claim as one for "*haqq-i-chaharam*" "is for a zamindari due customarily payable, it is not a claim for money due on contract, not for personal property or the value thereof, nor for damages," and the Court adds that they must not be understood to impugn the ruling that where "*chaharam*" is payable in virtue of a contract, the claim would be triable

(1) Unreported.

(2) 1 A. 444.

by a Court of Small Causes. The claim in the present instance is one expressly found on ancient custom, and it cannot be maintained that the record of this ancient custom in the administration-paper is a contract, express or implied, as between the owner of the mohalla [361] and the mohalladar. The record of the Custom is some evidence of its existence, and doubtless it was entered in the administration-papers of 1833 and 1867, because the Settlement Officer was bound to prepare a complete record of the mahal, and to include in it all village-customs, and extra cesses and collections. As the claims in these suits are based upon ancient usage and not upon contract, the Full Bench ruling clearly applies, and this being so, one cannot say that Art. 62, Sch. ii of the Limitation Act governs them, still less does Art. 132 apply to these cases. The "*haqqs*" referred to in the explanation and described as fees are fixed charges upon immoveable property, of which payment could be enforced by the sale of the property so charged. It is not contended here that a zamindar could recover his one-fourth share of the sale-proceeds of a house when sold by a suit to bring the house to sale by enforcement of any lien upon it. I need not, however, dwell at length upon the question of limitation, inasmuch as I am quite ready to accept the ruling of a Division Bench of this Court on the point in *Sheo Dehal* v. *Thakur Mathura Prasad* (1). The learned Judges in that case applied Art. 118, Sch. ii of Act IX of 1871, to a case of this nature, holding that there was no limitation expressly provided for such suits. I would therefore say that Art. 120, Sch. ii of Act XV of 1877, which represents Art. 118 of the former Act, governs the limitation in these suits, and if so, all these are within time, as the limitation is six years from the time when the right to sue accrues.

STRAIGHT, J.—I concur in Mr. Justice Spankie's judgment. I was in some doubt at one time upon the question of limitation, and was disposed to think the case within Art. 62, though I never had any doubt that Art. 132 was inapplicable. But, upon further consideration of the matter and the decision of this Court already referred to, I think Art. 120 properly applies.

1879 AUG. 21. — APPELLATE CIVIL. — 2 A. 358.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

1879 AUG. 25. — APPELLATE CIVIL. — 2 A. 361.

DURGA PRASAD (*Defendant*) *v.* ASA RAM (*Plaintiff*).

[25th August 1879.]

Constructive trust—Limitation.

In the absence of an actual and express trust, a constructive trust can be elicited by a Court, by an interpretation placed on the acts of parties and the circumstances of the case.

Where certain persons were transported for life, and their near relations, who had been living with them on terms of close intimacy and mutual confidence, took advantage of their absence and fraudulently appropriated to themselves the properties of the convicts; *held*, that the persons, who misappropriated, became, under the circumstances, trustees for the owners, and no limitation could affect the rights of the latter.

[Observed upon, 5 A. 608 (613); **D.,** 3 A. 458 (465).**]**

(1) Unreported.

1879

AUG. 25.

APPELLATE CIVIL.

2 A. 361.

JUDGMENT.

[363] OLDFIELD, J.—The plaintiff (1) claims to obtain possession of the property which is the subject of this suit as having belonged to one Kannu Lal, whom he represents by purchase of his interests in execution of a decree. The particular portion to which this appeal has reference is the half of a shop called in the proceedings the western shop. This is claimed by the appellant, Durga Prasad,(2) in his own right. It appears that he and his father Balkishen were transported for life thirty-seven years (3) ago, and the former has returned under a pardon granted at the time of the Delhi Darbar ; and he avers that when he and his father left the country, they made over the property to Bhawani Prasad and Kannu Lal, his adopted son, in trust, and they collected and gave the rents to their wives, and the wife of Durga Prasad received them till her death, nine or ten years ago. It is admitted that the property belonged to Durga Prasad and his father up to the time of transportation. The lower appellate Court has found, however, that there is no proof of any express trust being made of it to Bhawani Prasad and Kannu Lal when they left, or of the appellant's wife receiving the rents, and that she died seventeen or eighteen years ago, and that Bhawani Prasad and Kannu Lal have held the property adversely to the appellant, and have acquired a title by length of possession.

This finding cannot be sustained. If the facts be as found by the lower appellate Court that Bhawani Prasad and Kannu Lal never made over the rents to the wives of Durga Prasad or his father, and themselves took possession of the property on transportation of **[364]** the owners, although there may have been no actual and express trust, yet there are circumstances which the lower appellate Court has overlooked which amount to fraudulent conduct on their part, such as would by equitable construction convert their holding into that of trustees. The parties were nearly related to each other. living in what may be assumed to be terms of close intimacy and mutual confidence, and the appropriation of the absent relations' property could only have been carried out by a shameful abuse of the friendly and confidential terms on which they had lived, and by taking advantage of the enforced absence of the owners, who had no means of asserting their right. But the Subordinate Judge has failed to notice some evidence which shows that the wives of Durga Prasad and his father were in possession until their deaths, and that Bhawani Prasad and Kannu Lal never disputed their title, nor that of the appellant, and only asserted their right when they believed appellant to have died in transportation. This appears by proceedings taken in 1867 by Bhawani Prasad, when he claimed the property, admitting that Durga Prasad's wife had succeeded Durga Prasad, and claiming to succeed her at her death, and it is clear from a perusal of the judgment in that case that the claim proceeded on an assumption that Durga Prasad was dead. Thus Bhawani Prasad and Kannu Lal appear never to have asserted or intended to assert any title adverse to Durga Prasad. The appeal must be allowed with costs in both Courts, and the decree of the lower appellate Court modified by exempting the half of the western shop from the decree in plaintiff's favour.

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(1) to whom the entire shop was mortgaged on 30—5—1873, by Kannu Lal, the wives of Durga Prasad and Bal Kishen being dead then. The plaintiff was also the purchaser at a Court, sale held on 23—4—1879, in execution of a decree obtained by him on his mortgage.

(2) brother's son of Bhawani Prasad—the adoptive father of Kannu Lal.

(3) in 1840.

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APPELLATE CIVIL.

2 A. 361.

STRAIGHT, J.—It appears to me that in this case the Court is properly called upon to exercise its powers of equitable interference to the fullest extent. The appellant, Durga Prasad, was, at the time of his conviction and sentence, some 30 years ago, admittedly entitled, jointly with his father Balkishen, to a half share of the western shop, part of the property now in suit. Both the wife and mother of Durga Prasad were then alive, and so long as they lived it is beyond dispute that they enjoyed the income derived from this half share, which, so I gather from the findings, was paid over to them, first by Bhawani and afterwards by Kannu Lal. I do not think it is in the least material to the view I hold as to the mode in which this case should be treated, whether the wife of Durga Prasad did **[365]** or did not die within the twelve years preceding the institution of this suit. According to my judgment the whole point is, whether from all the circumstances and the relationship between them, the Court is justified in holding that a constructive trust existed in Bhawani and Kannu Lal for and on behalf of Durga Prasad and Balkishen, from the day their imprisonment commenced. A person may declare a trust either directly or indirectly: indirectly by evincing an intention, which the Court will effectuate through the medium of an implied trust, Lewin, 6th Ed., p. 95. Again, "Constructive trusts are those which the Court elicits by a construction put on certain acts of parties." Is the Court then, looking to the whole of the facts of this present case, entitled to come to the conclusion that a constructive trust is established? I am very clearly of opinion that it is, and that we are bound so to hold upon the plainest principles of equity, which in my view should be most liberally applied in a case where otherwise grave hardship and injustice would arise. By his imprisonment Durga Prasad was placed under a disability, just as much as a person "beyond the seas," or "lunatic," or "under age," and was thus deprived of the power of looking after his own interests, or asserting his rights, and during such time as it lasted it is obvious that Bhawani Prasad first and Kannu Lal, so far as his share in the property was concerned, occupied towards him a fiduciary position, of which the latter seems to have taken advantage in fraud of his "*cestui que trust.*" Till Durga Prasad obtained his release it would have been impossible for him to know what had happened, his wife was dead and he does not seem to have had any children to complain of the misappropriation of Kannu Lal or any means of gathering information of his misconduct. "No time will cover fraud so long as it remains concealed, for until discovery (or at all events until the fraud might with reasonable diligence have been discovered) the title to avoid the transaction does not properly arise," Lewin, 6th Ed., p. 710. No limitation therefore can affect the rights of Durga Prasad, and he is entirely justified in setting them up against the plaintiff's claim to the extent of his own interest. I therefore agree in Mr. Justice Oldfield's order both as to the shape in which this appeal is to be allowed and as to his order on the question of costs.

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APPEL-LATE CIVIL.

2 A. 433=4 Ind. Jur. 525.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

LACHMI NARAIN (*Plaintiff*) *v.* WILAYTI BEGAM AND OTHERS (*Defendants*). [27th August 1879.]

2 A. 433=4 Ind. Jur. 525.

Gift—Illegal and immoral consideration—Validity in absence of fraud.

A gift made by a person to his kept mistress,—who lived with him as his wife "on condition of her continuing to be his wife and remaining obedient to him, her husband"—which is followed by possession enjoyed for a number of years, cannot, even assuming that the consideration for it was illegal or immoral, be set aside, in the absence of fraud, in enforcement of a debt created subsequent to the gift.

Such a gift cannot be held to be immoral solely on the strength of the words used in the deed of gift, where the donor had children by his mistress, and his object in making it appears to have been her continuing to remain with him and discharge her duties to such children, rather than the continuance of their illicit intercourse. (*Ayerst* v. *Jenkins*, L.R. 16, Eq. 275, *F.*).

JUDGMENT.

[434] The plaintiff, Lachmi Narain, alleges that the defendant Captain W. Hearsey borrowed money from him on a bond, dated 3rd February, 1873, and again other sums from 7th September, 1873, to 27th October, 1876, and a further sum on a bond, dated 21st March, 1874. The plaintiff obtained decrees against him, and before judgment had attached certain properties, *i.e.*, mauza Kareli, mauza Bokhara, mauza Pahajganj, mauza Lissia Ghulam, and a share in mauza Kargina. The defendant Wilayti Begam, who is the mother of the other minor defendants, claimed these properties in her own right and that of her children, on the ground that they had been conferred on them by Captain Hearsey, and the properties were released. The relief sought by plaintiff is substantially to have declared the nature of the right of Captain Hearsey in the properties, that Wilayti Begam has no right in them, and that the other minor defendants have only a life-interest in them, and that the right and interest of Captain Hearsey in the property may be declared liable to sale in execution of the plaintiff's decrees. Wilayti Begam replied that these properties had been given to her and her children absolutely by Captain Hearsey, three years before the plaintiff became a creditor of Captain Hearsey, and that Captain Hearsey ceased to have any interest in them; and Captain Hearsey replied to the same effect. The Subordinate Judge has decided that there was a gift of the properties made by Captain Hearsey in consideration of love and affection for Wilayti Begam and his children, and that it was fully carried out by transfer of possession to them. There was no fraud on the plaintiff in the matter, for at the **[435]** time Hearsey was in affluent circumstances, and the debt which he incurred to plaintiff was incurred after the gift had been made, and he finds that these properties were not hypothecated in the plaintiff's bonds, a fact the Subordinate Judge thinks affords an argument in favour of the fact that they had been already transferred to defendants, and that the transfer was known to the plaintiff, who otherwise, being well acquainted with Hearsey's affairs, would have insisted on their being pledged as security for the money he was lending. The Subordinate Judge finds that the gift was made to Wilayti Begam by Captain Hearsey, who regarded

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her as his wife, on condition of her continuing his wife, and to the children, on the condition of their adhering to the Christian religion, and he disallows the plea that since it is admitted Wilayti Begam was not his married wife, but only his mistress, the condition was really one for continuance of concubinage and immoral, and the transfer null and void in consequence. On this point the Subordinate Judge remarks that: "Wilayti Begam is at least the mother of Mr. Hearsey's children, and lives with him as his wife: under these circumstances he made the gift of the property, having considered it his duty to support and provide for them, but as Wilayti Begam was of different religion and the children were minors, he introduced conditions calculated to invalidate the title of the transferees in case of their deviation;" and further on in his judgment he seems to consider that the gift having taken effect cannot be set aside at the instance of the plaintiff, and he dismissed the suit. The questions which we have to determine in appeal are (i) whether there was an actual gift which took effect and became operative by transfer of possession; (ii) its nature, what interest the transferees took under it, and whether anything remained to Captain Hearsey which can be taken in execution of plaintiff's decrees; (iii) whether the gift to Wilayti Begam can be set aside in this suit as illegal and immoral. (After determining that there was an actual gift which took effect and became operative by transfer of possession, and that in virtue of the gift the property vested absolutely in the donees, and no interest in the property remained to Hearsey, which could be sold in execution of a decree, the judgment continued:) Nor are we of opinion that the bequest to Wilayti Begam can be set aside by the plaintiff, and the property be taken in execution of his decrees, on the ground of ille-[436]gality. It is quite true that she is not the married wife of Hearsey, and that their connection is open to the charge of immorality, but it is clear, in making this bequest to her, he regarded her in the light of a wife and the mother of his children, and it appears to us that the consideration he had in mind in making the gift may be held to have been rather her continuing to remain and discharge her duties to the children she had by him, than the continuance of their illicit intercourse, for it must be remembered he considered his state of health at the time to be precarious, and a personal object does not appear to have actuated him. The imputation of an immoral object is based solely on some words which appear in Hearsey's applications for mutation of names, *viz.*, the words, "on condition of her continuing to be my wife and remaining obedient to me, her husband," but there is nothing in these words by themselves to support the imputation, but it is sought to attach an immoral object to them on the ground, though she is referred to as his wife, she was his mistress, but when explained by all the circumstances the object implied in the words does not necessarily appear to have been such as is imputed. Nor should we be disposed to allow this plea, so as to rescind the bequest, and make the property available as Captain Hearsey's to satisfy plaintiff's claim, so many years after the donees had taken possession under the bequest. On this point we may refer to *Ayerst* v. *Jenkins* (1), as the principle on which that case was decided seems applicable here. It is not pretended, nor can it be shown, that the bequests were made in fraud of plaintiff. On the contrary, there is evidence to show that at the time Captain Hearsey had a balance in plaintiff's hands of over a lakh of rupees, and the loans, the subject of this suit, were taken some years after the bequests had been made, and, as remarked by the Subordinate

(1) L. R., 16 Eq. 275.

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Judge, it is a significant fact that while other property was pledged for the loans, these properties were not, and as plaintiff was well aware of Captain Hearsey's affairs, the reason why the plaintiff did not insist on their being pledged may well be that he knew they had passed out of Captain Hearsey's hands. We have now disposed of all the material pleas in appeal, and there is no force in the last objection as to costs. We dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

1879 AUG. 28. — APPELLATE CIVIL. — 2 A. 366.

SUKHBASI LAL (*Plaintiff*) *v.* GUMAN SINGH (*Defendant*).

[28th August 1879.]

2 A. 366.

Hindu Law—Adoption.

When the adoption of a son has once been absolutely made and acted on for years, it cannot be cancelled or set aside at the suit of the adoptive father.

[R., 23 B. 327 (333), 24 B. 367 (380) (**F.B.**), 26 A. 40 (45), 5 A.L.J. 568 = A.W. N. (1908), 231 = 4 M.L.T. 385 (390) = 30 A. 549.**]**

Suit for a declaration that the defendant was not the adopted son of the plaintiff.

JUDGMENT.

[367] SPANKIE, J.—The plaintiff, appellant, presented a petition in the Revenue Court on the 27th April, 1860 and personally attested it. In this petition he most distinctly states that he had adopted defendant, and that all the requisite ceremonies had been performed, and that defendant would be the owner and heir of all the petitioner's property at his death. Thirteen years afterwards, the adoptive father and the adoptive son being engaged in litigation, the plaintiff filed a compromise (1) in which he says that he will consider the defendant as his adopted son. On the 14th April, 1877, he instituted this suit to invalidate the adoption as having been informal, and to annul the agreement or compromise of the 10th January, 1873.

The plaintiff, having himself affirmed the adoption as having been fully and formally made after the performance of all the ceremonies required by the Hindu law, cannot now disaffirm it and sue for a declaration that it is invalid. Indeed, when the adoption has once been absolutely made and acted on for years, it cannot be cancelled. It is certain that an adopted child cannot renounce the family of his adoptive father. He is entirely separated from his own family when his natural father disposes of him. The adoptive father in accepting an adopted son is bound by his act, which secures to the adopted son all the rights of a son born to the family. He is as much a son as if he had been begotten by his adoptive father.

[368] We are not called upon to consider the point urged in the second place, that a father can, under the principles of the Hindu law, exclude his adopted son, if such son is no longer in a position and fit to perform the religious ceremonies and rites which are the chief object of adoption. We must adhere to the claim as it stands in the plaint.

(1) dated 10th January, 1873.

The compromise of the 10th January, 1873, was filed in a suit which was determined on the terms of the compromise. If the plaintiff has suffered any wrong in consequence of defendant's omission to carry out the terms, and a new cause of action has arisen, he has a remedy, but he cannot renounce an adoption made prior to the compromise and acknowledged by himself as altogether complete and formal in 1860, by pleading now that owing to the refusal of defendant to act up to the terms of the compromise in 1873, he (plaintiff) is at liberty to consider the adoption at an end. The adoption subsists and must do so until the adopted son is dead. We dismiss the appeal and affirm the judgment with costs.

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Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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ABLAKH RAI AND OTHERS (*Defendants*) *v.* SALIM AHMAD KHAN (*Plaintiff*). [1st September 1879.]

Suit for cancelment of lease—Breach of conditions involving forfeiture—Act XVIII of 1873 (N.W.P. Rent Act), S. 93, Cl. (c).

A lease is not liable to cancelment and forfeiture, if its terms are substantially complied with, though not literally in the manner stipulated for; nor does an act or omission prohibited under it entail forfeiture, if no forfeiture is attached to such act or omission; nor does a condition, to which forfeiture is attached, involve such forfeiture, if the object was simply to ensure due compliance with the terms of the lease.

Held, accordingly, where a deed of perpetual lease stipulated for the payment of the rent annually, instalment by instalment, at the times fixed by the Government for the payment of instalments of revenue, that this was substantially complied with by payment of the instalments into the Government treasury, instead of to the lessor direct, as almost all the rent had to go towards revenue, and as such payment was in accordance with the arrangement previously made, as a matter of convenience between the lessor and the lessee; that the planting of trees, sinking of wells, etc., in violation of a condition simply prohibiting such acts, did not entail a forfeiture; and that irregularity and unpunctuality in the payment of instalments of rent did not, where no arrears were due, involve forfeiture, though so stated in the lease-deed. (H. C. R., N. W. P., 1871, p. 282 (**F. B.**), *F.*)

Suit under Cl. (*c*) of S. 93, Act XVIII of 1873, by the plaintiff the representative in title of the lessor by virtue of the purchase by him on 20—9—1876, for the cancelment of a lease, dated 7—12—1838, on the ground that the lessees had paid the rent to the Collector on account of the revenue due in respect of the estate instead of to him; that they had failed to pay instalments of rents due severally on 15—11—1876, 15—1—1877, 1—5—1877 on the due dates, and that they had allowed their tenants to plant trees and sink wells, and had themselves planted trees and sunk wells without the lessor's consent. Both the Courts below held that as the defendants had failed to pay the instalments of rent in question punctually, a breach of the conditions of the lease involving its forfeiture had taken place, and decreed in favour of the plaintiff, cancelling the lease.

Thereupon the defendants appealed to the High Court.

ORDER OF REMAND.

[439] STUART, C. J. and SPANKIE, J.—We are of opinion that the pleas in special appeal must be maintained. The lower appellate Court

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remarks that some years ago Nawal Kishore, representative of the deceased Babu Ram Ratan Singh, one of the original lessors in 1838 of the village in suit, fell into difficulties, and on the 20th November, 1876, his zamindari rights were sold at auction to the present plaintiff, respondent. The auction-purchaser found that the conditions of the lease (1), as regards the payment of rent, had not been complied with. He, therefore, sues to cancel the lease in accordance with the terms of the agreement recorded therein. The Judge considers that any private arrangement by which the lessees have been in the habit of paying the rent direct to the Government treasury, instead of to the lessor, has no bearing upon the case, and questions as to what might happen to respondent if appellant failed to pay his instalments. The question was whether or not appellant had by his failure caused a breach in the conditions of the lease. If the lessees paid direct to the Government treasury they should have paid before the instalment fell due, and this they had not done. He concludes that it has been proved that there has been a breach in fulfilment of the conditions as regards the regular and punctual payment of the instalments on the part of the lessees, and therefore the lease was liable to cancelment. He dismisses the appeal and affirms the decree of the first Court cancelling the lease. On examination of the lease, we must hold from its terms that it was intended to be perpetual. The original lessors reserved no profits for themselves. The lessees were to pay as rent Rs. 1,111 *sicca* rupees. The Government demand was or is Rs. 1,103-5-2, and there is no satisfactory evidence to show what became of the difference between these Rs. 1,111 and the equivalent in Queen's coin, Rs. 1,180-7-0, after payment of the Government revenue. According to the terms of the lease, the Rs. 1,111 Murshidabad rupees were to be paid to the lessor. The first condition as to payment of rent is that it is to be paid, instalment by instalment, when the Government revenue is paid. In case of its non-payment all the property of the lessees, both moveable and immoveable, may be sold, and the proceeds applied to the liquidation of arrears. The second and fourth conditions impose upon the lessees all the responsibilities and duties of a full **[440]** proprietor and declare that the lessors have no concern with the yearly rent as specified above. The lessees are to pay for roads, dak and police expenses, and patwaris' fees. The final condition is that the lease shall be held valid as long as the lessees shall pay the lessors regularly at every instalment the rent of the estate. If even a single instalment in any way falls into arrears, the lease shall be deemed null and void and shall be cancelled, the lessors having the right of making other arrangements with any one, as they pleased. It is not denied that, for convenience's sake or for some other reason, the lessor and lessees in times

(1) The material portion of the lease being :—

"As the lessee has agreed to take a permanent lease of mauza Darsan from the beginning of 1246 fasli at an annual rent of Rs. 1,111 (*sicca*) and has executed a kabuliyat, therefore this lease is granted to him: he shall now hold possession as *mustajir* and shall consider the fulfilment of the following conditions to be the means of his continuing to be lessee: (i) he shall pay the rent annually, instalment by instalment, from the month of Kuar to the month of Baisakh, at the times fixed by the Government for the payment of instalments of revenue; in case the rent is not so paid, all his property moveable and immoveable shall be sold, and the proceeds of such sale shall be deposited in the Government treasury towards satisfying any arrears: (ii) he shall not allow, without the lessor's permission, any one to plant trees, dig tanks, or sink wells, neither shall he himself do such things: as long as the lessee or his heirs shall continue to pay the rent annually, instalment by instalment, the lease shall remain in force, but if even one instalment falls into arrear, the lease shall become null and void, and shall be cancelled."

past arranged that the rent should be paid direct to the Collector, and not to the lessor, and the lease has now held good from 1838 to May, 1877, when the suit was instituted, a period of nearly 39 years. It is not shown that the plaintiff, after his auction-purchase in 1876, repudiated this arrangement, even if he had the power of doing so, or demanded the payment of rent directly to himself. We are not therefore disposed to hold that, in paying the rent to the Government treasury, there was any breach of the conditions of the lease that would entitle the plaintiff to claim its forfeiture. The money paid to and received by the Collector in accordance with the custom of past years must be regarded as money paid on account of the lessor and for him. We have seen that, in addition to the alleged breach of conditions in paying directly to the Government treasury, the Judge finds that the payments have been made with irregularity and want of punctuality. This may be the case, but we do not see in the lease itself any provisions which would justify the forfeiture of the lease on this account. Looking at the wording of the first condition, we should hold that a suit for rent was contemplated in the first instance on the failure to pay with regularity, and a decree to bring to sale the moveable and immoveable property of the lessees in satisfaction of any arrears. We are disposed to regard the last condition as a provisional clause for the security of regular payments, but not as one intended to enable the lessor to take advantage of any remediable lapse on the part of the lessees to pay their rent, and we think that the fact that the lease has held good for 39 years, and that its terms have been, in the matter of payment to the lessor, modified is a proof that the lease was perpetual and not to be cancelled at all as long as the rent was paid. It is worthy **[441]** of note that there are other conditions in the lease not affecting the question of the payment of rent which has been raised in this suit, and which appear to be framed with the view of maintaining some evidence of the lessor's proprietary rights, though the lease was intended to be perpetual. It seems to us that the suit, in so far as it has been brought to cancel the lease because the rent was not paid to the representative of the lessor, but to the Government, must fail, for the reasons assigned, and that it must also fail as brought on the ground taken by the Judge, irregularity in payment and want of punctuality, there being no proof of any existing arrears.

But there are allegations in the plaint which neither of the Courts below have taken notice of in their judgments. The plaintiff states that the lease is liable to cancelment because the lessees have allowed others to plant trees, and have themselves dug, and caused others to dig, wells on the land, and their doing so is an infringement of the lease. We have no judgment of the Court below on these allegations; doubtless the plaintiff is entitled to a judgment on them. Before we decide the appeal we must remand the case, under S 354, Act VIII of 1859, to the lower appellate Court to determine whether or not the lessees have allowed others to plant trees, and have themselves done so, without the permission of the lessor; whether they have allowed others to dig wells, and have done so themselves, without the permission of the lessor; and though doubtless we ourselves might determine the point, we direct the lower appellate Court to say, whether, in the event of its being shown that the lessees have exercised these proprietary rights, they have thereby incurred the forfeiture of their lease.

FINDING OF THE LOWER APPELLATE COURT.

The lower appellate Court found that the lessees had planted trees and sunk wells, and allowed their tenants to do so, without the permission

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of the lessors, thus breaking the conditions of the lease, and that such breach of the conditions of the lease involved, under the terms thereof, its forfeiture.

JUDGMENT.

[442] The main point on which the plaintiff relied was default in the payment of revenue, according to the Government instalments, the cause of action accruing on the 16th November, 1876, 16th January, and 2nd May, 1877. At the end of the plaint, and as it were an after-thought, it is stated that the lease is also liable to forfeiture because the lessees have dug wells and caused wells to be dug by others, but no instances are specified and no details given. (After determining that the lessor had acquiesced in the construction of wells and gardens by the lessees and their tenants, the judgment continued:) We have already disposed of that portion of the appeal which relates to the alleged unpunctuality in payment of the revenue. We have held that there is nothing in the lease to justify forfeiture of the lease in regard to the mode in which the revenue was paid, or the regularity or irregularity with which it was paid. In payment of the revenue the lessees followed an arrangement between the lessor and themselves which held good from 1838 to 1877, and we also held that there was no proof that after the purchase the plaintiff repudiated the arrangement; we also held that the lease would not justify forfeiture on the ground of any irregularity in the punctual payment of rent; our reasons are given in our judgment of the 13th February of this year; they need not be repeated here. We now hold regarding the issue remanded to the Judge that the sixth clause of the lease contains no provision that, if the lessees should build wells without the consent of the lessor, they should be liable to forfeiture of the lease. There is no such condition in this clause; on the contrary, the concluding part of it provides that as long as the said lease-holders or their heirs shall continue to pay the Government revenue annually, instalment by instalment, the lease shall remain in force, but if they fall into arrears for a pice even the lease shall become null and void, and the lease shall be cancelled. It is clear that the lease contemplates as the main condition that there shall be no default in payment of the Government revenue, there is nothing more than a prohibition regarding wells and planting trees. Even where the right of the zamindar to claim forfeiture in such a case is proved, according to a Full Bench ruling in *Sheo Churun* v. *Bussunt Sinah* (1) forfeiture is not to be [443] deemed the invariable penalty for breach of contract occasioned by the construction of a well or improvement of a tenant's holding. With this view of the case we decree the appeal and reverse the judgment of the Court below with costs, thus dismissing the suit as brought.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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FULL BENCH.

2 A. 340.

EMPRESS OF INDIA *v.* MANGU AND OTHERS. [2nd September 1879.]

Crim. Pro. Code, 1872, Ss. 272, 297—Arrest pending appeal.

After the admission of an appeal from acquittal by the High Court, the Court can order the arrest of the accused pending the appeal.

(1) H.C.R., N.W.P., 1871, p. 282.

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REFERENCE TO THE FULL BENCH.

STRAIGHT, J. referred the following question to the Full Bench.

Whether, after the admission of an appeal from an acquittal, the High Court may order the accused to be arrested pending the appeal?

JUDGMENTS OF THE FULL BENCH.

[341] STUART, C.J.—I concur in the opinion expressed by Mr. Justice Oldfield. I also agree with Mr. Justice Straight in holding that under S. 297 of the Criminal Procedure Code the re-arrest of the accused for the purpose of the appeal may be made.

SPANKIE, J.—On the point submitted to us, I accept the ruling in *Queen* v. *Gobind Tewari* (1), and approve the argument of the Legal Remembrancer in support of his contention that the Court had power to order the arrest of the accused. I observed at the hearing of argument in this case that if the contention quoted in the case referred to above could not be maintained, the High Court, under S. 297 of the Criminal Procedure Code, in any case coming to its knowledge, might, if it appeared that there had been a material error in any judicial proceeding of any Court subordinate to it, pass such judgment, sentence or order thereon, as it thought fit. It is not provided that the order passed should be final, and it might be one preliminary to a judgment in appeal. I do not, however, insist upon this view. I may observe that the draft Bill of the Criminal Code as amended—S. 427—expressly gives the power to the High Court to order the arrest of the accused person when an appeal is presented to it under S. 417, which corresponds with S. 272 of the current Code, except as to this power of arrest. The ruling, too, of the Calcutta Court referred to above (1) is cited as the marginal note to S. 427, and the proposed section is the same as para. 3 of S. 168 of Act IV of 1877, "The Presidency Magistrates Act," by which the High Court may order the accused person to be arrested, committed to prison, or held to bail, when the Public Prosecutor appeals on behalf of the Local Government against an acquittal, dismissal, or discharge.

OLDFIELD, J.—I concur in the view taken by the learned Judges of the Calcutta High Court in *Queen* v. *Gobind Tewari* and others (1). **[342]** The admission of an appeal revives the proceedings against the accused person who has been acquitted, and the appellate Court, which has power, under S. 272 of the Criminal Procedure Code, to pass such judgment, sentence or order, as may be warranted by law can, I apprehend, under the powers so conferred, compel the appearance of the accused person before it, and order his arrest.

STRAIGHT, J.—At the hearing of this reference I entertained some doubt as to the power of this Court, upon the admission of an appeal under S. 272 of the Criminal Procedure Code, to order the re-arrest of the person or persons who had been acquitted. I am not altogether clear upon this point now, despite the reasoning of the case (1) quoted by Mr. Justice Oldfield; but I may refrain from coming to any determinate opinion as to that, seeing that under the proposed new Code of Criminal Procedure such difficulty cannot recur. Moreover, I think, that under S. 297, it having come to the notice of this Court that the accused were improperly discharged, an order may be issued for their arrest. Let the Magistrate, therefore, arrest the accused, and keep them in custody till the appeal is disposed of.

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(1) 1 C. 281.

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APPEL-LATE CIVIL.

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PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

SHIB DAT (*Judgment-debtor*) *v.* KALKA PRASAD (*Decree-holder*).

[2nd September 1879.]

2 A. 443=4 Ind. Jur. 580.

2 A. 443=4 Ind. Jur. 580.

1. *Decree for money payable by instalments—Execution—Limitation.*

Where, in a decree for money payable by instalments, there is a proviso that, in default of payment of any one instalment, it should be executed for the whole amount, the decree-holder is strictly bound by its terms, and is bound to execute it in one lump; and an application for execution, made more than three years after the first default, would be barred, even though he may have received instalments in the interval.

[R., 15 C. 502 (505), 16 A. 371 (372); D., 5 A. 201 (206).]

2. *Acknowledgment after decree barred—Limitation Act, S. 19.*

An acknowledgment of his liability under the decree, made and signed by the judgment-debtor more than three years after the first default, could not save limitation.

[D., 5 A. 201 (206).]

JUDGMENT.

[444] SPANKIE, J.—In my opinion the decree-holder was bound strictly by the terms of the decree (1). When the first default (2) occurred, under the wording of the decree, he was bound to execute it in one lump. The instalment arrangement then ceased. If the decree-holder chose to continue to receive instalments, he did so at his own risk. When the acknowledgment (3) of the balance due was made, it seems to me that the decree was already dead, and could no longer be executed. Though the cases cited (4) may not be strictly in point, the principle upon which they proceed applies to this case. I would decree the appeal and reverse the order of the Court below (5) with costs.

STRAIGHT, J.—I entirely agree in the views of my colleague Mr. Justice Spankie.

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(1) Terms of the decree :—

The decree dated 14—7—1873 directed the payment of Rs. 700 together with interest at 12 annas per cent. in instalments, the first instalment being Rs. 200 payable in Pus 1281 fasli (5-12-1873—2-1-1874), the second being the same amount payable in Pus 1282 fusli (24-12-1874—21-1-1875), and the third being Rs. 300 payable in Asarh 1282 fasli (20-6-1875—18-7-1875) and further directed "In the event of default, the decree shall be executed for the whole amount."

(2) The first payment having been made on 4—1—1875.

(3) On 28—6—1877.

N.B.—The application for execution was made on 27—11—1878.

(4) 13 W.R., F.B., 44; 22 W.R. 282.

(5) The lower appellate Court held that, under S. 19, Act XV of 1877, the acknowledgment by the judgment-debtor of his liability under the decree created a fresh period of limitation.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Straight.

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APPEL-LATE CRIMINAL.

2 A. 444 = 4 Ind. Jur. 581.

EMPRESS OF INDIA *v.* GANRAJ AND OTHERS. [4th September 1879.]

2 A. 444 = 4 Ind. Jur. 581.

Evidence Act, S. 30 —Evidence of co-accused, admissibility of.

The test which S. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with another person or persons against whom it is tendered. To use a popular phrase, the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush.

[F., 2 A. 646 (649), 1 A.W.N. 20, 1 A.W.N. 135, Rat. Unrep. Crim. Cas. 436, L.B.R. (1893—1900), 7; R., L.B.R. (1893—1900), 70 (71).]

JUDGMENT.

[445] STRAIGHT, J.—This is an appeal by four persons (i) Ganraj, (ii) Basraj, (iii) Jhamman, (iv) Sittu, who are jointly tried and convicted together with a man named Samaru, at the Ghazipur Sessions Court on the 21st June last, for attempting to break into a dwelling house. It appears that upon the night of the 22nd April of the present year two chaukidars, by name Palak Singh and Musafir Singh, were going their rounds in the town of Zamaniah, about 11 o'clock, when they suddenly lighted on some eight or ten persons apparently engaged in endeavouring to effect an entrance into the house of one Malik Chand by breaking a hole through the wall. These officers at once made efforts to arrest the culprits, calling loudly for assistance the while, but the numbers against them were too great, and after a fight and several blows being exchanged the offenders escaped. About dawn of the 23rd April, however, Samaru was caught close to the scene of the attempted crime, and very soon after his being taken into custody he made a statement. On the 28th the charge against him alone was gone into before Mr. Wheeler, the Magistrate, and in his presence Samaru appears to have given two further accounts of the transactions. The result of these was that on the adjournment day the four appellants were placed in the dock with him, and at the conclusion of the proceedings the case was transferred to the Court of Mr. Rustomji. Further inquiry took place on the 6th May, and then all five defendants were committed. Upon the hearing of the appeal it was urged by Mr. Colvin for **[446]** the four appellants: (i) that the evidence of their identity as parties to the attempted crime was unsatisfactory, and that Palak Singh and Musafir Singh were untrustworthy witnesses: (ii) that each and all the confessions made by Samaru were inadmissible under S. 30 of the Evidence Act against his co-prisoners, because the statements contained in them did not admit his own participation in the crime, but on the contrary were obviously made to show that he was no *party* to it.

It will be as well to dispose of the last contention first. In order to do so I have very carefully examined each of the statements, five in all, made by Samaru. I need not point out their variations or discrepancies one from the other: even were they admissible I should not think of acting upon them for a moment. But I am clearly of opinion that none

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of them satisfy the requirements of S. 30, and that they are not *confessions* in the sense of that section. The charge upon which Ganraj, Busraj, Jhamman, and Sittu were tried in the Sessions Court was one of attempted house-breaking, and unless Samaru's statements went the length of admitting that he was at the spot approving of and coinciding in, in fact, in other words, that he was a principal in, the commission of the unlawful act upon which the others were engaged, I do not think that such statements should "be taken into consideration." In every one of them he seeks to fix guilt on the others, and to excuse himself, and I do not, therefore, think these so-called confessions "implicate him to the same extent as they implicate the persons against whom they are proposed to be used,"—*Queen* v. *Belat Ali* (1). As I pointed out at the hearing of the appeal, it seems to me that the test S. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it *of the offence* for which he is being jointly tried with the other person or persons against whom it is tendered. In fact, to use a popular and well understood phrase, the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush. I, therefore, think that **[447]** Mr. Colvin's objection to Samaru's statements is a valid one, and they should not have been taken into consideration in the Sessions Court. I have, however, come to the conclusion after a very close and careful examination of all the proceedings that, in the terms of S. 167 of the Evidence Act, there was sufficient evidence, without Samaru's statements, to justify the conviction of all the appellants, and I accordingly dismiss the appeal, at the same time observing that I do not think they were prejudiced in their defences by the admission in evidence of those statements. I see no ground for interfering with the punishment. The accused were convicted of a very serious offence, which they followed up by violence to the officers of the law, and I think the Sessions Judge very properly proportioned the punisbment.

CRIMINAL.

PRESENT:

Mr. Justice Straight.

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EMPRESS OF INDIA *v.* KASHI. [5th September 1879.]

CRIMINAL.

2 A. 447 = 4 Ind. Jur. 582.

2 A. 447=4 Ind. Jur. 582.

Crim. Pro. Code, 1872, S. 215—Discharge, without examining all prosecution witnesses.

An accused person shall not be discharged unless the Magistrate has examined all the witnesses named for the prosecution.

[F., 2 A.W.N. 179.]

JUDGMENT.

[447] STRAIGHT, J.—I regret that I feel myself prevented by the terms of S. 215, Criminal Procedure Code, from adopting the suggestion (2)

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(1) 10 B.L.R. 453=19 W.R. 67.

(2) The Sessions Judge had suggested that the order of discharge (made by Carter, the Magistrate, before whom the accused stood charged with an offence under S. 211, I.P.C.,—without the evidence of all the witnesses named for the prosecution being taken) should be allowed to stand as it did not appear that there had been any miscarriage of justice or material error sufficiently requiring the re-trial of the accused.

[448] of the Sessions Judge. The words of the explanation are plain and positive, and establish as a condition precedent to a discharge, the examination of all the witnesses named. It is impossible for me to say whether Mr. Carter was right or wrong in the view he took of the case, but he was clearly in error in determining it without satisfying the directions of S. 215. This point has already been made the matter of decision twice in this Court in the cases of *Empress* v. *Tantia* (1) and *Empress* v. *Bhodram* (2) decided 28th July, 1879. In both of those I followed the authority of *Empress* v. *Himatulla* (3) with which I may add I entirely agree. I must therefore set aside Mr. Carter's order of discharge, and direct him to re-open the case and examine the further witnesses named, and then pass such order in the matter, as the whole of the evidence may appear to call for.

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PRESENT :

Mr. Justice Straight.

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IN THE MATTER OF THE PETITION OF SUKHO *v.* DURGA PRASAD AND OTHERS. [6th September 1879.]

2 A. 448.

Crim. Pro. Code, 1872, Ss. 272, 297—High Court's powers of revision—Private prosecutor, right of, to move it, on acquittal.

It is competent for a private prosecutor to apply to the High Court, in the case of an acquittal, to exercise its powers of revision.

[R., 2 S.L.R. 25 (26); 5 N.L.R. 4 (6).]

JUDGMENT.

[448] STRAIGHT, J.—This was an application by petition on the part of one Sukho for revision of an order passed by the Sessions Judge of Bareilly, acquitting four persons prosecuted in his Court by the applicant. At the commencemen tof the proceedings before me objection was taken by Mr. Leach for the parties whose acquittals are complained of to the "*locus standi*" of Babu Jogindra Nath, to make such an application on the part of a private prosecutor, S. 272 of the Criminal Procedure Code giving the Local Government alone the **[449]** right to move against a judgment of acquittal. I was, however, of opinion that this being an application for revision, it was competent for a private prosecutor to bring to the knowledge of this Court material errors that had taken place in a judicial proceeding in a Court subordinate to it, with a view to having them set right. The circumstance that an acquittal had taken place in the Court below did not appear to me to affect the consideration of the objection, the whole question appearing to me to be whether the applicant's petition showed upon the face of it material error in law or procedure in the proceedings of the Sessions Court. I have carefully examined it, and find it deals purely with questions of fact, and that no point of law is raised upon it, consequently there is nothing to revise and the record may be returned. Properly I ought to have rejected the former application to send for the record.

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(1) Legal Remembrancer, N.W.P. vol. i, 11.
(2) Unreported.
(3) 3 C. 389.

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2 A. 465.

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PRESENT:

Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF GOBIND PRASAD AND ANOTHER. [15th October 1879.]

2 A. 465.

1. *Penal Code, S. 441—Criminal trespass—Term "annoy" explained.*

The word "annoy" in S. 441 must be taken to mean annoyance that would generally and reasonably affect an ordinary person, and not that which would specially and exclusively affect a particular individual.

2. *Penal Code, S. 441—Possession contemplated by the section.*

The possession contemplated and intended by S. 441, I.P.C., must be actual in the sense and meaning of S. 530, Crim. Pro. Code, 1872.

3. *Penal Code, S. 441—Criminal trespass*—Bona fide *assertion of right.*

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with the other persons, is not a criminal trespass, unless the intent to commit an offence, or to intimidate, insult or annoy is conclusively proved.

[3—R., 2 A.W.N. 236, 22 C. 391 (407), U.B.R. (1892—1896) 259, U.B.R. (1897—1901), 352, 13 P.R. 1905 (Cr)=81 P.L.R. 1905=2 Cr.L.J. 81, 12 P.R. 1906 (**F.B.**) (Cr)=54 P.L.R. 1907.**]**

JUDGMENT.

[465] STRAIGHT, J.—This is an application for revision under S. 297, Criminal Procedure Code, of an order of the Magistrate of Mirzapur, passed upon the 3rd of September last, convicting two **[466]** persons, namely one Gobind Prasad and Chaurasi, his wife, of criminal trespass under S. 441, Penal Code. The case has been very fully and exhaustively discussed before me by the pleaders on both sides. and I must frankly say, that I have experienced the greatest difficulty in forming any determinate opinion upon it. This has arisen from the unusually vague and elastic language used in S. 441, which, if not closely scrutinized and strictly interpreted, might lead to its application to sets of facts or circumstances, for which it was never intended by the Legislative authorities who framed it. For it is easy enough to conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit, of the section, ard which no one would for a moment consider fit subject even for civil proceedings, much less for a prosecution in the criminal Court. To lay down any rule, as to the extent to which its operation should be limited, is scarcely possible, but it is plain that its scope must be confined within those bourds that common sense and sound reason dictate. In this view let us see what the words of the section practically enact, and how they are to be practically applied. First, there must be an unauthorised entry into or upon property,—unauthorised, that is to say, either directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has an unlawful intention, which, were it known to such person, would make him object, forbid or prevent the entry that in ignorance of such intention he sanctions and permits; or, again, if the entry has been lawfully and legitimately obtained, there must be an unlawful "remaining," either directly or constructively against the will of the person in possession, to be judged by the tests

already explained. In either case, the unlawful entry or unlawful remaining must be with intent (i) to commit an offence, (ii) to intimidate, (iii) to insult, (iv) to annoy, any person in possession of the property. As to these intents, the first three are sufficiently explicit by the light of Ss. 40, 503 and 504 of the Penal Code; but as to the fourth, very grave difficulty arises to ascertain what is or is not meant. Is the word "annoy" to be taken in its fullest and most general sense, or with what limitations is it to be construed? The varieties and differences of human temperament are so innumerable that it is next to impos-[467]sible to estimate to what lengths a literal definition might not extend. It is a matter of daily observation, that what will annoy one man will not disturb an emotion in another; and in a vast community like the native population of this country, the endless fancies, feelings and prejudices, religious or caste-born, necessarily are stronger and more sensitive with one set of persons than with another. It must, therefore, be that the word "annoy" in this section 441 must have some plain and intelligible construction placed upon it, and its application must not be left to depend upon each individual case and the peculiarities of character or idiosyncrasies of feeling of the special person who comes forward to complain. It seems to me that the word "annoy" in S. 441 must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual.

I cannot agree in the argument of the pleader who appeared to support the conviction, that where an entry upon property is in itself illegal, that is sufficient to establish one of the criminal intents required by S. 441. Because an act is illegal in the sense that it is a breach of a man's duties and obligations under the civil law to obey and submit to any process that is sought to be enforced against him by execution or otherwise, it does not follow as a necessary consequence that that act is criminally unlawful and therefore punishable. The intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires.

So far I have dealt with the intent to annoy. But with intent to annoy whom? "Any person in possession of such property." Then the question arises what sort of possession is here intended, express or implied, constructive, in the sense of "legally entitled to," or actual, as contemplated in S. 530, Criminal Procedure Code. As to this last-mentioned provision, it is plain that, in the interest of public peace, it may be used to declare and protect the possession of a mere trespasser until he is "ousted by due course of law." How far a person in that position could invoke the provisions of S. 441 of the Penal Code against the party "legally entitled to possession," for making an entry upon property in the occupation [468] of the trespasser, I am not prepared here to discuss. That would be opening up the discussion of a question of so expansive a character that, as it is unnecessary for the purposes of the decision of the present case, I avoid entering upon it. Suffice it that, to deal with the matter before me, I am of opinion the possession contemplated and intended by S. 441 must be actual in the sense and meaning of S. 530, Criminal Procedure Code.

Having thus dealt with the legal aspects of S. 441, let us see in what way it can be applied to the present case, the circumstances of which are as follows:—On the 16th January, 1873, Gobind Prasad, Chaurasi his wife, and his brother Kalika, jointly mortgaged to one Ram Ratan Das four houses, two situate in Narghat, in Muzaffarganj mohalla.

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and one at Tirmohani, for an advance of Rs. 2,000. It was stipulated by the deed that the loan should be re-paid within six months, otherwise it would become a deed of conditional sale. Neither the capital sum nor any portion of it was re-paid within the time mentioned, and on the 12th February, 1874, notice as required by S. 8 of Regulation XVII of 1806 was duly issued. Some arrangement then appears to have been come to between the mortgagors and the mortgagee, the result of which was that, on the 4th July, 1874, the two houses at Narghat were sold for Rs. 833-8-0 and the proceeds of such sale were handed over to Ram Ratan Das. The year's grace from the notice of February, 1874, ran out, but no further steps were taken by the mortgagee, who, on the 15th March, 1875, accepted a further sum of Rs. 300 on account of his debt, thus making a total of Rs. 1,133-8-0 paid in satisfaction of the original principal sum of Rs. 2,000. On the 24th August, 1876, an order of foreclosure was made and issued. Thereupon a suit for possession was instituted, which was met by the defence that, as the plaintiff had accepted the payments before mentioned, his claim to foreclosure was barred. The Subordinate Judge of Mirzapur, who tried that case, decided in the plaintiff's favour, and against his decision Chaurasi and Kalika appealed. The judgment, however, stood good as against Gobind Prasad, who, on the 25th June, 1877, executed an agreement by which he promised to pay the balance due, with interest, within one year, failing which the plaintiff should have a decree for possession. It was intended that Kalika and Chaurasi should be parties to that document, but **[469]** as a matter of fact they were not: on the contrary, they lodged an appeal against the Subordinate Judge's decision, which was heard on the 29th November, 1877, and resulted in their favour. Gobind Prasad failed to fulfil the terms of the agreement, and the twelve months having elapsed and principal and interest not having been paid, Ram Ratan Das applied to be placed in possession of the two houses in Muzaffarganj mohalla and Tirmohani. To this Gobind Prasad objected: firstly, that the grounds upon which the appeal of Kalika and Chaurasi had been allowed applied equally to him as a matter of defence to the plaintiff's claim; secondly, that the houses were the joint property of himself and the other two mortgagors of the mortgage-deed of 1873. The Subordinate Judge passed an order of possession on the 2nd November, 1878, against which Gobind Prasad appealed to the Judge, and his case came on for hearing and was disposed of on the 14th November, 1878, the appeal being dismissed. Meanwhile, on the 11th November, the amin of the Court had gone to give possession of the house in Muzaffarganj mohalla to Ram Ratan Das, but he there found Kalika and an agent of Chaurasi on the chabutra, who said they owned a share of the house "and objected, and so I went back and reported to the Court." A few days later another amin was sent, who gave possession as directed by S. 264 of the Civil Procedure Code, Kalika objecting and Gobind Prasad being upon the premises at the time. This was the full extent of possession ever obtained by Ram Ratan Das. Between November, 1878, and April, 1877, disputes continued between the parties, and instead of directing his attention towards obtaining possession of the house in question by due process of law, Ram Ratan Das seems to have resorted to the Criminal Court for sureties of the peace by Gobind Prasad and his relations, no doubt with the view of making a cheap short cut to secure his object, namely, to force a surrender of the property. Ultimately, early in April, he preferred a charge under S. 441 against Gobind Prasad and Chaurasi for criminal trespass, which he alleged to have taken place on the 15th April. For some reason best known to himself

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the Magistrate, instead of taking up the case under the section upon which complaint had been made, proceeded of his own motion to deal with the matter under S. 530, Criminal Procedure Code, and on the 8th May he [470] found that Gobind Prasad and his wife were in possession of the house, but he directed them "to clear out within 10 days." This most irregular order, made in the teeth of the words of the section, came up to this Court for revision and was necessarily quashed by Mr. Justice Oldfield, who directed that the possession of Chaurasi must be maintained, while he at the same time pointed out that the complaint under S. 441 should be disposed of.

On the 14th July Gobind Prasad and his wife appeared before the Magistrate, to answer the charge under S. 441 for the alleged trespass on the 15th April, and after a hearing they were on the 14th July convicted and fined one rupee. They took no steps to set this conviction aside, and on the 1st September a second complaint was lodged before another Magistrate against them for an alleged trespass on the 14th July, the very day when they had been in attendance at the Magistrate's court. Upon this charge, after they had been given twenty-four hours' grace to turn out of the house, they were, on the 3rd September, convicted and fined Rs. 200 each. It is that conviction and sentence that now comes before this Court for revision. The only other facts that should be recapitulated are that, on the 17th February, Gobind Prasad had filed an application to be declared insolvent, which was rejected by the first Court, but granted on appeal to this Court, and that on neither occasion before the Magistrate did Ram Ratan Das himself appear as a witness or to support his complaint.

Such were the circumstances out of which the Magistrate was called upon to decide as to the guilt or otherwise of Gobind Prasad and his wife under S. 441, Penal Code, and it is as to the propriety of his determination upon that point, that the case now comes before this Court. I do not forget that I must deal with it, not as I should with an appeal, but simply as a matter for revision under S. 297, Criminal Procedure Code. At the same time it is my duty to see that the Magistrate had before him sufficient legal evidence to justify him in convicting. Applying the tests I have already adverted to in the earlier part of this judgment, I am clearly of opinion that no such possession as is required by S. 441 was ever proved to have been in Ram Ratan Das so as to make Gobind Prasad liable either for his "entering into" or "remaining" on the premises [471] in question. Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence, or to intimidate, insult or annoy is conclusively proved. Evidence of any such intent in this case seems to me to be altogether absent, nor does the complainant himself come forward to establish anything of the kind. Rightly or wrongly, both Kalika and Chaurasi allege a joint interest in the house in Muzaffarganj mohalla, and the former has made formal objection to possession of it being given to Ram Ratan Das. The original mortgage was joint, and of all four houses jointly, the loan was joint, the payment of the Rs. 1,133-8-0 was made on the joint account, and so accepted by the mortgagee, and the agreement of 25th June, 1877, was intended to be joint, though it was only executed by Gobind Prasad. Without enumerating other facts in the case, that appear to me to negative any of the intents under S. 441, there is quite sufficient to justify Gobind Prasad in protesting that what he has

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done has been with the *bona fide* object of asserting his rights or the rights of his co-sharers. Ram Ratan Das, if he had thought proper to do so, had only to put the machinery of the civil law in motion, and it would have accomplished for him all that he required, but he elected to appeal to the Criminal Courts, and he has no one to blame but himself if he finds that he must now revert to the course of procedure he should have originally adopted. The convictions are quashed.

2 A. 465.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1879 NOV. 17.

BHUPAL (*Defendant*) *v.* JAG RAM (*Plaintiff*). [17th November 1879.]

APPELLATE CIVIL.

2 A. 449.

Promise not to alienate property—Charge.

An undertaking by a judgment-creditor, in a petition to the Court executing a decree against him, stating generally that he would not alienate his property until the debts are paid, does not amount to a charge on his property.

2 A. 449. [R., 12 A. 175 (178).]

JUDGMENT.

[450] STUART, C.J.—In this case one Jawahir, in the course of execution of a Small Cause Court decree against him at the suit of the plaintiff, had by a petition in the execution department, dated the 19th December, 1871, agreed to pay the debt by yearly instalments, and the petition then proceeds as follows: "In case of default I shall pay the amount of both the decrees in a lump sum: I shall not alienate my own property and that of my father until the amount of both the decrees has been paid: if I do so I shall first pay the amount of the decrees: the first instalment shall fall due in the month of Baisakh, Sambat 1929." It is contended that this has the effect of constituting a valid lien by hypothecation in favour of the plaintiff, and that therefore a subsequent sale to Bhupal, the defendant, was invalid. But such a contention cannot be allowed. The agreement contained in the petition is not evidence of any hypothecation, not even of a verbal one, but simply an arrangement that the property should not be alienated till the debt was paid. In fact such an agreement goes to disprove that any mortgage or hypothecation was made, or even intended by it, for the very fact of an undertaking "not to alienate" shows that neither the property itself nor any interest in it had actually passed to the plaintiff, which, if there had been a good and valid hypothecation, must have occurred. The sale therefore to the defendant, appellant, cannot be impugned. The present appeal must be allowed, the decrees of both the lower Courts are reversed and the suit dismissed with costs in all the Courts.

OLDFIELD, J.—It appears that the plaintiff obtained a decree in the Small Cause Court against his judgment-debtor for a sum of **[451]** money, and in course of execution of it the judgment-debtor entered into an arrangement to pay the amount by instalments, and stipulated that he would not alienate his property until the amount was satisfied. He, however, made an alienation by private sale to the defendant, appellant, before us, and the plaintiff has brought this suit to have the property re-sold, on the ground

that it had been hypothecated to him by the arrangement entered into the execution proceedings above referred to. The Courts below have decreed the claim. The appeal on the part of defendant, however, must prevail, since, on examination of the proceedings on which plaintiff relies, it cannot be held that the judgment-debtor made any pledge of any particular property to the plaintiff, for a mere stipulation not to alienate his property generally cannot be taken to effect a mortgage of property as security for a debt. The appeal is decreed and the decrees of the Courts below reversed and the suit dismissed with all costs.

1879 NOV. 17. — APPELLATE CIVIL. — 2 A. 449.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1879 NOV. 17. — APPELLATE CIVIL. — 2 A. 471=4 Ind. Jur. 585.

RAMADHIN AND ANOTHER (*Defendants*) *v.* MAHESH AND ANOTHER (*Plaintiffs*). [17th November 1879.]

2 A. 471=4 Ind. Jur. 585.

Arbitration—Suit for filing of award—C.P.C., 1877, Ss. 2, 526 and 588.

There is no appeal from an order directing the filing of an award, (made on a private reference to arbitration), passed in a suit for filing such award, where such order is not followed by a judgment and decree. For, such an order is neither a decree, nor one of those orders made appealable under S. 588 of the C.P.C.

[R., 7 B. 316 (320).]

In a suit wherein the plaintiffs claimed under S. 525 of Act X of 1877 that an award made on a private reference to arbitration should be filed in Court, the Court of first instance, holding that an award was valid, made an order in the following terms: "Ordered that the claim of the plaintiffs be decreed." Ramadhin and Tulsi Ram, two of the defendants, appealed, contending that the arbitrator had determined matters not referred to him, and had been guilty of misconduct and corruption.

JUDGMENT.

[472] STUART, C. J.—A preliminary objection is taken by the plaintiffs, respondents, that the present appeal does not lie, seeing that it is an appeal from an order, which, taken in connection with the relief asked for in the plaint, is simply an order directing the award to be filed as provided by S. 526, Act X of 1877, and that such an order is not one of those made appealable by S. 588. This objection must be allowed. The award in the present case was made in a private arbitration, but the effect of S. 526 is to place it on the same footing as an award made in an arbitration made before the Court, and the procedure to be followed for enforcing the award must be precisely the same in both cases. Instead therefore of the Subordinate Judge recording the order he has made, by which he appears to decree the plaintiffs' claim on its merits, he should have proceeded as directed by S. 526, read in connection with S. 522 of Act X of 1877, and given a formal **[473]** judgment according to the award and a decree following upon such judgment. And this he ought to do still. The present appeal is an incompetent proceeding; we cannot hear it but must disallow it with costs.

OLDFIELD, J.—This suit before us was brought for filing an award under S. 525, Act X of 1877. The Subordinate Judge has decreed the claim, and the first question we have to determine is whether the appeal

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now preferred by the defendants is maintainable. By S. 525 the application made under that section has to be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and it is incumbent on the Court to determine if any such grounds as are mentioned in Ss. 520 and 521 are shown against the award, and if not, it is provided by S. 526 that "the Court shall order the award to be filed, and such award shall then take effect as an award made under the provisions of this chapter," *i.e.*, chapter xxxvii. I understand this to mean that the Court, after ordering the award to be filed, shall proceed to do as directed in S. 522, *i.e.*, give judgment according to the award and follow the judgment so given by a decree (1), and that the decree will then be enforced in the manner provided for the execution of decrees, and no appeal will lie from such a decree except in so far as the decree is in excess of or not in accordance with the award. In the suit before us the Subordinate Judge has determined questions under Ss. 520, 521, but his final order is merely that the claim be decreed, and looking to the plaint and the nature of the claim this amounts only to an order for filing the award; no judgment according to the award followed by a decree required by S. 522 can be said to have been given, and the question does not arise whether there is an appeal with reference to the provisions of S. 522.

Nor do I consider that there is any appeal from the order that has been made. It is not one of those orders from which an appeal is allowed by S. 588, and it cannot be held to be a decree as the word is defined in S. 2, Act X of 1877, so as to give a right of appeal as from a decree, as has been urged before us. for the order is not the formal order of the Court in which the result of the **[474]** suit (and the proceeding is a suit) is embodied; the order for filing an award is but an interlocutory order, a step in the decision of the suit, the result of which is embodied in the final decree which the law (S. 522) directs shall follow judgment. The Court below should be moved to give judgment in accordance with the award and a decree to follow it. There may or may not be an appeal from that decree according to circumstances, but this appeal must I think be dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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SHEO PRASAD (*Defendant*) *v.* A. B. MILLER, OFFICIAL ASSIGNEE TO THE HIGH COURT, CALCUTTA (*Plaintiff*). [17th November 1879.]

2 A. 474.

Stat. 11 and 12, Vict. C. 21 (Insolvent Act), S. 24—"Voluntary conveyance by insolvent."

Per STUART, C. J.—An assignment made by a person, two days before being adjudicated an insolvent and before the vesting of his property in the Official Assignee, of a portion of his property in favour of one of his creditors, who pressed him, is not "voluntary" within the meaning of S. 24 of the Insolvent Act, and is, therefore, not fraudulent or void as against the Official Assignee.

Per PEARSON, J.—S. 24 of the Insolvent Act has no application; where the vesting order was not made on a petition by the insolvent for his discharge.

[F., 3 A.L.J. 604 = A.W.N. (1906), 250.]

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(1) *Sahib Ram Jha* v. *Kashee Nath Jha*, 21 W. R., 295.

Baij Nath and his two brothers Bansi Dhar and Ghasi Ram were carrying on business at Calcutta, Cawnpore and Lucknow (under the style of *Nanu Mal—Bansi Dhar* and *Ghasi Ram*—and *Chotey Lal* and *Sita Ram*, respectively). On 20—12—1875, one Sheo Prasad, of Cawnpore, a creditor of the firm of *Bansi Dhar* and *Ghasi Ram*, sent his agent Paras Ram to Baij Nath to demand a debt due to him by that firm. Baij Nath took Paras Ram to the house of Ram Prasad, a resident of Lucknow, who was indebted on that date to the firm of *Chotey Lal* and *Sita Ram*. There a settlement of accounts took place between Baij Nath and Ram Prasad, and Ram Prasad drew the following *rukka* on one Kanahaiya Lal:—"My friend Lala Kanahaiya Lal, Rs. 10,352 are due by me to Baij Nath: I now draw this *rukka* in your favour to the effect that under his assignment I am causing Rs. 9,452 to be paid to Paras Ram on account of his debt: take a receipt from Paras Ram according to this *rukka* and enter the amount in my account: I will give credit for this item against my item of deposit, at the time of adjustment of accounts: it is necessary that you should attend to this matter." This *rukka* was handed over to Paras Ram.

On 22—12—1875, at the instance of some of the creditors of the firm of *Nanu Mal*, Baij Nath and his brothers were adjudicated insolvents by the Calcutta High Court and that Court made an order vesting their property in the Official Assignee of the Court who instituted the present suit in December, 1877, against Sheo Prasad for recovery of the amount of Ram Prasad's debt to the firm of *Chotey Lal* and *Sita Ram*, on the ground that it had been fraudulently transferred to him by Baij Nath. On the first Court giving the plaintiff a decree, the defendant preferred an appeal to the High Court.

JUDGMENT.

[476] STUART, C. J.—This appeal must be allowed. The simple question is whether the *rukka* drawn by Ram Prasad on Kanahiya Lal was transferred by the former to the defendant, Lala Sheo Prasad, honestly and for good consideration, or "voluntarily" within the meaning of that word in S. 24 of the Insolvent Act 11 and 12 Vict., c. 21. That is the sole question before us, and it must be answered favourably for the *rukka* and against the plaintiff. The facts material to the question may be stated as follows:—The *rukka* was drawn and transferred to the defendant on the 20th December, 1875, and on the 22nd December, 1875, the parties represented by the plaintiff were adjudicated insolvents by the Calcutta Insolvency Court. By S. 20 of the Insolvent Act the whole estate of the insolvent, without necessity of express conveyance or assignment, vests in the Assignee in trust for the benefit of the insolvent's creditors. By S. 21 it is provided that the Assignee shall take possession of such estate, and by S. 26 it is, among other things, enacted that persons holding property of, or being indebted to, the insolvent shall hold such property for, and pay according to such indebtedness to, the Assignee for the general benefit of the creditors of such insolvent. These sections of the Insolvent Act give to the Assignee an absolute title to and complete control over the entire estate of the insolvent as at the date of the vesting order. But by S. 24 of the Act it is enacted that "if any insolvent * * * * * * * shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, * * to any creditor, or to any other person in trust for or to, or for the use, benefit, or advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances and *within*

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[477] *two months* of the date of the adjudication of insolvency * * * shall be deemed, and is hereby declared to be fraudulent and void as against the assignee of such insolvent." Relying on this section the plaintiff claims the value represented by the *rukka* on the ground, first, that the 20th December, 1875, was not its true date, and secondly, even if it was, that the *rukka* was given voluntarily and fraudulently, that is, in fraudulent preference of the defendant. But I can see nothing in the evidence to support such a contention. It is very clear in the first place that the 20th December, 1875, was the true date of the *rukka*; this is the plain inference from all the evidence on the subject. The plaintiff's recorded statements to the contrary are not distinct and absolute according to certain knowledge on his part, but as rather suggestedly asserted with the view apparently of giving him a *locus standi* for contending that the date of the *rukka* was subsequent to the vesting order, and the transaction was voluntary and fraudulent within the meaning of S. 24 of the Insolvent Act. It is also in evidence that the debt represented by the *rukka* was due by Baij Nath, to the defendant, and there was therefore good consideration for the transfer to the defendant. There is also evidence to show that the defendant Sheo Prasad, by himself or by Paras Ram, his manager, had been pressing for payment of the debt due to the defendant by Baij Nath, and it is further in evidence that Ram Prasad discharged his debt to Baij Nath by honestly and in good faith transferring to the defendant the *rukka*, which appears to have been duly cashed by Kanahiya Lal. Under these circumstances it is idle to argue that the *rukka* was obtained by the defendant by any voluntary or fraudulent act on the part of Ram Prasad.

Some English cases were referred to at the hearing on the part of the appellant and they appear fully to support his contention. Thus in *Strachan* v. *Barton* (1) it was laid down that, in order to make a payment to a creditor by a bankrupt a fraudulent preference the bankrupt must be a volunteer, and not pay in consequence of any request or pressure for payment on the part of the particular creditor. During the argument Pollock, C.B., remarked that the simplest request may be sufficient if payment was the result of that request. In answer to a suggestion by counsel that there [478] was no request, and that the offer of payment on the part of the bankrupt was voluntary, the Chief Baron observed that it was only voluntary in the sense that the bankrupt offered it to satisfy the demand of the creditor, and he gave his judgment in accordance with these views. Alderson, B., was of the same opinion. He said: "The question is what is the meaning of a voluntary payment? I understand it to be a payment made by the debtor alone," that is, by the debtor without pressure or solicitation on the part of his creditor. He goes on to say, "The test in cases such as the present is, would the bankrupt have made the payment without the creditor's coming?" In the present case the creditor undoubtedly did come, for it is clear from the evidence to which I have referred that Baij Nath was hard pressed for payment by the defendant and his manager. In the same case Martin, B., concurring, observed that "every creditor has a right to go to his debtor and get his debt, if he does so *bona fide*. But in *Mogg* v. *Baker* (2) it was distinctly laid down, that a payment is not necessarily voluntary because pressure, in the ordinary sense of the word, has not been used. There the question was, whether a possession of goods was voluntary under the then Insolvent Act. Lord

(1) 25 L. J. N. S. Ex., 182.
(2) 4 Mee. and W. 348=8 L. J. N. S. Ex. 55.

Abinger, than whom no man better understood the law on this subject, said, 'that if a demand is made by a creditor *bona fide*, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the Insolvent Act,' and he observes that the constant practice at Nisi Prius has been that a demand by a creditor is sufficient."

Another case referred to at the hearing was that of *Ex parte Hitchcock* (1) before Bacon, Chief Judge in Bankruptcy, where traders in a hopeless state of insolvency, three days before they suspended payment, paid in the ordinary course of business, and without any motive for favouring the payee, a considerable sum to a creditor, who received it *bona fide*, and the payment was upheld. In giving judgment Bacon, C.J., said, "The act of the debtor was the only thing that could be inquired into, and if the act done by him could be referred to any other motive than that of giving one creditor preference above another, the payment **[479]** would not be fraudulent or void." In the same judgment (p. 82) it was further observed: "Here was a debt paid to a person entitled to receive it, and received in good faith by the payee. Clearly, it came within the proviso at the end of the section. The Statute had put the law upon a plain, reasonable, straightforward footing, by having saved the rights of payees acting in good faith. No motive could here be assigned for the bankrupts preferring this creditor to any other. In order to make out that the payment was fraudulent, it should have been proved that there was such a preference, or some motive for presuming such a preference must be shown from the other facts proved. Here a fraudulent preference was neither proved, nor could it be justly or reasonably inferred that there was any motive for such preference."

Many other authorities might be cited to the same effect, and they all go to show that, until the bankruptcy or insolvency of a debtor takes legal effect, he does not act voluntarily in the sense of giving a fraudulent preference, where he simply pays a debt that is really due at the request, in good faith, of a particular creditor. That such was the state of things in the present case cannot reasonably be doubted. And this view of the facts before us derives considerable force when the present state of the law of debtor and creditor in these Provinces is considered. I have already in another case, *Kheta Mal* v. *Chuni Lal* (2), shown what that law is, and I may be here allowed to repeat what I there laid down. I there said:—"There is no bankruptcy law in these Provinces nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present defendant, appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and **[480]** his creditors, the law, at least in these Provinces, places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his

(1) 40 L. J. N. S., Chanc. and Bankr.

(2) 2 A. 173.

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creditors ; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements, or conveyances without fraud, that is, honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors, but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person (1)." Such undoubtedly is the law binding on this Court, and according to it, Baij Nath and the defendant, acting without any fraudulent intent, but in good faith, with respect to a debt honestly due by the one to the other, were justified in their dealing, and the plaintiff cannot interfere between them.

The Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case. And not apparently knowing the law he was probably misled by the somewhat confused and evasive contention on the part of the Official Assignee persistently and elaborately maintained before him. Our judgment must therefore be for the appellant, and the suit must be dismissed, with costs in the Court below and in this Court.

PEARSON, J.—Ram Prasad's debt to the firm of Chotey Lal and Sita Ram, and that firm's debt to the defendant, appellant, **[481]** on the date of the alleged transfer of the former debt are not points in issue. The single point for determination is, whether the assignment was made before or after the date of the order by which the property of the insolvents, Baij Nath, Bansi Dhar, and Ghasi Ram was vested in the plaintiff. (After determining that the assignment was made before the date of the vesting order, the learned Judge continued) : The assignment made by him was not a voluntary one in the sense of having been made spontaneously without pressure, but as it has been stated by the respondent's attorney that the vesting order of the 22nd December, 1875, was not passed in consequence of any petition filed by the insolvents for their discharge, S. 24 of the Insolvency Act is not apparently relevant to the case. I would decree the appeal and dismiss the suit with all costs.

(1) at page 179.

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PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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SARJU PRASAD (*Plaintiff*) *v.* BHAWANI SAHAI (*Defendant*).

[17th November 1879.]

2 A. 481.

1. *Sulehnama hypothecating immoveable property—Registration—Suit for money charged on immoveable property.*

A charge, exceeding Rs. 100 in value, created upon immoveable property by means of a sulehnama (with a half-rupee Court-fee stamp affixed) presented in Court in execution proceedings, cannot be enforced against such property, the document not being properly stamped and not being registered. **2 A. 481.**

2. Observations, by SPANKIE, J., on previous decisions of the High Court in which suleh-namas were relied on as evidence of a separate oral agreement or were held not to require registration.

The facts of the case are sufficiently stated in the Judgment of *Spankie, J.*

JUDGMENTS.

[483] STUART, C. J.—It is unnecessary to consider the findings of the lower Courts in this case, as the objection taken on the ground of the *suleh-nama* not having been registered is fatal to the plaintiff's claim, and the appeal must therefore be dismissed with costs. There is also an objection that the document does not bear any stamp. The Judge suggests that it might still be stamped under S. 17 of the Stamp Act then in operation, X of 1862, but I do not observe that any offer of this kind was made by the plaintiff, it need not be considered, seeing that the compromise cannot be looked at on account of its non-registration, the value covered by it being considerably more than Rs. 100. I must, however, guard myself against being supposed to acquiesce in the extraordinary and repugnant opinion recorded by the Judge respecting the effect of the *suleh-nama* on the plaintiff's claim. He finds that this instrument should have been registered, and not having been so it cannot be read in evidence, and yet at the same time he proceeds to argue upon its contents, calling it a new agreement which the plaintiff had violated and that the defendants are therefore free from their liability. I must therefore take care to confine myself to his decretal order by which he upholds the Munsif's decree dismissing the suit, and I would dismiss the present appeal with costs.

SPANKIE, J.—The plaintiff obtained a decree on the 4th August, 1865, against Bhika Rai for money. The house and **[484]** property of the judgment-debtor were attached in execution of the decree. The defendant Bhawani Sahai and Brij Lal, deceased, and Mithu Lal, cousin of Bhika Rai, objected that the house was their property. An arrangement (1) was

(1) On the 30th July, 1866, the pleader for the decree-holder, the pleader for Bhawani Sahai, the pleader for Brij Lal, and the pleader for the judgment-debtor presented to the Court executing the decree the "*suleh-nama*" in virtue of which the plaintiff now sued. This document, upon which a court-fee of eight annas had been paid, recited that the interests of the judgment-debtor in the property had been sold to Bhawani Sahai and Brij Lal for the amount of the decree, Rs. 135-2-0, and that the judgment-debtor was no longer in the possession of his interests in the property, but such interests were in the possession of the purchasers. The instrument then proceeded as follows: "That it being necessary to satisfy the decree, we the objectors who are in possession of the property have undertaken to pay the amount of the decree, and promise to pay the same within one year: that in default of such payment the property shall be sold at auction in satisfaction of the amount of the decree: that until the payment of the amount, we the objectors have hypothecated the property and promise not to transfer it directly or indirectly: that if we wish to sell it in order to satisfy the decree, we shall obtain the permission in writing of the decree-holder to our doing so." This document was verified by the pleaders of the parties concerned.

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2 A. 481.

effected on the 30th July, 1866, with the decree-holder, and a compromise filed in which the defendant and Brij Lal undertook that the money should be paid in one year, or in default to pay it, and they hypothecated the property that had been attached, in which they had privately become the purchasers of the shares of the judgment-debtor and Mithu Lal his cousin, as collateral security for the debt. The present suit is to recover Rs. 159-7-3 principal and interest, the amount of the decree, by sale of the property attached, and which was subsequently hypothecated in the compromise. The defendant Bhawani Sahai, for himself and as heir of Brij Lal deceased, contended that the suit was barred by lapse of time; that the property hypothecated was worth more than Rs. 100, but the instrument was not registered and not properly stamped; that after the compromise plaintiff continued to execute his decree against the judgment-debtor and received Rs. 50, thus acting in opposition to the terms of the compromise, which therefore became inoperative. The first Court held that there was an hypothecation of the property in the compromise, and that the deed was inadequately stamped, and to such an hypothecation no liability was attached: the defendant might have been personally liable, but more than twelve years had elapsed from the date of the compromise: the claim also was barred by the three years' limitation as the hypothecation was a nullity. The suit was dismissed. The lower appellate Court noticed that in 1877, when plaintiff took out execution against the defendant, the Court held that defendant, the judgment-debtor had been absolved from liability under the decree by the compromise, and the order was affirmed in appeal, and the plaintiff referred to the Civil Court. The Judge holds that it was not barred because plaintiff had prosecuted his claim with all due diligence in the execution department: the deed however was not properly stamped: but there was no reason to suppose that fraud was intended, and the plaintiff was therefore permitted to make good the value: but the deed required to be registered and being unregistered could not be received. The Judge also held that the plaintiff could not sue on the compromise, **[485]** because he himself had endeavoured to obtain the amount of his decree in execution after the compromise had been executed; he therefore dismissed the appeal.

It is contended in second appeal that, as defendant undertook to pay the money under the deed of compromise in 1866, he could not be released from his liability by the act of plaintiff in realising a portion of the decree from the judgment-debtor. Looking at all the circumstances of the case, and having regard to the fact that the money received by the decree-holder after the compromise had been executed, is said to be deducted from the amount now due from the parties who effected the compromise, we should not have been disposed to hold the respondent free from liability under the deed. But what is termed the compromise is, in this case, much more than a mere compromise. It accepts the debt due by the judgment-debtor, and the defendant and Brij Lal, who had purchased the interests of the judgment-debtor and his cousin Mithu Lal in the property attached, agree to discharge the debt in a year, and they hypothecated the property that had been attached, and which was purchased by them, as security for the debt. Such an instrument is a "mortgage-deed," inasmuch as by it the defendant and his brother obliged themselves to pay money to the plaintiff, and it evidences a pledge of the property for securing the payment of the money. Under the Stamp Act in force in 1866 this instrument, being an obligation for the payment of money, would not have been admissible as a mere agreement, or as a *razinama*, if it had been necessary to bring a suit upon it, and the later

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Acts are not less stringent. The immoveable property pledged, it is not denied, is worth more than Rs. 100, and the instrument should have been registered, as the suit to enforce the lien is brought upon the deed itself, and the plaintiff seeks under it to bring to sale the property hypothecated therein and thereby to recover his money. He cannot therefore say that the deed is simply a recital of a compromise, and it is to be regarded as merely information given to the Court of an oral agreement between the parties for the adjustment of the proceedings in execution pending in Court. The case cited by plaintiff, *Ramdyal* v. *Jhaunnan Lal* (1), does not apply, as in that case it did not appear that the agreement referred **[486]** to in the compromise was made in writing. The actual agreement had been orally made, and the document put into Court was simply a petition informing the Court of the arrangement arrived at by the parties. The plaintiff's pleader has put in several decisions of this Court which he argues rule the point in his favour, and are to the effect that such documents as that now before the Court need not be fully stamped or registered as bonds or mortgages. But I have very carefully gone into these cases and now refer to them in detail.

Bhikam Ram v. *Hanuman Prasad* (2)—In this case the decree under the compromise dated 12th June, 1866, gave a lien on the property to the decree-holder, and the claim before the Court was not to enforce the compromise but clearly to enforce the lien given by the decree. *Jiwan Singh* v. *Rampartab Singh* (3)—In this case the sixth plea in appeal raised the point whether the transaction in dispute was valid, the deed not having been properly stamped and registered. It is doubtful whether the plea was pressed. It is certain that the judgment does not determine the point and that it is absolutely silent with regard to it. *Mukand Ram* v. *Cheda Singh* (4)—In this case the petition put into Court was held not to be the agreement itself. It was filed in order to inform the Court that an oral agreement had been made and it asks for postponement of sale. The judgment proceeds upon the fact that the agreement itself (apart from the petition) had never been denied. *Bansidar* v. *Ahmad Husain Khan* (5): *Bansidar* v. *Muzaffar Husain Khan* (6)—In these cases there were several petitions asking for postponement of sale which were not alleged in the subsequent claim to have been the basis of that claim. The dispute arose out of the several agreements to pay high interest. When the cases came before the High Court the learned Judges ruled that the first Court had misunderstood the nature of the claim, which was not founded on the petitions, but on a separate oral agreement. There was no hypothecation whatever in those agreements or petitions. *Bisharath Husain* v. *Imamunnissa* (7)—**[487]** In its judgment this Court expressly stated that it was satisfied that the document objected to was not a compromise, but simply a petition informing the Court regarding an arrangement at which the parties had arrived. This judgment cites, as ruling the point, the case of *Ramdyal* v. *Jhaunnan Lal* (1) which I referred to above as cited by plaintiff's pleaders during the hearing, and which I have held inapplicable to the present case. It also cites for the same purpose the case of *Bansidhar* v. *Ahmed Husain Khan* (8) above referred to. The learned Judges lay it down that such a petition, not being the agreement itself, cannot be rejected as evidence of an arrangement between the parties simply because it was not sufficiently stamped and was not registered.

It will thus be seen that none of the rulings cited are applicable to this case in which the claim is based upon the hypothecation contained

(1) H.C.R., N.W.P., 1871, p, 14.
(2) to (8) Unreported.

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in the compromise. Here the document, put in in execution of a decree and not embodied in a decree charging the property, which property plaintiff seeks to sell in order to secure his money, is not relied upon as evidence of a distinctly separate parol evidence, but as the hypothecation itself. Such a document I hold to be one which must be sufficiently stamped, and if necessary, as it is here, registered. I would therefore on this ground dismiss the appeal and affirm the judgment with costs.

2 A. 481.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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RANJIT SINGH (*Defendant*) *v.* SHEO PRASAD RAM (*Plaintiff*) AND RAGHU NANDAN RAM (*Defendant*). [17th November 1879.]

2 A. 487=4 Ind. Jur. 641.

2 A. 487= 4 Ind. Jur. 641.

Addition of parties—Powers of appellate Court—C.P.C., 1877, Ss. 32 and 582—Limitation Act, 1877, S. 22.

Although an appellate Court has, under Ss. 32 and 582 of the C.P.C., the power of adding parties in appeal, yet it cannot, with reference to S. 22 of the Limitation Act, grant, to any of the parties, a relief which is barred by limitation.

Therefore, when a suit has been dismissed as against one of two defendants, by the Court of first instance and the unsuccessful plaintiff has not appealed against that part of the decree, the addition, as a party in appeal, of the defendant against whom the suit has been dismissed, does not empower the appellate Court to pass against him a decree which the Court of first instance declined to pass, and, in the decision of which Court the plaintiff chose to acquiesce; much less so, when the appeal, as against the defendant so added, is barred by limitation.

[F., 27 A. 23 (24)=24 A.W.N. 155, 1 A.L.J. 358; **Cons.**, 13 A. 78 (82).**]**

JUDGMENT.

[488] STUART, C.J.—The question in this case is a very nice one, showing a certain conflict between the law of procedure and the law of limitation relating to suits and decrees. It is the first time I have met with it as a Judge of this Court, and I am not aware that it has arisen in any of the other High Courts. The circumstances under which it comes before us for decision in the present appeal are these:—The plaintiff, respondent, instituted a suit in the Court of the first class Assistant Collector at Ghazipur, on the 14th December, 1876, against Raghu Nandan Ram and Ranjit Singh for recovery of Rs. 164-11-3 principal and interest, being the profits of a one-anna share in a zamindari estate from 1281 to 1282 falsi. A decree, however, was not made in that suit till the 27th of May, 1878, when the Assistant Collector found the claim proved as against Raghu Nandan Ram, and decreed accordingly against that defendant with all costs, but the suit as against Ranjit Singh was dismissed. Raghu Nandan Ram, however, the defendant against whom the

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decree had been given, appealed to the Judge who, after inspection of the record of the Court of first instance and hearing the pleaders of the parties, ordered that Ranjit Singh, although he had been absolved by the first decree, should be made a respondent in the appeal before him, and the appeal thus supplemented was heard by the Judge and decided by him against Ranjit Singh, whom in his judgment he somewhat inaccurately calls an "outsider," but whom he nevertheless found accountable for a large **[489]** surplus, and he therefore decreed the appeal and set aside the order of the lower Court, thereby reversing the Assistant Collector's decree. The Judge added to his order this remark: "The effect of this decision will be that I give a decree in favour of respondent as against Ranjit for the amount claimed, *viz.*, Rs. 164-11-3, with all costs, and interest thereon at six per cent. per annum."

Against this order of the Judge the present second appeal has been brought in which it is contended, among other things, that the Judge's decree against Ranjit Singh was illegal, seeing that Ranjit held the decree of the first Court in his favour, and that decree, under the Limitation Law, Act XV of 1877, Sch. ii, Art. 152, had become final, seeing that the limitation period thereby prescribed, *viz.*, 30 days, had expired before the filing of the appeal to the Judge. The two material dates are these, the 27th of May, 1878, when the Assistant Collector's decree dismissing the claim against Ranjit Singh was given, and the 10th of July following, when the appeal to the Judge was filed, so that 43 days had expired.

This contention on the part of the appellant must be allowed. As a general rule there can be no doubt that a Judge under the present procedure law, Act X of 1877, is acting within his powers when he orders a party in the position of this Ranjit Singh to be made a respondent in an appeal before him. Indeed, S. 582 read with S. 32 is to my mind sufficient for such a general conclusion. But in the present case there is this peculiarity, that the Judge, who must be taken to have known the law he was administering and the legal position of the parties in the matter in issue before him, was bound to take cognizance of the fact that, while he thought it desirable that Ranjit Singh should be made a party to the appeal, this same Ranjit Singh had obtained a decree in his favour in the suit which was the subject of that same appeal, and that since the date of such a decree the limitation period provided by law had run out, and that the appeal before him, so far as it impugned that decree, could not be entertained. Instead, however, of proceeding in this way, the Judge made an order as if Ranjit was a party properly before him, and which order therefore cannot stand. Whether such is a satisfactory state of the present law of procedure may perhaps be doubted, for it humbly appears to me **[490]** to be very awkward and embarrassing that a power or discretion vested in a Judge for the purposes of justice may be defeated by another and almost contemporaneous law. The result is that the Judge's order against Ranjit Singh comes to nothing and must be set aside, and *pro tanto* the present appeal must be allowed with costs.

SPANKIE, J.—The plaintiff, respondent, sued Ranjit Singh, Raghu Nandan Ram, and others, defendants, for Rs. 164-11-3 principal and interest, being the profits of a one-anna share in a zamindari estate from 1281 to 1282 fasli. The question was whether Ranjit Singh or Raghu Nandan Ram, or both of them, owed the money claimed, and in what proportion the sum sued for should be recovered. The first Court decreed the claim in full against Raghu Nandan Ram and dismissed it in regard to Ranjit Singh. The defendant Raghu Nandan Ram appealed, but plaintiff accepted the decree which absolved Ranjit Singh and did not appeal

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from it as he might have done. The Judge found it necessary to make Ranjit Singh a respondent, and having done so, he decreed the appeal of Raghu Nandan Ram and set aside the order of the first Court. He added these words,—"The effect of this decision will be that I give a decree in favour of respondent as against Ranjit Singh for the amount claimed, *viz.*, Rs. 164-11-3, with all costs, and interest at six per cent. per annum."

It is contended in second appeal by Ranjit Singh that, as neither plaintiff nor Raghu Nandan Ram had appealed against the Munsif's decree as regards him, no decree should have been passed against him in appeal: the Munsif's decree absolving him from all responsibility, not being appealed, became final: the powers given by S. 582, Act X of 1877, are not applicable to the case, and if they were, the appeal as against appellant was barred by limitation.

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S. 582, Act X of 1877, provides that the appellate Court shall have the same powers in appeal under Ch. xli as are vested by the Code in Courts of original jurisdiction in respect of suits instituted under Ch. v, and by S. 587 the provisions contained in Ch. xli shall apply as far as may be to appeals under Ch. xlii. After a suit has been instituted in the manner prescribed by S. 48, Ch. v, the Court **[491]** has power under S. 32 (Ch. iii, relating to parties and their appearances and acts), on or before the first hearing, upon the application of either party, to strike out the name of any party, whether as plaintiff or defendant, improperly joined. By the second clause of the section the Court has "*proprio motu*" power to order any plaintiff to be made a defendant, or any defendant to be made a plaintiff, and also that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necesssry in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. Under S. 73, Act VIII of 1859, and S. 37 of Act XXIII of 1861, corresponding with Ss. 32 and 582 of Act X of 1877, the appellate Courts in past years have always felt themselves at liberty to add parties who have been parties to the original suit. I have no doubt that the lower appellate Court in this case did not exceed its jurisdiction in making Ranjit Singh, a defendant in the suit, who was no party in the appeal, a respondent, to enable it effectually and completely to adjudicate upon and settle all questions involved in the appeal.

It has, however, been urged that when Ranjit Singh, defendant in the suit, was made a party to the appeal as respondent, the limitation prescribed by law within which an appeal must be instituted had expired so far as he was concerned.

Cl. 5, S. 32, Act X of 1877, provides that "all persons whose names are added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisious of the Indian Limitation Act, S. 22) the proceeding as against them shall be deemed to have begun only on the service of such summons." It has been contended that "the parties whose names are so added" are parties whose names have been added on the application of the plaintiff, or on their own application, and that the clause does not refer to cases in which the Court acts on its own authority and without application. It has also been suggested that the preceding clause shows this. The clause runs thus:—"Any person on whose behalf a suit is instituted or defended under S. 30 may apply to the Court to be made a party to such suit," and then follows the fifth clause, "all parties whose names are so added, **[492]** &c., &c." But this contention appears to be more ingenious than successful. Under all

circumstances it would be necessary to serve a summons on every person made respondent by a Court, to enable him if absent to appear and answer the appeal, and such a party appears to be of necessity one of those "parties whose names are so added as defendants," that is to say, meaning "so added" under the clauses of S. 32 of the Act. At the same time the addition of a defendant to an appeal as respondent cannot override the law of limitation. In an appeal the appellant is for the time the plaintiff, and the respondent for the time defendant, and if Cl. 5, S. 32 applies at all, it carries with it the saving of S. 22 of the Limitation Act, XV of 1877. S. 22 provides that when, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. This being so, I am of opinion that though the Court of appeal, if it hold it desirable for the purposes of justice, in order to determine the appeal, might make any one a party to it, who was a party to the original suit, or represented a party to the suit, it would not be able to decree the original claim as against the party so made a respondent, if the first Court had dismissed the suit in his favour and the plaintiff had not appealed against that part of the decree within the time prescribed by the Limitation Law.

I would therefore hold that the Judge should have closed the case by decreeing the appeal of Raghu Nandan Ram and reversing the order as against him, with costs payable by plaintiff, and further that the Judge should also have dismissed the appeal as regards Ranjit Singh, with costs payable by plaintiff, as the latter ought to have appealed against him within the time prescribed by law. At the same time, I do not think that it was necessary in this case for the Court to make Ranjit Singh a party to the appeal as plaintiff had accepted the first Court's judgment relieving him of liability, and the Judge had the record before him, which contained materials sufficient to enable him to determine the appeal of Raghu Nandan Ram on the merits. I would decree the appeal with costs in favour of appellant, and not interfere with the rest of the judgment.

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FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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2 A. 451.

UMRAO BEGAM (*Judgment-debtor*) *v.* THE LAND MORTGAGE BANK OF INDIA (*Decree-holder*). [18th November 1879.]

Act XVIII of 1873 (N.W.P. Rent), Ss. 9, 171—Right of occupancy-tenant—Transfer—Execution of decree.

S. 9, N.W.P. Rent Act (XVIII of 1873), does not prevent the land-holder from causing the sale, in execution of his own decree, of the occupancy-rights of his own judgment-debtors in land belonging to himself.—By the Full Bench, *Spankie, J. contra.*

[F., 2 A. 735 (738) ; **R.**, 2 A.W.N. 45, 7 A. 851 (852) **(F.B.)**; **D.**, 7 A. 511 (513).]

N. B.—This decision affirms the decision in 1 A. 547, for which see p. 431, *supra*.

In this case an application for the review of a judgment passed by a Division Bench of the High Court (PEARSON and OLDFIELD, JJ.) on the

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2nd January, 1878 (1), having been granted by the learned Judges of that Bench, those Judges referred to the Full Bench the question whether the view taken in that judgment, *viz.*, that S. 9 of Act XVIII of 1873 was enacted in the interest of the landlord and was not intended to bar a sale made with the landlord's consent, was correct or not.

JUDGMENTS OF THE FULL BENCH.

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[452] STUART, C. J.—This is a reference to the Full Bench of the Court by a Division Bench (PEARSON, J., and OLDFIELD, J.) to whom an application for a review (2) of judgment had been presented. The Division Bench had held that S. 9 of the Rent Act XVIII of 1873 did not prevent a zamindar, who was the holder of a decree against a tenant with a right of occupancy, from attaching and selling in execution of his decree his judgment-debtor's occupancy-right. In the course of the hearing before the Division Bench, a Full Bench ruling of this Court in the case of *Ablakh Rai* v. *Udit Narain Rai* (3) was referred to. In that Full Bench case it was held by a majority that the right of an occupancy-tenant was only transferable by sale in execution of a decree, where the decree-holder was a co-sharer by inheritance in such right. I agreed with the majority so far, but I went further and held, and still hold, that the right to enforce legal process by execution of any decree against such property *quantum valeat* cannot under any circumstances be taken away unless by express words to that effect, and I referred to S. 171 of the Rent Act to which the attention of the Full Bench had been directed as strengthening my view of the meaning and application of S. 9. Under these circumstances, I could not dissent from the judgment of the Division Bench in the present case, for, in my opinion, S. 9 read in connection with S. 171 allows the transfer of property by the execution of a decree against the tenant in the hands of any **[453]** decree-holder. Nor in so expounding the law do I consider that I am legislating by arbitrarily adding to its body. On the contrary, I am simply giving effect to the rights of suitors with decrees in their hands against such a class of judgment-debtors, and which decrees in my view can be executed against any property or right and interest in property which his debtor may have, and for what it may be worth. I would therefore refuse the present application for a review on the grounds assigned and affirm the ruling of the Division Bench.

I may here observe that the report of my judgment in that Full Bench case is not quite correct in one particular. I am there made to say that "I consider that the words 'or otherwise' must be understood to be a general expression controlling the particular words which go before." It should have been "controlled by the particular words which go before."

PEARSON, J.—It is intelligible that it was the intention of S. 9, Act XVIII of 1873, to empower occupancy-tenants to transfer their rights to co-sharers by inheritance in such rights without the consent of the land-owner. But it is difficult to understand that it was intended to prohibit absolutely a transfer of such rights by such tenants to any person to whom the land-owner was willing that such transfer should be made. A land-owner can oust a defaulting tenant in execution of a decree for arrears of rent and make over the holding to another person. Why should not a

(1) See 1 A. 547 at p. 431, *supra*.

(2) The grounds on which the review was sought were (i) that the judgment was opposed to the express provisions of that section, which declared the holding of the tenant to be transferable among the co-sharers only, and (ii) that the judgment was opposed to the spirit, and defeated the object, of the law relating to tenants having a right of occupancy.

(3) 1 A. 353 = 1 Ind. Jur. 705—which see at p. 278, *supra*.

transfer of the holding be arranged and effected between the defaulter and another person with the land-owner's consent? In such a transaction there appears no moral turpitude or political evil such as to warrant the Legislature in forbidding and repudiating it as essentially bad and declaring it to be null and void in law. On the contrary, such a transaction appears to be of an innocent. unobjectionable, and convenient nature, and incapable of harming anybody. It seems also, as the judgment which it is sought to review observed, unreasonable to hold that a land-owner should not be at liberty to cause the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself, if he be willing to accept the auction-purchaser as a tenant. Although the terms of S. 9 are not qualified by any reference to the consent of the land-owner, we are yet bound to construe them in such a reasonable **[454]** manner as to avoid absurd conclusions. I therefore adhere to the view expressed in the judgment of the 2nd January, 1878.

SPANKIE, J.—We must, I think, accept the strict terms of S. 9 of the Rent Act. The rights of tenants at fixed rates are heritable and transferable. But no other right of occupancy shall be transferable by grant, will or *otherwise*, except as between persons who have become by inheritance co-sharers in such right. It seems to me that to allow sales, provided that the landlord consents to them, would be law-making on the part of this Court. We should practically add to the section a proviso which the framers of the law and the Legislature might have introduced, when the Act was passed, had they been so minded. I would therefore say that S. 9 bars a sale made with the consent of the zamindar, which, without reference to his consent, is prohibited by the terms of the section, except as between persons who have become by inheritance co-sharers in the right, the subject of the sale.

OLDFIELD, J.—The question raised in this case is whether the sale in execution of a decree of a Civil Court of the rights and interests of a tenant having rights of occupancy made at the instance of his landlord, who has obtained a decree against him, is valid so as to convey any rights or interest to the purchaser. S. 9 of Act XVIII of 1873 is relied on to show that such a sale is invalid. That section is as follows: "The rights of tenants at fixed rates shall be heritable and transferable: no other right of occupancy shall be transferable by grant, will or otherwise except as between persons who have become by inheritance co-sharers in such right." If this section is to be taken to mean that a landlord may not bring to sale his tenant's rights in his holding in execution of a decree of a Civil Court obtained against him, it can only be by interpreting this section as absolutely and without qualification forbidding and rendering void all transfers outside the limitation prescribed under whatever circumstances they have been made, whether with the consent of the landlord, the tenant, or of both, and if so, such a transfer will necessarily be void although made with the consent of both landlord and tenant. It seems to me impossible to suppose that this was the intention of the law. The object of this section was, I apprehend, to define the extent of a tenant's interest in his **[455]** holding as opposed to the landlord's, and settle what had been a vexed question, how far a tenant has the power, without the consent of his landlord, to transfer his holding. The section refers to transfers made by the tenant independently of the landlord, and it was not intended to disallow transfers when made with the consent of the landlord, or at his instance, as in the case before us, in execution of a decree of the Civil Court, when there is otherwise nothing in the law forbidding a tenant's rights to be sold in execution of

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such a decree. It will be seen that the effect of S. 9, Act XVIII of 1873, is to give a larger property in their holdings to tenants at fixed rates than it gives to the tenants with rights of occupany, and a larger property to the latter than it gives to mere tenants-at-will. The first class can transfer their holdings at their own pleasure, and the second class can only do so under limitations. The distinction between the different powers of transfer in different classes of tenants is intelligible only when we ascribe it to the desire to protect the landlord against transfers at the will and pleasure of his tenants. It is certain that the Rent Act does not extend to the tenants any absolute right to be maintained in their holdings against their landlords. Tenants with rights of occupancy are not protected against being ejected from their holdings by their landlords in execution of decrees for arrears of rent obtained against them by their landlords, and it would appear that the landlord might, if so disposed, bring to sale his tenant's interest in his holding in execution of a decree for rent, under S. 171 and following sections of Act XVIII of 1873. I see no reason to suppose that it was the intention of S. 9, Act XVIII of 1873, to invalidate the sale in the case before us.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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HARBHAJ AND OTHERS (*Plaintiffs*) *v.* GUMANI AND ANOTHER (*Defendants*). [18th November 1879.]

Wajib-ul-arz—Absent share-holders—Trust.

An entry in an administration-paper that absent share-holders shall, on their return to the village, have their shares surrendered to them by their present occupiers, does not necessarily constitute a valid trust in favour of such absentees, though it may be evidence of such a trust.

Such an entry cannot be regarded as evidence of a pre-existing trust or as an admission of such trust by the occupiers.

[R., 3 A. 458 (464), 13 C.P.L.R. 99 (101).]

JUDGMENT.

[494] The plaintiffs, appellants, asserted that Amir Chand and Sarhu, (1) some thirty-two years ago, made over their zamin-**[495]**dari share and a house in trust to Ramjas, the father of defendants, on condition that when they or their children returned to the village they would be allowed to re-occupy their lands: Ramjas and his successors had all along remained in possession as trustees. and had admitted the trust when the settlement papers were last revised: the plaintiffs returned in 1934, Sambat, and are heirs of Amin Chand and Sarhu, but defendants refused to surrender the share. The defendants deny that any land or house was made over to Ramjas in trust by Amin Chand and Sarhu: Ramjas and they (defendants) have held the property adversely to plaintiffs for forty years, and the suit was barred by limitation: Amin Chand and Sarhu owed nearly Rs. 600 to defendants, they broke down and could not pay the Government revenue: Ramjas held possession for eight years and paid it: when he asked Amin

(1) from whom they were descended.

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Chand and Sarhu to pay him their debt they left the village, and since then the possession of Ramjas and defendants has been adverse. The Munsif decreed the claim for the land and dismissed it for the house. He held that the administration-paper provided for re-entry. The Judge in appeal has reversed the Munsif's decree, holding that there was no satisfactory proof that Sarhu and Amin Chand intrusted their property to defendant's father Ramjas: parol evidence after such a time was not good for anything, and the administration-paper was not a proof of the trust: it recites that absentees or their descendants may on their return re-enter on their lands: the community assented to this, but any one could recall his consent: the entry is no proof that any one in possession of the share of an absentee held it as a trustee; the possession of the defendants was shown to have been adverse, and to have been so for at least twenty years.

We are not disposed to interfere. The finding as to the adverse character of the possession of defendants is one of fact. A village administration-paper does not necessarily constitute a valid trust. It might be evidence of a trust, but in this case, as regards the share in dispute, the persons entered as "absent shareholders" were neither present in the village when the settlement was in progress, nor were they assenting parties to the arrangement recorded in the administration-paper. The arrangement as to the re-entry of an absentee was made amongst the co-sharers present in the vil-[496]lage; possibly the main object in making it was to secure peaceable possession to those in occupation of the shares of absentees. In this administration-paper there is also a proviso that no owner who is a defaulter as regards Government revenue will be re-admitted until he pays up the arrears due by him. If an administration-paper containing a clause (1) such as that before us is to be regarded as constituting a trust, it would appear to be a trust created by the shareholders of the estate, ostensibly for the benefit of absentees, though the latter really derive no present benefit from their land remaining in the

(1) Clause of administration-paper, dated 7—1—1869, whereon the plaintiffs relied as establishing the alleged trust:

"Clause 16—Absent share-holders: the following persons are at present absent from the village: (here follows a list of absent shareholders, the entry relating to the plaintiffs being as follows):—

Thoke.	Absent shareholders.	Present occupier.	Period of absence.	Present residence of absent shareholder.
Thirteen biswas Thoke of Ramjas.	Harbhaj and Hansa, sons of Amir Chand, and Dya Ram, son of Sarhu, Jats.	Ramjas, son of Amir Chand, Jat.	Twenty-two years.	Mouza Dhorana, Parganga and Tahsil Gohana, Zila Rohtak.

"Whenever the absent shareholder, or his descendants, returns and settles in the village, he shall immediately be put in possession of his property without taking any account of profit or loss; the person occupying the property shall not object to relinquish his occupation of the said property: if from any cause the share of the present occupier is transferred; the property of the absent shareholder shall be held by the brother of the present occupier or by one belonging to the same stock: whenever the absent shareholder, or his descendants, returns and settles in the village, effect will be given to the above condition: if any absent shareholder is a defaulter in respect of the Government revenue, he or his descendants shall pay the same, before they become entitled to obtain possession."

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possession of the shareholders in the estate, whereas the shareholders are at once benefited by taking up the shares of the absentees which they may possibly be never called upon to surrender without, as in this case, the institution of a suit. Moreover, the arrangement may be one which the shareholders actually present when it is made may afterwards, if they please, revoke, or omit to record in a future settlement. However this may be, it is sufficient in this case to say that the Judge has not acted erroneously in refusing to accept the administration-paper as conclusive evidence of a trust, and we must not overlook the nature of this claim as stated in the plaint. The claim of the plaintiffs was that thirty-two years ago Amin Chand and Sarhu made over their share in trust to Ramjas, so that it is not pretended that the trust was raised by the administration-paper: that paper is relied on as evidence of the trust, and an admission by the parties who signed it that there was a trust. But there is no such admission of any actual trust as that set up by the plaintiffs. There was a long list of absentees, and amongst them are the plaintiffs, as sons of Amin Chand and Sarhu. The declaration is general that any absconding parties returning to and settling in the village shall immediately be put in possession: the occupants shall not object to relinquish their holdings. There is no declaration of any pre-existing trust as between the absentees and the occupants of their shares individually. We accept the finding of the lower appellate Court on the matter of fact that there is no evidence to establish the claim that Amin Chand and Sarhu personally intrusted their shares to Ramjas thirty-two years ago. The present appeal is therefore dismissed with costs.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

1879 NOV. 25. — PRIVY COUNCIL. — 5 C. 744=3 Suth. P.C.J. 704=7 I.A. 63=6 C.L.R. 593=4 Saraswati's P.C.J. 93.

On Appeal from the Courts of the Commissioner of Lucknow and the Judicial Commissioner of Oudh.

RANI LEKRAJ KUAR *v.* BABOO MAHPAL SINGH

AND

RANI RUGHUBUNS KUAR *v.* BABOO MAHPAL SINGH

[25th November 1879.]

(Two Consolidated Appeals.)

5 C. 744=3 Suth. P.C.J. 704=7 I.A. 63=6 C.L.R. 593=4 Saraswati's P.C.J. 93.

Proof of special custom—Village administration-papers, admissibility of—Evidence Act, Ss. 35, 48.

On the question of the existence of a special custom in the Bahrulia clan in Oudh excluding daughters from inheritance, the *wajib-ul-arz* or village administration-papers, directed to be made by Reg. VII of 1822 and ascertaining and recording usages of the kind of the custom in question, were properly received in evidence under S. 35 of the Evidence Act, though they had been prepared by the Settlement Officer's subordinates and not by himself as required by the Regulation.

[F., 9 C. 586, 15 M. 378, 3 C.L.J. 594 (P.C.)=3 A.L.J. 415=8 Bom. L.R. 402=10 C.W.N. 730=28 A. 488=1 M.L.T. 171; D., 11 M. 116, 4 O.C. 71; R., 15 C. 20=14 I.A. 127 (P.C.), 12 A. 328 (F.B.), 12 A. 234 (F.B.), 1 O.C. 301, 20 C. 940, 25 A. 90, 8 O.C. 94, 31 A. 247=6 A.L.J. 197=13 C.W.N. 1073=10 C.L.J. 216.]

Semble. Even if such papers were to be treated only as the recorded opinions of those likely to know the custom, they would be admissible in evidence under S. 48 of the Act. (2 N.W.P.H.C. 395, *Appr.*)

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These were consolidated appeals from judgments of the Commissioner of Lucknow, and of the Judicial Commissioner of Oudh, respectively, pronounced in 1876.

JUDGMENT.

[749] SIR M.E. SMITH :—The question in this appeal is, whether the plaintiff, Baboo Mahpal Singh, or one of the defendants, Rani Rughubuns Kuar, is entitled, as the next heir to Udit Pertab Singh, one of the talookdars of Oudh, to the talook of Surajpur, and another talook, of which Udit Pertab Singh died possessed. Udit died without male issue, leaving a widow, since deceased, and an only daughter, the defendant Rughubuns. The plaintiff is the nearest male relation of the deceased talookdar, standing in the position of first cousin once removed. On the death of Udit Pertab Singh, his widow Subhraj was put into possession of the talooks in dispute; but under a compromise with Rani Lekhraj Kuar, the stepmother of the deceased talookdar, the possession was given up to Rani Lekhraj. That was the state of things when the present plaint was brought, and Rani Lekhraj Kuar was alone made the defendant. The first judgment in the case was given by the Deputy Commissioner, when the Record was in this state. On an appeal from his judgment, the Commissioner directed that the daughter, Rani Rughubuns Kuar, should be joined as a defendant, and remanded the case to the Deputy Commissioner, directing a new issue, which was necessary in consequence of her being brought into the suit. That issue in substance was, whether the plaintiff or the daughter was the next heir to Udit Pertab Singh, and entitled to succeed to his estate. There can be no doubt that, by the general Hindu **[750]** law, which would prevail in the absence of any special custom, the daughter would have been entitled to the inheritance of her sonless father. The question which is raised in the cause, and by the issue which was joined after Rughubuns had become a defendant on the Record, is, whether, in the Bahrulia clan, to which this family belongs, a custom exists to exclude daughters from succeeding to the inheritance of their father's estate.

5 C. 744=3 Suth.P.C.J. 704=7 I.A. 63=6 C.L.R. 593=4 Saraswati's P.C.J. 93.

Other questions were raised in the suit, but the only question which remains to be determined is, whether the evidence which was given by the plaintiff to support that custom was properly admissible? This evidence consists of a number of *wajib-ul-arz*, or village administration-papers, which state, in a manner which will be hereafter adverted to, a custom to the effect that daughters are excluded from inheritance in the Bahrulia clan. There is no doubt that, if those papers are properly admissible in evidence as proof of the custom, Rughubuns, the daughter, would be excluded by the custom stated in them. These *wajib-ul-arz*, or village-papers, are regarded as of great importance by the Government. They were directed to be made by Reg. VII of 1822, and it may be as well to read the language of it before adverting to the objections which have been taken to the reception of the papers in the present suit. The 9th section is, "It shall be the duty of Collectors, and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue, to unite, with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as

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accurate a record as possible of all local usages connected with landed tenures, as full as practicable, a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land," and other purposes are referred to in this section. Then in the latter part of it there occurs this passage: "The information collected on the above points shall be so arranged and recorded as to admit of immediate [751] reference hereafter by the Courts of Judicature." It is stated by the Judicial Commissioner that officers in administering the Provinces of Oudh were directed to be guided by the spirit of this amongst other Regulations.

The papers which are objected to were offered in evidence and received by the Courts under the 35th section of the Indian Evidence Act, 1872. The section is this: "An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

The manner in which these village papers were made up with respect to the custom, appears to be, that the officer recorded the statements of persons who were connected with the villages in the pergunnah in which this talook is situate. Some of the persons whose statements were taken were the proprietors of villages in the talook; others appear to be the proprietors of villages not in the talook, but in the pergunnah. The Record contains translations of the *wajib-ul-arz*, but not of the whole contents of the papers. Extracts from them only are printed, and these extracts show that the persons giving the information made statements, which are contained in paragraph 4, declaring the existence of the custom in question. These documents are entered on record in the office, and they must be taken upon the evidence to have been regularly entered and kept there as authentic *wajib-ul-arz* papers. The objections which were taken to their reception are stated in the judgment of the Judicial Commissioner, and are these: "Exception was taken to these documents on the part of the daughter on the ground that they were not prepared or attested by the Settlement Officer in person as required by Reg. VII of 1822, and that they relate to matters which the Settlement Officer had no jurisdiction to include in them." Those are the only objections which are stated by the Judicial Commissioner to have been made. A further objection which was relied on by Mr. Cowie appears also to have been taken by the daughter [752] in the course of the proceedings, *viz.*, that she was not bound by the statements in question, inasmuch as she was no party to the making up of the *wajib-ul-arz*. Before dealing with these objections, it will be convenient to refer to what the Commissioner says of the documents. He says: "These are official records of admitted customs all properly attested." It must therefore be taken that they are official records kept in the archives of the office, and that they are authenticated by the signatures of the officers who made them, that being what their Lordships understand from the statement of the Commissioner that they are all properly attested.

The first objection, and the one most relied upon, is that these papers were not prepared or attested by the Settlement Officer in person. We have no precise information of the manner in which the Regulations were directed to be of force in Oudh, but the Judicial Commissioner, as already mentioned, says: "Officers in administering the Province were directed to be guided by the spirit of this amongst other Regulations, but they were not tied down to its exact text." It is plain that they could not be so tied down, because the Regulation in question refers to Collectors, and

there are no Collectors in the Province of Oudh. Therefore, in applying this Regulation in its spirit, we must substitute for Collectors and their subordinates the persons who were performing the duties which would have fallen upon Collectors in the parts of India to which the Regulation originally applied. These would be the Settlement Officers, or those subordinate to the Settlement Officers, who were employed in making or revising the settlements. The words of the Regulation are:—"It shall be the duty of Collectors and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue," to make up the papers. When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation, unless the contrary appears. Upon this objection the Judicial Commissioner makes the following observation: "The mere fact then that the Settlement Records of this Province were prepared and attested by officers subordinate to the Settle-[753]ment officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves." He was of opinion that the officers who obtained this information, and who attested the record of what they had obtained, were officers subordinate to the Settlement Officer, and this being so, their Lordships think that the Judicial Commissioner was right in holding that the *wajib-ul-arz* were prepared by the proper officers, and that this first objection ought not to prevail.

If then these documents were made by proper officers, is there any valid objection to receiving in evidence the information which they record? The objection taken and referred to by the Judicial Commissioner does not very precisely hit the point which has been argued at the Bar. He says, "The objection was that they"—that is, the administration-papers —"relate to matters which the Settlement Officer had no jurisdiction to include in them." That objection seems to their Lordships to be unfounded. The officers who were to make the enquiries were directed to ascertain and record "the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible, of all local usages connected with landed tenures." This custom of the Bahrulia clan relating to the mode of inheritance in the clan seems clearly to be a usage of the kind which the Regulation requires the officer to ascertain and record.

The objection which has been argued is, that the papers, upon the face of them, do not show that the officers had passed any judgment upon the information they received, and contain no record of their opinions or findings upon them. It is true that no express statement of the opinion or finding of the officers appears upon the papers, but their Lordships think that the fact that the officers recorded these statements, and attested them by their signature, amounts to an acknowledgment by them that the information they contained was worthy of credit, and gave a true description of the custom. Suppose the papers had had a heading such as the following: "The usages of the Bahrulia clan appear in the information recorded below." This would undoubtedly be an expression by the officer of his opinion that [754] the statements contained a correct description of the custom. Then, when we find that the statements are recorded and authenticated in the manner that has been mentioned, and placed in the Government Records, ought it not to

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5 C. 744=3 Suth. P.C.J. 704=7 I.A. 63=6 C.L.R.593=4 Saraswati's P.C.J. 93.

be implied that the officer has in effect affirmed that the information embodied in the recorded statements was true, and described an existing custom? Their Lordships think that such an implication may in this case be properly made.

The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulations, and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act. That relied on is the 35th section, which has been already read. It is necessary to look at the precise terms of this section; and for the present purpose it may be read: "An entry in any official record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, is itself a relevant fact." There can be no doubt that the entries in question, supposing them to bear the construction already given to them, state a relevant fact, if not the very fact, in issue, *viz.*, the usage of the Bahrulia clan. If so, then, the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact; that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant.

There is another ground upon which it is said that these entries would be admissible. Supposing that these papers were not to be treated as records themselves describing the custom, but as recording only the opinions of persons likely to know it, the 48th section would appear in that view of the entries to make them admissible. The 48th section is, "When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant." Then, if opinions of this nature were relevant, the entry of such opinions in an official record is itself a relevant fact, which makes the entry admissible. There may be doubt whether, what for the present purpose are assumed to **[755]** be opinions, would fall under the 48th clause, or the 49th, which is as follows, and refers to family usages: "When the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge therein are relevant facts." It is enough for their Lordships, without giving an opinion on this last ground, to rest their decision as to the admissibility of the entries on the first ground. Placing the admissibility of the papers on this ground, the Evidence Act does not appear to have altered the law with regard to papers of this description, for it had been decided by the High Court of the North-Western Provinces that *wajib-ul-arz* papers, being a record of rights made by a public servant, were admissible in evidence and entitled to weight in proof of village customs. That case is found in the 2nd volume of the North-Western Provinces High Court Reports, page 395.

On the part of the daughter it was objected that, being no party to the making up of the papers, she was not bound by the statements in them. She is, no doubt, not bound in the sense of being concluded by them. They do not in any way estop her from asserting her right or disputing the custom which is stated in them. They are only received as evidence, and are open to be answered, and the statements in them may be rebutted. No evidence however was given on the part of either of these defendants to show that the custom did not exist, and their Lordships cannot but observe that, if the custom did not exist, nothing could have been easier than to obtain proof of descents and succession to property, which would negative it. It appears that there are numerous

villages in this talook, and more in the pergunnah ; the Bahrulia clan is a large one, and, if the custom did not exist, the defendants must have had means, to be obtained without difficulty, of disproving it.

Their Lordships, therefore, think that these administration-papers were properly admitted in evidence, that the objections made to their reception have failed ; and that being so, it is not disputed that they contain full proof of this custom.

Their Lordships are of opinion that the judgments of the Court [755] below are right, and they will humbly advise Her Majesty to affirm them, and to dismiss the appeal with costs.

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5 C. 744=3 Suth.P.C.J. 704=7 I.A. 63=6 C.L.R. 593=4 Saraswati's P.C.J. 93.

PRIVY COUNCIL.

PRESENT :

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

IN THE MATTER OF F. W. QUARRY. [25th November 1879.]

2 A. 511=7 I.A. 6=4 Saraswati's P.C.J. 99.

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2 A. 511=7 I.A. 6=4 Saraswati's P.C.J. 99.

1. *Suspension of pleader for misconduct—Act XX of 1865—Special leave to appeal—Expiry of period of suspension.*

Where a pleader was suspended for professional misconduct, and the period of suspension had considerably expired, before application was made for special leave to appeal against his suspension, that in itself would form some ground why their Lordships should not accede to the application ; but, if the effect of the order of suspension had been to inflict, upon the character of the applicant, a lasting stigma, and there had been a clear miscarriage of justice shown, the fact that the period of suspension had expired would not alone have sufficed to refuse the application.

2. *High Court's finding on question of fact.*

Where the High Court, acting regularly within their jurisdiction, come to the conclusion, from facts placed before them, that a pleader is guilty of professional misconduct, and suspend him from practice, and there are no materials to show that such conclusion, on a pure question of fact, is wrong, or even where there is some doubt on the subject, the Judicial Committee will refuse to grant special leave to appeal.

JUDGMENT.

[512] SIR J. W. COLVILE.—This is an appeal made to the discretionary power of the Court to grant special leave to appeal against an order of the High Court dated as long ago as the 3rd of April, 1879, whereby the petitioner was suspended for three months from practising as a vakil. The period of suspension has obviously expired considerably before the time at which this application is made, and that in itself forms some ground why their Lordships should not accede to the application. Their Lordships, however, do not mean to go so far as to say that, if the effect of the order had been to inflict upon the character of the applicant a lasting stigma, and there had been a clear miscarriage of justice shown, the fact that the period of suspension had expired would alone have induced them to refuse this application. But it appears to their Lordships after hearing the statement at the bar, and reading the pro-

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2 A. 511=7 I.A. 6=4 Saraswati's P.C.J. 99.

ceedings which have been filed in support of the application, that the Court below acted within its jurisdiction: that upon the complaint of Mr. Bullock, the Judge of the Small Cause Court, they formulated certain charges, charges which, if substantiated, would have justified their order, that a rule to show cause was served upon the applicant, that he put in his answer, that there were affidavits filed on both sides, that the Court heard both parties, and having heard both parties made the order which is now complained of. Their Lordships think that the Court acted within its jurisdiction when they found upon the evidence that ground was made out upon which the rule should be made absolute, or rather that enough had been made out to justify them in suspending the applicant for the time for which they did suspend him from practice, and, so far as their Lordships can judge from the materials before them, they are not prepared to say that this was not a right conclusion. It would not have followed, even [513] if their Lordships had entertained more doubt on the subject, that they would have granted an appeal against Judges acting regularly within their jurisdiction upon a pure question of fact. The application must therefore be refused.

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PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

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On Appeal from the High Court for the North-Western Provinces at Allahabad.

BADRI PRASAD (*Plaintiff*) *v.* MURLIDHAR AND OTHERS (*Defendants*).

[27th November 1879.]

2 A. 593=4 Ind. Jur. 257=3 Suth. P.C.J. 708=7 I.A. 51=6 C.L.R. 257=4 Saraswati's P.C.J. 100.

2 A. 593=4 I.J. 257=3 Suth. P.C J. 708=7 I.A. 51=6 C.L.R. 257=4 Saraswati's P.C.J. 100.

1. *Usury laws—Reg. XXXIV of 1803—Mesne profits in lieu of interest.*

Prior to, and subsequent to, the repeal of the Usury laws, a mortgage, under which the mortgagee was to enjoy mesne profits in lieu of interest, would have constituted a valid and legal contract, and the mortgagee was not bound to account for such profits. But, under the Usury laws, the rate of interest was limited to 12 *per cent.*, and securities might be avoided if they contracted directly or indirectly for higher rate of interest: and there were also provisions for the taking of accounts between mortgagor and mortgagee.

2. *Rendering of accounts whether and when necessary.*

There is nothing in Reg. XXXIV of 1803, making it compulsory for the mortgagee to file accounts, whether they are required for the purpose of determining the rights of the parties in the suit or not.

Accounts would be necessary, even if there were a stipulation to the contrary, if the contract had been made in evasion of the Regulation, and as a contrivance for giving the mortgagee a higher rate of interest than he is entitled to under the law.

They may be also necessary, when the profits received by the mortgagee in possession are fluctuating in amount, to enable the Court to decide on the validity of the contract for interest.

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Where, therefore, under the terms of a deed of mortgage, the only sum that the mortgagee was to receive, over and above the interest allowed by law, was a fixed amount found to be necessary for costs of collection of the village jama, *held*, that a clause in the deed, making the rendering of accounts unnecessary, was not improper; and that the mortgage-deed was a sufficient answer to a suit based on the supposition (contrary to the terms of the agreement) that, if the accounts be taken, the mortgage would be found to have been discharged by debiting the mortgagee with the balance remaining over and above the interest, or so much of the balance as he could not account for.

[R., 5 A. 419=3 A.W.N. 43.]

2 A. 593=4 I.J. 257=3 Suth. P.C.J. 708=7 I.A. 51=6 C.L.R. 257=4 Saraswati's P.C.J. 100.

[595] SIR J. W. COLVILE.—This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and **[596]** assignees of the mortgagee's interest. The mortgage-deed between the original parties was dated 16th January, 1852. It was a mortgage of what was called the *malikana* interest of certain taluqdars; the amount of that *malikana* being, during the pendency of the then settlement, a fixed and known sum. The mortgage-deed contained this stipulation: "We hereby make a written agreement that the said mortgagee having taken possession of the mortgaged villages, with all the powers enjoyed by us, may on his own authority collect the *jama* fixed by the Government from the villages of the *ilaqa*, and himself pay the revenue to the Government, instalment after instalment, according to the usage in the pargana; that he may bring to his own use the income of the *malikana* due to us, crediting every harvest Rs. 1,656 per year as interest on the amount of consideration on this mortgage, at the rate of one per cent. per mensem, and take the remainder, Rs. 565, the surplus of the *malikana*, as his own collection fee and pay of the agent and peons employed for making collections in the villages; that is, he may credit the income of the *malikana* to the payment of two items—one, the interest on the mortgage-amount, and the other the expenses incurred in making collections in the villages; for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the *malikana* profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by Mr. Doyne at the bar, is whether this agreement is sufficient to deprive the plaintiff of his statutory right, under the 9th and 10th sections of Regulation XXXIV of 1803, to call upon the defendants to render the account mentioned in those two sections. A preliminary question however arises as the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from **[597]** having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to twelve per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would

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have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favour of the legal validity of the stipulation as will presently be more fully stated. It has, however, been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not only, point raised by the appellant.

Their Lordships are of opinion that this contention is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bonâ fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about $5\frac{3}{4}$ per cent., was certainly neither exorbitant nor unusual. Having so **[598]** found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the defendants to file accounts would be to increase the costs of suit which must ultimately fall on the plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court (1), and to dismiss this appeal with costs.

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(1) The High Court on appeal urging that the Rs. 565 must be regarded as a usurious addition to the legal interest, had declared as follows:—

"We are of opinion, however, that the above stipulation in the mortgage is not in the nature of a contract for interest. When the parties agreed that Rs. 565 should be allowed for expenses without an account, there was no evasion thereby of the law, or any contract to give usurious interest. This item was *bona fide* for the cost and risk of collections. It is an item in the account based on the footing of a distinct contract quite apart from the question of interest, and when we look at the position of the mortgagees, there was nothing unusual or unfair about it. They had to collect Rs. 9,870

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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2 A. 497 = 4 Ind. Jur. 644.

LACHMAN SINGH (*Plaintiff*) *v.* MOHAN AND ANOTHER (*Defendants*).

[28th November 1879.]

2 A. 497 = 4 Ind. Jur. 644.

1. *C.P.C., 1877, Ss. 2, 540—Decree—Judgment—Appeal.*

(*By the Full Bench*, STRAIGHT, J., *dissenting.*)

Where, in a suit for possession based on title, the defendants deny the plaintiff's title and set up their own, and the Court, finding against the plaintiff, and also that the defendants have a limited right only as lessees under an unexpired lease, dismisses the suit in these terms:—"Ordered that the plaintiff's claim, as it stands at present, be dismissed,"—the defendants are entitled, under S. 540 of the C.P.C. (1877), to appeal from such decree.

[Appr., 7 A. 606 (610) **(F.B.)** = 5 A.W.N. 89; **R.**, 17 A. 174 (184), 9 C.W.N. 584; **D.**, 3 A. 152 (155) **(F.B.)]**

2. *Construction of decree—Reference to judgment and record.*

Per STUART, C.J.—When a decretal order is not self-explanatory, it would be necessary, in order to its being intelligible, to read it with the judgment and the record.

[Diss., 4 M. 134; **F.**, 57 P.R. 1907 = 66 P.W.R. 1907; **R.**, 3 A. 239 (246), 9 C.W.N. 584.**]**

JUDGMENTS OF THE FULL BENCH.

[497] STUART, C.J.—This is a reference to the Full Bench of the Court by a Division Bench (SPANKIE, J. and STRAIGHT, J.) and since it was heard the Code of Procedure, Act X of 1877, has been **[498]** amended by Act XII of 1879 passed on the 29th July, 1879, and among other changes made by the amending Act a new definition of the term "decree" has been given. But the suit in the present case having been instituted, and the appeal having been presented, before the amending Act came into operation, the present reference must be considered according to the provisions of Act X of 1877. The point referred is the subject of the first reason of appeal, and is to the effect that the Munsif's decree shows nothing on the face of it against which the defendants could appeal to the Judge. The question was very fully argued before us, and we were much pressed with the contention that, having regard to S. 540 of the Procedure Code, Act X of 1877, and the definition of the "decree" in S. 2 of the same Code, we were to look to the decree alone, without reference to the judgment, and that, on a strict reading of the definition given of "decree" in S. 2, the decree in the present case came within the meaning of that definition, and was not appealable under S. 540, inasmuch

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from the biswadars, and were responsible for the payment of the revenue, and they had moreover to see that the biswadars made the collections from the tenants. Their position was certainly one of some risk, and the percentage allowed to them for the expense and risk of collecting was certainly not exorbitant or unusual. It may or may not be that their actual expenses fell short of the sum allowed, but this consideration will not render the arrangement a contravention of Regulation XXXIV of 1803, and therefore one to be set aside. The view here taken is, we find, supported by decisions of the Courts, cited by Mr. Macpherson in the 5th edition of his work on Mortgages, pages 51 and 53. We affirm the decision of the lower Court and dismiss the appeal with costs."

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as it was a decree which so far as it decreed anything, did so in favour of the defendants, seeing that it dismissed the suit against them, and therefore was not a decree by which these same defendants could be said to be aggrieved. It appears to me, however, that such a view of the Code is too narrow, and that we may look not only into the judgment, but into the pleadings to see what the decree really means. Nor are we to confound the decretal order given at the end of the Munsif's judgment with the decree itself as actually and formally made, although the same principles of interpretation apply to both where the order or decree is in any respect ambiguous or imperfect. In the present case it is plain that the decretal order is not self-explanatory, and if we had nothing else to go upon it would be necessary, in order to its being intelligible, to read it with the judgment; and as to a decree itself in its complete form, I hold the opinion very strongly that, where it is ambiguous or imperfect as to any essential particular, it may be read with the judgment and record. Nor is this view of the legal quality of a decree inconsistent with the definition of a decree given in S. 2 of the Code, where it is defined to mean "the formal order of the Court in which the result of the decision of the suit, or other judicial proceeding, is embodied." This definition in no **[499]** way prevents us from looking into the judgment and record, in order to a correct understanding of the true meaning and intended application of the decree as formally drawn up. On the contrary, we are told that a decree is to embody the "result," a general term which, however, is to be particularized by reference to the decision or judgment made in the suit. These materials therefore may, if necessary, all be considered where the decree, owing to any defect or ambiguity in its terms, has to be cleared up in order to its proper enforcement. And quite consistently with these considerations S. 206 of the Code of Procedure declares that "the decree must agree with the judgment," and therefore any defect or ambiguity in the decree cannot be seen without reference to the judgment. In the present case it is with the decree and not with the decretal order that we have to deal, and that decree shows plainly that it was one of which the defendants Mohan and Hira had reason to complain as being materially unfavourable to them, and that they were therefore entitled of right to appeal against it to the Judge. The decree sets out the claim made by the plaint as one for possession of 3 bighas, 15¼ biswas *maafi* land, the boundaries of the land and the names of the parties, and after decreeing 17½ biswas, being No. 79 in the record, and as to which there is no dispute, it proceeds to order that "the rest of the claim of the plaintiff be dismissed as brought, the costs of the plaintiff to the extent decreed be charged to Nawab Ahmad Husain Khan and Khuman Singh, defendants, with future interest at eight annas per cent. per mensem, that Mohan and Hira, defendants, be exempted, and their costs with future interest at eight annas per cent. per mensem be charged against the plaintiff, that the costs of Nawab Ahmad Husain Khan and Khuman Singh, defendants, be borne by themselves, and that under the circumstances of the case the defendants' pleaders' fees be separately calculated in the case." There is here not only a full recognition of the plaintiff's title as against the defendants, but the suit against Mohan and Hira is dismissed as brought, which, when we look into the judgment, we find, is tantamount to a decision that their right, if any, was not as proprietors, as they had alleged, but as being in the inferior and subordinate position of lessees, and that any claim which the plaintiff had against these defendants as such lessees **[500]** could not be entertained in the present suit, but must be made in another. Now this is not only a finding *pro tanto*

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against the defendants, but it is one which may injuriously affect any future proceedings on their part for the vindication of the proprietary rights they claim, for in any suit they might hereafter bring they might according to the rulings of this Court and the Privy Council, probably be met by the plea of *res judicata* although with what effect I cannot anticipate. Strictly speaking there is in the state of things appearing on the face of the Munsif's judgment and decree no *res judicata*, but for the determination of the question as to the true nature of these defendants' rights the parties are simply, or at least by necessary implication, referred to another suit. My own opinion has always been, and is, that under such circumstances, there is no room for the plea of *res judicata*, and in a case(1) before Mr. Justice Oldfield and myself, where, as in the present case, the parties were merely referred for the determination of the matter of the plea to another suit, I expressed the opinion that the plea could not hold good. But it is difficult to anticipate what view may be taken of such a plea in a particular case, and undoubtedly the rulings of the Courts would go to put parties, whether plaintiffs or defendants, and pleading *res judicata* in any subsequent suit, in considerable danger; and this is a consideration which of itself goes to strengthen the defendants' right of appeal in the present case.

The case of *Ram Gholam* v. *Sheo Tahal* (2) was referred to on behalf of the defendants as favouring their contention as it clearly does. Reference was also made to a previous Full Bench decision of this Court, *Pan Kooer* v. *Bhagwant Kooer* (3), where it was held that the Appellate Court should not have entertained the appeal. Particular stress was laid on my own judgment in that case. I there stated that, "for the purposes of the suit then before us, the words decree, decision, and judgment may all be taken to mean the same thing, *viz.*, the ultimate and final determination of the matter or matters in issue between the parties." I also held that the decree in that case was not of such a nature as to entitle the defendants to appeal against it to the Judge, seeing that it was an appeal "by the defendants themselves against a decree wholly in their own favour, and the legal meaning of which is and can only be that the plaintiff's suit alto-[501]gether fails," and I ended my judgment by observing that "the decree as read by the light of the plaint is not only entirely in their favour, but is possibly beneficial to them, and their appeal therefore to the Judge was incompetent and anomalous." In the present case, however, I have shown that the decree, although apparently, and so far as it goes, favourable to the defendants, was imperfect and not self-explanatory, but that when read by the light of the record it was really unfavourable and might prove injurious to them, and that they were therefore aggrieved by it and had every interest to appeal to the Judge.

Holding this opinion and that there is nothing in the Code of Procedure to exclude the appeal from the Munsif's order to the Judge, and that the relative position of the parties in the suit, the effect of the Munsif's decree on their rights and interests, and the justice and the reasonableness of the defendants' contention, must be admitted, my opinion is that the appeal to the Judge ought to be heard. The first reason of appeal must therefore be disallowed, and the case will go back to the Bench who referred it to the Full Bench for determination of the other reasons of appeal on the merits.

SPANKIE, J.—The plaintiff, appellant, claimed possession of 3 bighas, 15½ biswas of *maafi* land in mauza Sheopat Patti, under a sale deed

(1) Unreported.
(2) 1 A. 266.
(3) H.C.R., N.W.P., 1874, p. 19.

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executed on the 2nd January, 1873, by the Nawab Ahmad Husain Khan, for the sum of Rs. 700 : Mohan and Hira had, however, taken possession of the land, asserting that it formed part of the garden known as "Bakhshiwala," but it was not included in their auction-purchase, being a separate plot : the plaintiff therefore prays for possession by ejectment of the defendants Hira and Mohan. These two defendants contend that when Nawab Ahmad Husain Khan sold the land to plaintiff, he had no longer any interest in it : the lands in suit are Nos. 74, 75, and 78, and they were included in the previous purchase by defendants at auction and form part of the garden known as "Bakhshiwala." They also urged that as between the Nawab and themselves it had already been found that the land belonged to the garden, and therefore the suit was barred by S. 13, Act X of 1877, as the plaintiff claims under a deed of sale from the Nawab. The first issue laid down by the Munsif was, whether the land Nos. 74, 75, and 78 form part of the garden "Bakhshiwala" purchased by the defendants Mohan and Hira. **[502]** The second issue was, has the plaintiff a right to sue and are defendants entitled to possession by virtue of a lease. The Munsif held upon the auction-sale certificate, dated 17th May, 1870, the schedule of property attached in execution of decree, dated 12th September, 1869, the copy of the sale notification, dated 16th November, 1869, and the proceeding confirming the sale, dated 4th March, 1870, that only the garden "Bakhshiwala" was sold, and that the land in dispute was not sold at auction. It is unnecessary here to give the Munsif's reasons for the conclusion at which he arrived. On the second issue the Munsif found that though the land in dispute had not formed part of the garden known as "Bakhshiwala" and purchased by defendants at auction, they nevertheless were in possession of it under a lease that had not expired at the time of the institution of the suit and it had not been shown that it had expired up to date. The defendants therefore could not be ejected. "They," and this is an important part of the judgment, "having acquired the rights of a lessee by payment of consideration, possess the same title which the lessee did." The Munsif also found that S. 13, Act X of 1877, did not bar the suit. The first Court in its decretal order with reference to the lands Nos. 74, 75 and 78, dismisses "the plaintiff's claim, as it stands at present," and the defendants Mohan and Hira get their costs. Both parties appealed. I need not refer to the plaintiff's appeal. The defendants Mohan and Hira contended that, as it had already in a previous suit been found as between themselves and Nawab Ahmad Husain Khan, whose representative plaintiff is, that the disputed land was a portion of the "Bakhshiwala" garden, no finding to the contrary could be made in this suit, which was barred by S. 13, Act X of 1877. It was also urged, amongst other grounds, that the evidence of the patwari and exhibits filed showed that the disputed land was a part of the garden. The Judge reversed the Munsif's decree, finding that the defendants had purchased at auction the lands in dispute. On the objection of the plaintiff the lower appellate Court also held there was an appeal in this case on the part of the defendants, because the Court below had ruled that the latter were not proprietors but lessees only. The Judge cited the case of *Ram Gholam* v. *Sheo Tahal* (1).

[503] The plaintiff appealed to this Court and his first plea is that, whereas the claim as against respondents were dismissed by the Court of first instance, the defendants, respondents, could not appeal from that

(1) 1 A. 266.

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decree to the lower appellate Court, whose decision was therefore bad in law. This plea led to the reference of the case to the Full Bench, the Judges of the Division Bench before whom the appeal came holding different opinions on the point, Mr. Justice Spankie holding that the Judge had been at liberty to dispose of the appeal on its merits, Mr. Justice Straight doubting whether the decree contained any matter on which the defendants could be heard in appeal.

The plea raised by appellant's pleader goes to the extent that, whereas the suit of the plaintiff was dismissed, the defendants could not appeal, and the decision of the Judge was bad in law for entertaining it. But such a plea is opposed to the very terms of S. 540 of Act X of 1877, which expressly declares that an appeal *shall* lie from the decrees or from any part of the decrees of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts. There is therefore an appeal by right from all decrees. When a decree has been prepared and signed, an appeal may at once be preferred. The form in which it is to be filed is laid down in S. 541. It can only be rejected for the reasons assigned in S. 543. Once admitted and registered it must come on for hearing. It may be dismissed under S. 551 and the judgment of the Court from whose decision the appeal has been admitted may be confirmed, without issuing notice to that Court or upon the respondent. But there is no room for the contention that the appellate Court cannot entertain the appeal. The appellant's pleader, however, was relying on the judgment of this Court, dated 24th November, 1873, *Pan Kooer* v. *Bhagwant Kooer* (1), in which the suit was to recover possession of certain lands by setting aside a lease of them. The decree dismissed the suit, but the judgment contained a finding against the defendant as to certain items of the consideration for the lease, against which the defendant appealed, and it was held that the appellate Court should not have entertained the appeal. I was a party to this ruling, so far that I concurred in the obser-[504]vations of Mr. Justice Jardine on the point. It was urged in that appeal that an appeal ought not to have been entertained merely on the ground of error in the judgment when the decree was admittedly correct. In construing the language of the sections in Act VIII of 1859 regarding decrees and judgments and decisions the learned Judge observed, "It appears to me that the proper interpretation of this language is that the appeal must be strictly from the decree, that is to say, the appellant must object to the decree before he can be allowed to enter upon his detailed objections to the judgment. In effect, the appeal is equivalent to an allegation that the decree is wrong and that the reasons which led to the decree are, as stated in the lower Court's judgment, insufficient." Summed up the ruling in that case amounts to this that the appellants must be aggrieved by the decree. It was held in the particular case then before the Court that he was not so aggrieved, and the learned Chief Justice went so far as to say that, read by the light of the plaint, the decree was not only entirely in appellant's favour, but was positively beneficial to him. I am now quite ready to accept the principle that an appellant must be aggrieved by the decree. But since the ruling of this Court in 1873, Act VIII of 1859 has been repealed, and we have a new Code of Procedure. The language of the sections as to appeals, judgments, reviews of judgment, is much the same as that cited in Mr. Justice Jardine's judgment. But there are two important points of difference between the old and the new Codes, first that "judgment" and "decree" are defined by the

(1) H.C.R., N.W.P., 1874, p. 19.

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latter, and secondly that S. 540 not only allows appeals from decrees but from any part of decrees. When this section is read with S. 2, we are in a position to put a more liberal construction on the words of the first section without going beyond the principle that an appellant must be aggrieved by the decree. "Judgment" means the statement given by the Judge as the grounds of the order or decree by which a suit or other judicial proceeding is determined. "Decree" means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. The decree therefore is not to be vague or shadowy: it is to have substance and body.

By S. 203, Act X of 1877, the judgment of the Court shall contain a concise statement of the case, the points for determination, [505] the decision thereon, and the reasons for that decision. By S. 204, when issues have been framed, the Court shall state its finding and decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit. By S. 206 the decree must agree with the judgment, and amongst other particulars it shall specify clearly the relief granted or other determination of the suit, and in fulfilling these conditions I would say that the decree must show the finding and decision on the points for determination: otherwise it will not agree with the judgment. It is true that if the decree be found to be at variance with the judgment, or if any clerical or arithmetical error be found in it, the Court by this section can amend it, so as to bring it into conformity with the judgment, or to correct such error. The section, however, gives no power to alter or vary the decree, a review of judgment or an appeal can alone do this. But a review of judgment can only be allowed under the limitations imposed by S. 623. It could not be allowed merely to enable the Court to reconsider its judgment upon the same evidence. If therefore a party feels himself aggrieved by a decree and desires to vary, or alter or get rid of it altogether, he claims his right of appeal under S. 540. Now a decree may not contain all that it should contain, may not in fact fulfil the conditions of Ss. 2 and 206 of the Act. It may in consequence of omissions operate prejudicially against one of the parties and that party may be the defendant, in a suit which is dismissed. It may be in the highest degree prejudicial to him, for since the enactment of Act X of 1877, S. 13 has widely extended the provisions of S. 2, Act VIII of 1859, and it becomes more than ever imperative to appeal from a decree in a suit, which may become final within the meaning of the section, and in which the decree by omissions or otherwise may endanger the future interests of any party. By the terms of the section no Court shall try any suit or issue in which the matter directly or substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit, between the same parties, or between parties under whom they or any of them claim, litigating under the same title. The "explanations" attached to the section very clearly show how a decree, if it does not fulfil all the conditions of the law as laid down in Ss. 2 and 206, may [506] prove hereafter injurious to any party to the suit. If therefore the omissions in a decree are such as to aggrieve any party, and yet are not such as can be amended by S. 206, it follows that he must appeal in order to protect his own interests, and it is perhaps possibly on this account that decrees may be appealed not only altogether but in part. For it is obvious that a person may be aggrieved by one part of a decree, though he may not be aggrieved by the remaining portion of the decree, and the remedy, admittedly, in this case is appeal. It seems to me inconsistent that there should be grounds for an appeal when the matter

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of the decree is prejudicial to the interests of a party, and none when the decree itself is equally injurious to a party in consequence of its omissions. I am therefore led by these considerations to conclude that a decree which is materially defective, and cannot be amended, is appealable on that ground alone, and that any party aggrieved thereby may take that objection, and in support of his objection may refer to the judgment of the Court whose decree is appealed, and this conclusion is borne out by the fact that by S. 541 an appellant not only is bound to file a copy of the decree appealed, but also a copy of the judgment, unless the appellate Court dispenses with the latter. Now with respect to the case in which the reference has been made to us, I hold that the decree is defective, not only because it contains omissions, which, if they had been supplied, would have at once given admittedly grounds for an appeal, but because the decree itself does contain matter which laid it open to appeal. It is defective because it does not embody the result of the Court's finding on the points for determination, as both parties claimed the ownership of the lands in dispute, and the judgment declares plaintiff to be the owner and defendants merely lessees, whereas the decree is silent on the issue. The omission in this respect makes the decree injurious to the defendants because they will not be able to plead in any future suit that they were owners, as this issue in the suit was decided against them finally in the present suit, if there was no appeal, and therefore S. 13 of Act X of 1877 would be pleaded in bar of a second trial of the issue.

The decree then is open to appeal on this ground, and also because the words "the rest of the claim *as it stands at present* be dismissed," read and interpreted by the copy of the judgment filed with [507] the copy of the decree, show that these words are injurious to the interests of defendants, inasmuch, as they maintain the right of the plaintiff to the land as owner, though he cannot have possession at once, because the lease of defendants had not expired. These words can have no other meaning and having that meaning the decree limits the rights of defendants to those which lessees have, and denies their right as owners, and therefore defendants may be aggrieved by the decree, assuming that they have a case to lay before the Appellate Court, and not only is their appeal in that Court entertainable but it is one that should be heard on the merits. Holding these views I maintain that the Full Bench ruling of this Court to which I was a party in 1873 (1) is not a bar to the appeal, whilst the ruling of a Division Bench in which I also was one of the Judges, *Ram Gholam* v. *Sheo Tahal* (2), is strictly applicable, and this latter decision is the one upon which the Judge of the lower appellate Court relied in deciding the point before him as to the admissibility of the appeal.

OLDFIELD, J.—By S. 540, Act X of 1877, 'an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." It appears to me that the object and effect of this section are to postpone the right of appeal until the decree or formal order embodying the result of the decision of the suit or judicial proceeding has been made, and that on the decree being made, an appeal shall lie from it, as a matter of right, and since in S. 541 it is directed that the appeal shall be accompanied by a copy of the judgment (unless the appellate Court disposes therewith), and since the decree is nothing more than the formal order embodying the result of

(1) H. C. R., N.W. P., 1874, p. 19.
(2) 1 A. 266.

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the judgment it seems to me a necessary consequence, and to have been the intention of the Legislature, to give a right of objecting to the judgment, when preferring an appeal from the decree.

In the case before us I see no reason why the appeal should not be maintainable, for whether we regard the judgment or the decree the defendant is aggrieved by both. Although plaintiff's suit was dismissed, the judgment decided in favour of the plaintiff's title **[508]** as against defendants, and the decree by its order "dismisses the suit as it stands," an order which is no proper embodiment of the judgment, and impliedly allows the plaintiff's title. The decision of this Court in *Ram Gholam* v. *Sheo Tahal* (1) is in point.

STRAIGHT, J.—This was a suit to obtain possession by ejectment of 3 bighas, 15¼ biswas of land numbered 74, 75, 78 and 79, claimed by the plaintiff under a purchase from the defendant Ahmad Husain Khan. The sale to plaintiff was admitted by Ahmad Husain Khan, and with regard to No. 79, that may be excluded from consideration, for as to that judgment was confessed by defendant Khuman Singh. The other three portions were admittedly in the occupation of the defendants Mohan and Hira, who to the plaintiff's claim for possession set up the following pleas, —(i) That they were auction-purchasers of proprietary rights in respect of 74, 75 and 78: (ii) That if not purchasers of proprietary rights they were purchasers of lessee's rights. At the hearing before the Court of first instance the evidence was very fully gone into, and the following were the issues of fact that had to be decided:—(i) whether the lands 74, 75 and 78 form part of the garden "Bakhshiwala" purchased at auction by the defendants Mohan and Hira: (ii) Has the plaintiff a right to sue and are the defendants entitled to possession by virtue of the lease. The Munsif in his judgment very exhaustively deals with these matters, and disposes of them by finding "that the defendants cannot be ejected from the lands Nos. 74, 75 and 78 owing to the term of the lease not having expired: they having acquired the right of a lessee by payment of consideration, they possess the same title the lessee did: therefore the plaintiff's suit against them is wrong." The terms of the decree are, so far as they affect the point in this case, these: "That the rest of the plaintiff's claim as it stands at present be dismissed, that the defendants Mohan and Hira be considered as exempted (from costs), that the whole of the costs with future interest at eight annas per cent. per mensem be paid by the plaintiff." Against this decision of the Munsif both the plaintiff and the defendants Mohan and Hira appealed to the lower appellate Court, the ground taken by the latter being, that the Court of first instance had wrongly disallowed their proprietary claim. On **[509]** the part of the plaintiff, respondent, it was objected, that the decree of the Munsif being in favour of the defendants they had no right of appeal, and the case could not be entertained. The Judge rejected the contention and found the defendants Mohan and Hira to be auction-purchasers of "proprietary" right, dismissing the cross appeal of the plaintiff. Against this decision the plaintiff appealed to the High Court, and the case came on to be heard before Mr. Justice Spankie and myself, when there being a difference of opinion between us upon a point of law it was referred to the Full Bench. The matter has now been very fully argued but the whole question resolves itself into this. Does an appeal lie under S. 540 of Act X of 1877 by a party to a suit, as to whom upon the face of the decree there is no adverse finding or declaration? In other words, can

(1) 1 A. 266.

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the terms of S. 540 "shall lie from the decree or from any part of the decrees" be so elastically construed as to justify what in the present case is practically an appeal from a judgment. No doubt the point taken for the plaintiff, respondent, is somewhat technical and I had every indisposition to entertain it, but after careful consideration and a close examination of the Act I can come to no other conclusion than that it should prevail. The expressions used in S. 540 do not appear to me to present any ambiguity, nor do the words "or form any part of the decrees" substantially alter the law as it stood in S. 332 of Act VIII of 1859, upon which the Full Bench ruling (1) of this Court was given in November, 1873. To my mind language cannot more plainly declare what an appeal is to be from. From "the *decrees* or any part of the *decrees*," I turn to the interpretation clause of the Act only to find a perfectly plain and definite description of "decree" in contradistinction to "judgment." "Judgment" means the statement given by the Judge as the *grounds of the order or decree*. "*Decree*" means the formal order of the Court in which the result of the decision of the suit is embodied. In short, the judgment has no operative effect of itself at all and until its terms are drawn up in the decree the suit remains open. It is the decree that has effect and must be enforced, not the judgment, and what it is to contain and how it is to be expressed are provided by Ss. 205 and 206 of the Procedure Code. It is altogether idle **[510]** and useless for the purposes of the present case to examine, as was suggested, any proposed Bill now under consideration of the Legislative authorities for the further amendment of the Civil Procedure of this country, which may or may not hereafter prevent the recurrence of the difficulty that now arises. Language can readily be found to alter S. 540 in such a way as to give the fullest power of appeal, but while it remains as it is and the broad distinction exists between judgment and decree, to which I have already called attention, it must in my opinion be taken, that the words "an appeal shall lie from the decrees, or any part of the decrees," mean that it is the terms of the decree itself, and nothing but the terms of the decree, that are to be made the subject of appeal. The words at the end of S. 540 "to the Courts authorized to hear appeals from the decisions of those Courts," so far as the use of the expression *decision* is concerned, seem to me in no way to extend the meaning of what precede them or to have any bearing upon the construction to be applied. While feeling that the limitation which I hold to exist in S. 540, confining an appeal to the decree, is a somewhat capricious one, and involves the incongruity, that the Court of Appeal from appellate decrees might entertain matters of appeal outside the decree which could not be dealt with by the first appellate Court, I cannot strain the interpretation of what seem to me explicit words, because as was urged hardship might arise. Nor does it appear to me that the possible operation of S. 13 of Act X of 1877 upon the defendants, respondents, had they not appealed the decision of the Court of first instance, in any after proceedings in respect of the same property, is a matter that has any relevancy to the present argument. I may, however, point out that it was competent for them under S. 206 of the Procedure Code to have had the decree put in order by the Munsif and his finding in reference to their claim duly declared upon the face of it. Had this course been adopted all difficulty would have been obviated, for then "in accordance with his judgment" (S. 205) he must have decreed them to be "lessees" and not "proprietors," which of necessity would have at once disclosed matter for appeal. Further than this,

(1) H. C. R., N.W.P., 1874, p. 19.

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S. 13 of Act X of 1877 would under such circumstances have afterwards become applicable, had they not appealed, because a Court of competent jurisdiction would not only have "heard" but have [511] "*finally determined*" their claim. It was suggested in the course of the argument, that upon the face of the decree itself there was something that affected the defendants, respondents, in the words "as it stands at present," so as to afford them matter of appeal. At the hearing I was somewhat disposed to adopt the view and I wish I could do so now, as it would avoid the necessity of my differing with the rest of the Court. I cannot, however, upon further consideration see in the terms of the decree anything but a most positive finding against the plaintiff and in favour of the defendants, with their costs, and I see nothing upon the face of it giving them any ground for appeal. No doubt the decree is most carelessly and inadequately framed and is altogether out of compliance with S. 205 of the Procedure Code, but for the reasons I have already given, it is the only document to be looked at for the purposes of appeal, and however full the judgment, that is ineffectual and inoperative, except so far as it finds voice and expression in the words of the decree. But to the extent it goes it deals with the plaintiff, as a non-suit would in the English Courts, and relegates him to an assertion of his rights of possession by a fresh proceeding whenever the proper moment arrives. Under all these circumstances I am of opinion that the Judge of the lower appellate Court was wrong in entertaining the defendants' respondents' appeal and that the present appeal should be allowed.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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APPELLATE CIVIL.

MUNIA AND OTHERS (*Defendants*) *v.* BALAK RAM (*Plaintiff*).

[1st December 1879.]

2 A. 513.

Certificate to collect debts—Act XXVII of 1860—Power to borrow or charge estate of deceased person.

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Where a person, to whom a certificate has been granted under Act XXVII of 1860 to collect debts due to a deceased person, is not his heir and has no share or interest in his estate, he is not competent to contract debts even for the purpose of paying debts for which the estate may have been liable, still less to create a charge or lien on the estate. And moneys advanced to the holder of the certificate, on such charge, cannot be claimed from the heirs and the estate of the deceased, even though they may have been applied to the liquidation of his debts.

A certificate which was granted on 12—12—1876 to Janki (the concubine of Bisram deceased), empowering her to collect the debts due to Bisram's estate, was set aside on 20—3—1877 at the instance of Munia and Lachminia (the daughters of Bisram) who had sued her for the said purpose. In the meanwhile, before the grant of the certificate, Janki, as the widow of Bisram and heir in possession of his estate, had executed a bond on 6—9—1876 in favour of the plaintiff mortgaging a portion of Bisram's real estate as collateral security for the payment of the amount alleged to have been borrowed from him for paying the debts due from the estate of Bisram. Plaintiff in February, 1878, sued Janki, Munia and Lachminia for recovery of the dues under this bond from them personally and by sale of the mortgaged property.

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2 A. 513

The Court of first instance holding that Janki, not being the widow of Bisram or his heir, was not competent to mortgage his property, that she was not competent to mortgage it in virtue of the certificate granted to her under Act XXVII of 1860, that, under the circumstances, the fact that a debt of Rs. 900, due from the estate of Bisram to one Badri Das, was paid out of the money advanced to Janki on the mortgage did not make Munia or Lachminia, or the property of Bisram, liable for the money so advanced, observed as follows :—" I hold that a stranger cannot take upon himself to pay another's debts without his consent and make him liable to himself by making such payments : the plaintiff had no business to pay the debts of Bisram without the consent of his daughters, who were his real and proper heirs : it is not denied that their consent was not taken by the plaintiff : the plaintiff cannot therefore make the daughters of Bisram liable for this debt : for the same reasons Bisram's property of which those daughters were owners is not liable for this debt : the principle of *caveat emptor* applies : the plaintiff got the property mortgaged to him by a person who had no right to mortgage it : he made a voluntary payment without any consideration : it was an officious act on his part to pay debts due not by him or his mortgagor but by other persons, and he has no legal right to enforce the liability of that act against those persons : I hold therefore that the plaintiff cannot get a decree against the daughters or the property of Bisram, but he should get a decree against the person of Janki."

The lower appellate Court modifying the decree of the Court of first instance, and giving the plaintiff a decree against all the defendants and against the mortgaged property, observed :—" She (Janki) had been to all intents and purposes the wife of Bisram, although not married to him, and, holding a recognised position in his house for many years, she was competent to so administer his affairs as to clear them from the debts of their deceased owner : the discharge of Badri Das's money-claim was a primary and obligatory charge on the estate : the period of his loan for Rs. 500 was two years : contracted in July, 1874, its time for payment was up in July, 1876, but it could not be paid off without incurring a fresh loan, which was accordingly done with appellant in September, 1876 ; Badri Das admits the receipt of the money and return of the mortgage-bonds, and because Janki took the opportunity to include other necessary charges in her transaction with appellant, she cannot be held to blame, morally or legally : the money so raised was not for her personal benefit but to benefit the estate of Bisram, and, until her power to incur the fresh debt was revoked by competent authority, she must be held to have been acting within the power conferred by the certificate granted in July, 1876 : moreover it is not proved there has been any waste or misappropriation by Janki : the debt incurred by her should therefore be borne by the estate and the persons for whose benefit the act was done : S. 4, Act XXVII of 1860, affords full indemnity to debtors paying debts to the person in whose favour a certificate has been granted, the certificate being conclusive of the representative's title against all debtors of the deceased person : the presumption is that, since the certificate-holder has the power to receive moneys in discharge of debts, his right to pay them is equally good : the appellant refers to the precedent ruling of the High Court, *Hasan Ali* v. *Mehdi Husain* (1), where a sale by a female certificate-holder was found to be binding upon the minors for whose benefit it was effected, being valid under the Muhammadan law, and in accordance with

(1) 1 A. 533.

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justice, equity, and good conscience, the property having been sold in good faith and for valuable consideration to liquidate ancestral debts and to meet other necessary purposes and wants of the certificate-holder and the minors: although that precedent has reference to Muhammadan parties, the principles are equally applicable to Hindus, among whom the payment of debts is one of the first charges incumbent upon inheritors: the Contract Act, IX of 1872, S. 69, also authorises the re-imbursement to a person paying money for another in the payment of which he is interested: at the time of payment of Badri Das's claims, both Janki and Munia and her sister were interested; the subsequent decretal order of March, 1879, recognizing a better right to inherit on the part of Munia and her sister, does not alter the case, nor lessen or remove the liability of Munia and her sister, as inheritors, to pay the appellant's money-claim conjointly with Janki, who has also separately appealed against the order which fixes the liability solely upon her."

Munia and Lachminia appealed to the High Court.

JUDGMENT.

[516] PEARSON, J.—In our judgment all the grounds (1) of appeal are valid and must be allowed. The reasons for which the Court of first instance exempted the daughters and the estate of the deceased Bisram from liability to the plaintiff's claim were sound and incontrovertible; while those assigned by the lower appellate Court for decreeing the claim against the appellants and the mortgaged property are untenable. Musammat Janki was not one of Bisram's heirs; she had no share or interest in the estate left by him; and she was wholly incompetent to contract debts even for the purpose of paying debts for which that estate may have been liable; and still less was she justified in creating a charge or lien on that estate. The plaintiff cannot therefore by virtue of acts done by her claim to **[517]** recover moneys advanced by him to her, even though they may have been applied to the liquidation of Bisram's debts, from his daughters and estate. Accordingly we reverse the lower appellate Court's decree in so far as it modifies the Subordinate Judge's decree, and affirm the latter in its entirety. The costs of the appeal are awarded to the appellants.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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On Appeal from the Court of the Judicial Commissioner of Oudh.

SIR MAHARAJAH DRIG BIJAI SINGH (*Defendant*) *v.* GOPAL DATT PANDAY (*Plaintiff*). [5th December 1879.]

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'Birt' tenures—Act XVI of 1865—Act XIII of 1866—Birteah, suit by—Limitation.

A suit by a birteah, in respect of his tenure, is cognizable under Act XVI of 1865 and Act XIII of 1866, notwithstanding that he may not have been in possession in 1855.

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(1) That Janki was not competent to mortgage the property of Bisram, being his concubine and not his widow, that being a stranger her acts could not bind the defendants, the lawful heirs of Bisram, and the certificate granted under Act XXVII of 1860 to her did not give her authority to mortgage.

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The appellant is His Highness the Maharajah of Bulrampore, K.C.S.I., and the question in litigation between him and the respondent is as to whether the latter had established a claim to under-proprietary right as birt zamindar in two villages and half of a third, which formed part of the Maharajah's estate.

JUDGMENT.

[220] SIR R. P. COLLIER.—In this case the plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a "birt zamindar," in twenty-eight villages; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the **[221]** ground that, inasmuch as plaintiff did not prove that he had been in possession in 1262 and 1263 Fusli—in other words, in the year 1855, the year before the annexation of Oudh—his claim could not be entertained. The Commissioner of Oudh not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the plaintiff was entitled to the right he claimed, which is sometimes described as a "birt shankallap" right, sometimes as a "shankallap" right, (some kinds of shankallap being almost identical with that of birt, some being different from it,) and an under-settlement was decreed to him. The Judicial Commissioner, in pursuance of a power which he possessed, allowed an appeal to this Board upon a point of law which he states to be, whether paragraph 5 of ruling 5 of the Financial Commissioner, which he sets out, was or was not correct. The ruling is in these terms: "In the investigation of this and all cases of the same nature it must be remembered that the extension of the term of limitation made by Act XVI of 1865 is founded only on the agreement of the talookdars, and does not apply to tenures originating in favor. A claimant who cannot prove possession of his shankallap holding in 1262-1263 Fusli has no *locus standi* in Court." This ruling appears to be based upon a Circular of 1861, which their Lordships will assume to have had at the time the force of law. The passages in that Circular, on which the ruling is supposed to be founded, are principally these: The first section enacts, "Though the settlement recently concluded with the talookdars has been declared final and perpetual, subject only to revision of assessment, it has at the same time been provided that the rights of the under-proprietors, or parties holding intermediate interest in the land between the talookdar and the ryot, shall be maintained, as these rights existed in 1855." Then follows S. 24, which relates to birt tenures, and is in these terms: "Where the birteeah has lost possession, there is no more to be said. We are not to restore it to him. But the Chief Commissioner is clearly of opinion the birteeahs who are found in direct engagement with the State at annexation, or who have **[222]** uninterruptedly held whole villages on the terms of their pottahs under the talookdars, must be maintained in the full enjoyment of their rights in subordination to the talookdars." Then come other sections which illustrate the meaning of birt. Section 25 says: "The meaning of the term 'birt' is a 'cession.' It was the purchase of the proprietary rights subordinate to the talookdar on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power." Section 26 runs thus: "Instructions are also required regarding the treatment of shankallap at settlement. Some shankallap is of much the same nature as birt, and therefore will be governed by the same rules; but it differs so far from 'bai-birt' that it is a condition of the former

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tenure that the talookdar can redeem it at any time by re-paying the purchase-money. The option of availing himself of this condition should be afforded him at settlement. Other 'shankallap,' that which is styled 'kooshust,' and is usually given to Brahmins and pundits, is a pure maafi tenure given by the talookdar, and will be treated like other rent-free grants by talookdars." The latter words refer us back to S. 20, which is in these terms: "Those birts conferred by favor, or 'regatte' birts, as they are styled, in contradistinction to the former, or 'bai-birts,' are not birts in their essential characteristics, but are identical with the rent-free grants made by talookdars, and therefore liable to resumption by them at regular settlement, when the Government will take its full share of the rental, as has already been explained in paragraph 14 of the maafi rules."

Their Lordships observe that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenures, and to tenures in the nature of shankallap, which are to some extent different from birt tenures, and are assumed to be held at the option of the talookdar; but their Lordships find no such distinction in the Circular of 1861. The words treated as words of limitation in S. 24 apply to all birt tenures. If a shankallap be a birt tenure, they apply to it; if it be not a birt tenure, they do not apply to it, and it follows **[223]** that there is no term of limitation in the circular order applicable to shankallaps. But it must be assumed for the present purpose that this is a shankallap to which the term of limitation, as it is called, applies; that is to say, that it is a shankallap of the nature of a birt, which seems to be the effect of all the holdings in this case.

Sections 1 and 24 enact in effect that if a birteeah is out of possession in the year 1855, his claim cannot be recognized. They are not, in the technical sense, enactments of limitation, though their effect is in some respects the same, *viz.*, to prevent the owner of a birt tenure being heard to support his claim; and they appear to be treated as enactments of limitation by the authorities in Oudh, and to some extent by the Legislature itself. We then come to a Statute, No. XVI of 1865, which is entitled "An Act to remove doubts as to the jurisdiction of the Revenue Courts in the Province of Oudh." Section 5 is in these terms: "No suit relating to any under-tenure which shall be cognizable in any Revenue Court under this Act"—and claims of this kind come under that category —"shall be debarred from a hearing under the rules relating to the limitation of suits in force in the Province of Oudh, if the cause of action shall have arisen on or after the 13th day of February, 1844," that is, 12 years before the annexation of Oudh, which occurred on the 13th February, 1856. Act XIII of 1866 followed, which is very much *in pari materia*. The 1st section, after re-enacting in almost the same words the provisions of the 5th section of the former Act, goes on to say, "And any suit or appeal relating to any tenure, and cognisable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits if the cause of suit shall have arisen on or after such day," that day being the 13th February, 1844. It appears to their Lordships that, whether the provision in the Chief Commissioner's circular order referred to be considered a provision of limitation or not, it was in effect repealed by these Statutes, and that the suit of a birteeah became cognisable, notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could **[224]** be raised on the question of limitation, their Lordships are of opinion that these two Statutes are an answer to it.

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But it has been contended that the disability, which it is said the plaintiff labours under to prove his title, is not in effect a disability under a Statute of Limitations, but a disability affecting the title itself. Act No. XXVI of 1866 is relied upon for this purpose. It is entitled, "An Act to legalise the rules made by the Chief Commissioner of Oudh for the better determination of certain claims of subordinate proprietors in that Province;" and it enacts, "Whereas certain rules have been made by the Chief Commissioner of Oudh for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration; and whereas it is expedient that such rules shall have the force of law, it is hereby enacted as follows :—1. The rules for determining the conditions to which persons possessed of subordinate rights of property to talookas in the territories subject to the administration of the Chief Commissioner of Oudh shall be entitled to obtain a sub-settlement of lands, villages, or sub-divisions thereof which they held under talookdars on or before the 13th day of February, 1856, and for determining the amounts payable to the talookdars by such subordinate proprietors, which rules were made by the said Chief Commissioner, sanctioned by the Governor-General of India in Council, and published in the *Gazette of India* for September 1st, 1866, and which are republished in the schedule to this Act, are hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the plaintiff's claim. The chief reliance has been placed upon the 1st and 2nd sections. The first section is to the effect that—"The extension of the term of limitation for the hearing of claims to under-proprietary rights in land makes of itself no alteration in the principles hitherto observed in the recognition of a right to sub-settlement." Rule 2 goes on to say, "When no rights are proved to have been exercised or enjoyed by an under-proprietor during the period of limitation, beyond the possession of certain lands as seer or nankar, no sub-settlement can be made. But the [225] claimants will be entitled, in accordance with the rules contained in the Circular Orders which have hitherto been in force in Oudh upon this subject, to the recognition of a proprietary right in such lands." That does not apply to this case. "To entitle the claimant to obtain a sub-settlement, he must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." So far it appears to their Lordships that the finding of the Courts is in favor of the plaintiff. He must be taken to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence was the time when he was ejected by the Rajah. Then follow these words, on which reliance has been placed: "He must also show that he, either by himself, or by some other person or persons from whom he has inherited, has, by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favor of the talookdar, held such lands under contract (pucka), with some degree of continuousness since the village came into the talooka;" and the next section explains what is meant by "some degree of continuousness." It has been argued that, inasmuch as this is a shankallap tenure of the kooshust description, and held merely by favor, and not as of right, the plaintiff is excluded by the above words. Their Lordships are of opinion, however, that he is not so excluded; they adopt the findings of fact of the different Courts. The claim of the plaintiff is treated in the first place by the Settlement Officer, who

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originally dismissed it on the grounds which have been stated, as a claim not to "kooshust," but to "birt shankallap." The judgment of the first Court upon remand is to this effect: "I consider it proved that there were five shankallap villages held by the plaintiff's family; that about 1256 Fusli" (it is agreed that that should stand 1258 Fusli) "they lost possession when Jadunath executed the conditional deed of sale. There is proof that plaintiff held his share separately, from the defendant's own written note on the wajib-ul-arz presented by Jadunath; and as the defendant neglects to produce the deed, there is no evidence to show that Jadunath did or could legally convey the rights of Gopal Datt; that the Rajah had no right to [226] eject him in 1256 Fusli, and he is now entitled to regain possession and to hold as an under-proprietor." That decision is confirmed by the Commissioner, Mr. Capper.

It appears to their Lordships that the effect of the finding is, that the plaintiff did hold, not merely in the words of the section, "through privilege granted on account of services or by favor of the talookdar," but by an under-proprietary right which is distinguished from a holding through privilege in favor; that he was entitled to hold, not merely during the will of the talookdar, to which the latter part of the section appears to point, but *in invitum*; and their Lordships are of opinion that from the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held 'pucka,' or under contract, or at all events under an arrangement from which a contract might be inferred. That being so, their Lordships are of opinion that he is not excluded, by the words which have been read, from the right of coming before the Court and proving his case.

It has not been seriously disputed that, if this be so, he has held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they will humbly advise Her Majesty that the judgment of the Commissioner be affirmed.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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2 A. 517 = 4 Ind. Jur. 650.

PREM SUKH DAS AND OTHERS (*Plaintiffs*) *v.* BHUPIA AND ANOTHER (*Defendants*). [5th December 1879.]

Landlord and tenant—Non-payment of rent—Adverse possession—Limitation.

(By the Full Bench, SPANKIE, J., *dissenting*.)

Once the relation of landlord and tenant is established, the mere non-payment of rent by the tenant, for over twelve years before the institution of the landlord's suit for possession and rent, is not sufficient to establish, either the cessation of the tenancy, or the tenant's title by adverse possession; the cessation of the tenancy must be established by the tenant by means of affirmative proof, over and above the mere failure to pay rent.

[D., 31 A. 318 = 6 A.L.J. 239; R., 31 A. 514 = 6 A.L.J. 584, 5 Ind. Cas. 350 (351).]

JUDGMENTS OF THE DIVISION BENCH.

[518] PEARSON, J.—The claim in this suit is based on a *keraianama*, dated 6th July, 1828. In so far as the vacation of the houses in

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question is claimed in accordance with the condition stated in that document, the suit appears to be one for specific performance of a contract, to which Art 113, Sch. ii, Act XV of 1877, is applicable. Neither of the lower Courts has, however, tried the material issue whether the defendants are bound by the *keraia-nama* aforesaid. If they are in possession of the houses under the instrument, their possession cannot be held to have been adverse merely because they may not have paid rent within twelve years. The plaintiffs' claim for rent for the years for which it is claimed appears to be within the time allowed by Art. 110, Sch. ii of the Limitation Law aforesaid. Whether the claim to enforce the condition relating to the vacation of the houses be within the time allowed under the terms of Art. 113 may be matter for inquiry and determination.

[519] Setting aside the decrees of the lower Courts, I would remand the case for fresh disposal to the Court of first instance, with an instruction that the costs of this appeal shall follow the event and be costs in the cause.

SPANKIE, J.—I cannot regard the suit as one for the specific performance of a contract, and if it could be so regarded, it would be barred by lapse of time, for we must accept the finding of the Courts below that no rent has been paid for upwards of twelve years prior to the institution of the claim. Under these circumstances the plaintiff must have had notice that the performance of the contract was refused, and he should have brought his suit within three years from the first default.

But the claim does not profess to be one for specific performance of a contract. It assumes that the conditions of the lease have been fulfilled up to the 6th July, 1875, and asks for the amount due in cash at the rate of two annas for each of the labourers that defendants should have supplied under the terms of the deed of 1828, and also for possession. The defendants totally repudiate the proprietary title of plaintiffs, and deny that any rent was ever paid by themselves or predecessors to plaintiffs, and allege that they have all along held proprietary possession of the house.

We cannot in a second appeal question the finding of fact that the rent has not been paid for upwards of twelve years prior to the institution of the suit. This being so, it appears to me that a claim now to enforce the terms of an instrument written in 1828, which it is shown have not been enforced for upwards of twelve years prior to the institution of the suit, is barred, and should be dismissed. I would dismiss the appeal and affirm the judgment with costs.

The plaintiffs preferred an appeal to the Full Bench, under Cl. 10, Letters Patent, against the judgment of Spankie, J.

JUDGMENTS OF THE FULL BENCH.

OLDFIELD, J. (STUART, C. J., PEARSON, J., and STRAIGHT, J., concurring).—This is a suit to recover two years' rent of a certain house from the defendants and to eject them from the premises. **[520]** The plaintiffs' case is that under a deed of lease, dated 6th July, 1828, their ancestors leased the house to defendants' ancestors on the following terms, that the latter should supply annually eight labourers to the lessor or should pay a sum of two annas in lieu of supplying each labourer, and on failure to comply with the terms should be liable to be evicted from the premises. The answer of the defendants is that the house was built by their ancestors and has always been held by them in proprietary right, and that the deed of 6th July, 1828, on which plaintiffs rely, is a forgery. The Court of first instance, after remarking that no doubt the defendants' ancestors were located by those of plaintiffs, finds that there has been no payment

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of rent within twelve years, and relying on this fact has concluded that their possession has been adverse and has dismissed the claim. The Judge has affirmed the decree: he remarks that "there is evidence to show that the defendant or his predecessors, in times not long ago, acknowledged that he was the plaintiffs' ryot and had been originally located there by the plaintiff's ancestor, Sital, and whatever may be the dependency of a ryot on his lord I think clearly exists between the plaintiff and defendant here: probably the land is still the plaintiffs' and cannot be diverted to other purposes or sold by the defendant without the consent of the plaintiff, and there probably the plaintiff's interest and power end, but that plaintiff has a right to eject or take rent is not proved, and the long tenure of defendant without rent is now equivalent to a good title to hold without payment of rent."

Neither of these judgments amounts to an adequate finding on the question of tenancy, or disposes of the real question at issue whether or not the defendants' ancestors became tenants of the plaintiffs' ancestors under the deed set up by the plaintiffs, dated 6th July, 1828, and so became liable to the payment of rent and to eviction as averred. This question has not been touched on, nor has the genuineness or otherwise of the deed been even alluded to, and supposing that a tenancy did arise in the manner contended for, the Courts are in error in supposing the mere non-payment of rent for a period of twelve years will suffice to establish that it has been determined, and that defendants have obtained a title by adverse possession, so as to defeat the claim, for once the relation of landlord and tenant has been proved, it is for the latter to establish its cessation by affirmative proof, over and above the **[521]** mere failure to pay rent. The Courts have in the present suit to decide whether the deed produced by plaintiffs is genuine, and established a tenancy on the part of defendants' ancestors, on the terms alleged, and if so whether defendants have shown that the tenancy has determined, and that they have held for twelve years since its determination. If these questions are decided in plaintiffs' favour they are entitled to succeed. We are of opinion that the appeal must prevail and that a decree should pass in the terms of Mr. Justice Pearson's proposed order.

SPANKIE, J.—It will be seen from the pleas in appeal from the Judge's decision to this Court that it is assumed that the relation of landlord and tenant exists under the lease; secondly, that the Judge had not determined whether defendants paid or did not pay rent to plaintiffs, nor had he considered the admission of defendants that they were tenants; thirdly, admitting defendants did not pay rent for some time still the right to receive it cannot be destroyed. In second appeal we had to confine ourselves to these pleas and no others. It is erroneous to assume that the relation of landlord and tenant exists or was admitted as regards the *houses*. The lease itself refers to thatched and mud-built houses hired to the defendants. But the first Court found that the *houses* had been constructed entirely by the ancestors of defendants, though these ancestors had been located on the *land* by the ancestor of plaintiffs. The plaintiffs sued for rent under the lease, averring that it had been paid up to 1875. This the plaintiffs were bound to establish, and it was in issue whether they were entitled to recover possession of the houses in virtue of their proprietary right and the rent claimed by them, or whether, no rent having been paid to them within the twelve years prior to the institution of the suit, they had lost their proprietary right. The first Court found that the plaintiffs had never received the rent within twelve years prior to the institution of the suit: the defendants had repudiated

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the proprietary title of plaintiffs in the house. The first Court also found that defendants had held adversely to plaintiffs for more than twelve years prior to the institution of the suit. The second Court appeared to me to accept the judgment of the first Court "that defendants had held over twelve years adverse possession and therefore had acquired a title against plaintiffs."

[522] It seems to me that the rest of the judgment of the lower appellate Court has been misunderstood. The Judge refers to the original location on the *land* of the persons who constructed the houses which formed the *sarai*, and in his view, only so far as the land is concerned is there any connection between the plaintiff and defendant as landlord and ryot. "Probably," observes the Judge, "the land is still the plaintiff's and cannot be diverted to other purposes or sold by the defendant without the consent of the plaintiff, and there probably the plaintiff's interest and power end." But the Judge holds the right to take rent or eject the defendants not proved, and that defendants have acquired a good title by long tenure to hold without payment of rent.

When then the first plea before us in 2nd appeal referred to the lease of 1828, and the second to the payment of rent and the admission made by defendant that he was a tenant and paid rent, it appeared to me that the Judge had disposed practically of both these pleas in the finding at which he arrived, and that after such a finding no claim brought under the lease could be enforced The plaintiff's allegation and averment that he had received rent under the lease up to 1875 had broken down, and the lease had never been in operation, certainly for twelve years prior to the institution of the suit. The Judge and Court below him also found that the defendants had acquired a title against plaintiffs by continuous occupation for a very long period without payment of rent, asserting their own proprietary possession as regards the house. Under these circumstances the lease, having never been enforced within twelve years prior to the institution of the suit, could not be enforced now, and I thought that the suit as brought failed and was therefore properly dismissed, and I think so now and would dismiss the appeal.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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APPELLATE CIVIL.
2 A. 527.

PHUL KUAR (*Plaintiff*) *v.* MURLI DHAR AND ANOTHER (*Defendants*).

[5th December 1879.]

Mortgage—Hypothecation.

An instrument, which recites that the obligor has received a certain amount of money and has mortgaged his house to the obligee, that the latter has been put in possession of the mortgaged property, that he promises to pay the sum to the mortgagee, within two years and redeem the mortgaged property, and that, if he fails to pay the mortgage-money within that time, the mortgagee shall be at liberty to recover the amount in any manner he pleases, creates a simple mortgage of the house, which can be enforced by sale. (H. C. R., N. W. P., 1875, p. 55, *D.*).

[F., 8 A.W.N. 171; R., 21 A. 4 (8) = 18 A.W.N. 167.]

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APPELLATE CIVIL.

2 A. 527.

Suit, instituted in the Court of the Munsif of Ghaziabad, in April, 1878, "to recover Rs. 300, the principal amount of the mortgage-money, besides the rent of the mortgaged house, at eight annas a month, under the terms of the mortgage-deed, and Rs. 70-9-0 on account of interest from the date of ejectment up to the date of suit, at the rate of one per cent. per mensem, in all Rs. 427-1-6, by the auction-sale of the mortgaged house situated in the town of Ghaziabad, under the mortgage-deed, dated the 6th November, 1868."

Both the Courts below allowed the contention of the defendants [that the instrument of the 6th November, 1868, created no mortgage of the house, and the plaintiff's claim being consequently reduced to one merely for money, the suit was not cognizable by the Munsif but by the Court of Small Causes at Meerut] and dismissed the suit. The plaintiff preferred an appeal to the High Court.

JUDGMENTS OF THE DIVISION BENCH.

[529] STUART, C. J.—In this case it was objected by the defendants, respondents, and both the lower Courts have held, that the claim is one cognizable by a Small Cause Court, and that the Civil Court had no jurisdiction to entertain the case, seeing that, in their opinion, possession of the house for two years, as conditioned by the deed, does not confer such a mortgage-right as would entitle the mortgagee to realize the amount under it from the property. All that the mortgagee is entitled to sue for is Rs. 300, and for that purpose she ought to proceed in the Small Cause Court. On the other hand it is contended by the plaintiff, appellant, that there is a good mortgage of the house to her; and her plaint shows that she has brought the suit for recovery of the Rs. 300, which is the mortgage-money, and interest, besides the rent, by **[530]** auction-sale of the mortgaged house, and that the suit is therefore cognizable by the Munsif and not by the Small Cause Court. This is her only plea, and it is the sole question before us in this appeal. The following is the mortgage-deed (1). * * * * * If the first part of this deed stood by itself without reference to anything that was to follow, it might perhaps be fairly argued that what was really mortgaged was not the house itself, but only two years' use of it. But even if so, there was a mortgage, a limited mortgage, and such a transaction is not within the terms of S. 6 of Act XI of 1865. Taken as a whole, however, the transaction bears a wider aspect, for it states that the mortgagors "have put the mortgagee in possession of the thing mortgaged like ourselves," and it goes on to provide, "that we agree," *i.e.*, we intend and promise, "that we shall pay the aforesaid sum in a period of two years and get," *i.e.*, the mortgage-debt being then paid, we shall then get, "the thing mortgaged redeemed," and then comes a very important clause showing that the contingency of the

(1) The mortgage-deed:—"We, Murlidhar and Sagar Mal, sons of Ram Lal, do hereby declare that we have mortgaged a house situate in Ghaziabad, bounded as below, owned and possessed by us, in lieu of Rs. 300, half of which is Rs. 150, to Kashi Ram and Ganga Ram for two years: that we have received the entire mortgage-amount from the mortgagee, and nothing remains due: that we have put the mortgagee in possession of the thing mortgaged like ourselves: that eight annas has been fixed as monthly interest besides the rent of the house, which we shall pay from our own pocket: that we agree that we shall pay the aforesaid sum in a period of two years to the mortgagee and get the thing mortgaged redeemed: that if we fail to pay the mortgage-amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases: that whatever is laid out by the mortgagee in repairing the house shall be paid by us at the time of redemption of mortgage: hence these few presents have been executed by way of a mortgage-deed to serve as evidence."

debt not being paid within two years was kept in view, for it provided that, "if we fail to pay the mortgage-amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases," that is, he may either proceed against the mortgaged property or against the mortgagor personally, and it is added that, whatever is laid out by the mortgagee in repairing the house "shall be paid by us," not at the end of two years, but "at the time of redemption of mortgage."

It is, therefore, quite clear to me that the deed is an ordinary simple mortgage-deed, by which the mortgagor's house in Ghaziabad is pledged as security for the mortgage-debt, the condition as to payment of the amount within two years pointing to a mere contingency as to the mortgagor's intentions, but in no way altering the legal character of the mortgagee's right under his deed. The precedent referred to by the Judge —*Dulli* v. *Bahadur* (1)—does not appear to me to have any application to the present case. There the defendant failed to carry out his covenant to put the plaintiff in possession of a zamindari share, in consequence of the estate being in the hands of a lessee who, of course, insisted on **[531]** his own independent right, and the property itself was not mortgaged to secure the debt. Here we have a simple mortgage which undoubtedly secured the property to the mortgagee until his debt was paid, the two years' condition being merely in the nature of a contingent promise or expectation of releasing the property by payment of the debt within that time, and not otherwise limiting the plaintiff's rights under her security. Both the lower Courts are therefore clearly wrong in holding that the jurisdiction of the Munsif was ousted, and that the case could only be entertained by the Small Cause Court.

I would, therefore, allow the present appeal with costs, setting aside the judgment of both the lower Courts, and I would remand the case for disposal on its merits by the Munsif.

SPANKIE, J.—I cannot say that the decision of the lower appellate Court is open to the objection taken by appellant. The terms of the mortgage-deed are not denied, and it appears that the mortgage was for two years, and for those two years the mortgagee was put in possession as security for the interest rather than the principal. The mortgagors put the mortgagee in possession of the subject of the mortgage, and agreed to pay interest at eight annas a month, as well as the monthly rent. If they fail to pay the amount of the mortgage-money within the period of two years, the mortgagee would be at liberty to recover it in any way he pleased, but the deed does not provide that the house at the expiration of two years shall remain hypothecated for the payment of the money. It is admitted that the mortgagee has been put out of possession, and she now seeks to recover the amount of the money due to her by sale of the mortgaged property. The amount in suit is under Rs. 500, and the Courts below have held that there was no real security for the payment of the principal, and therefore that there could be no decree for the sale of the mortgaged property. The claim then became one cognizable by a Court of Small Causes. It was therefore dismissed.

The precedent relied on by the lower appellate Court—*Dulli* v. *Bahadur* (1)—appears to be in point. The judgment is one to which I myself was a party, and I consider myself bound by it. **[532]** But regretting that I differ from the honorable and learned Chief Justice, I am quite willing, if he should be disposed to refer it, that the case may go

(1) H. C. R., N. W. P., 1875, p. 55.

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before another Judge. At present I would dismiss the appeal and affirm the judgment with costs.

The Judges of the Division Bench differing on a point of law, the appeal was referred under S. 575 of Act X of 1877 to Oldfield and Straight, JJ.

JUDGMENT.

OLDFIELD, J.—The question which we have to determine is whether under the terms of the deed, dated the 6th November, 1868, a mortgage was created in plaintiff's (appellant's) favour by reason of which she is entitled to recover the amount she claims by sale of the house alleged to be mortgaged.

In our opinion there can be no doubt that the deed creates a mortgage of the house as security for payment of the principal sum, Rs. 300, lent, and that the plaintiff is in consequence entitled to recover by sale of the mortgaged property. A pledge is created by the terms, "We, Murli Dhar and Sagar Mal, sons of Ram Lal, do hereby declare that we have mortgaged a house situate in Ghaziabad, bounded as below, and possessed by us, in lieu of Rs. 300, half of which is Rs. 150, to Kashi Ram and Ganga Ram for two years," and the deed goes on to stipulate, "if we fail to pay the mortgage-amount within the period of two years the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases." It is true that a term of two years is entered as the term of the mortgage, but this term is named with reference to the period within which the obligor was bound to satisfy the debt, and before the expiry of which the obligee could not demand payment, and it is obvious that the object of the mortgage would be frustrated if it were held to cease after two years, whether the debt be satisfied or not. The case on which respondents rely and which is referred to in the judgments of the Courts is distinguishable from the one before us. In that case the mortgage was a usufructuary mortgage for a term of years, and no question arose as to the right to bring the mortgaged property to sale in satisfaction of the debt. The only question decided was that the mortgagee could not retain possession of the mortgaged property after the term of the **[533]** usufructuary mortgage had expired. In the case before us, the deed cannot be held to pledge the house for the payment of interest, and so far the claim to recover interest as secured by the mortgage of the house will fail. An order will be made in the form proposed by the learned Chief Justice for remanding the case for disposal on its merits. The costs of the appeal to this Court and of the Courts below will follow the result.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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EMPRESS OF INDIA *v.* SABSUKH AND OTHERS. [5th December 1879.]

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1. *Crim. Pro. Code, 1872, Ss. 468, 469—Revenue Courts, whether Civil Courts.*

Held by the Full Bench (SPANKIE, J., *doubting*) :—A Revenue Court is a Civil Court within the meaning and intent of Ss. 468, 469, Cr. P.C.

[F., 10 A. 582 ; R., 97 P.L.R. 1903.]

2. *Ibid—Sanction to prosecute.*

A refusal by a Court of Revenue to give sanction to a prosecution under a mistaken view of the law, and under an impression that sanction was unnecessary, would not constitute a sanction.

3. *Ibid—S. 470—Sanction, when can be applied for.*

The words "at any time" in S. 470 mean at any time during the trial, seeing that it is for the purpose of such trial, the sanction is required, and without it the trial could not proceed, and that after conviction and sentence, there is nothing to follow for which sanction may be asked.

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REFERENCE TO THE FULL BENCH.

[533] STRAIGHT, J.—This was an appeal from a judgment of the Court of Session at Farukhabad. The case was argued before me on the **[534]** 3rd November last by Mr. Leach for the appellants and the Junior Government Pleader for the Crown. I took time to consider judgment, not on the questions of fact, as to which I was quite satisfied, but upon the point of law that had been raised, and as upon consideration I feel that the matter is one of very serious importance, I have thought it best to state the following case for the opinion of the Full Bench.

The appellants were prosecuted for and convicted of offences against Ss. 193 and 471, Indian Penal Code. The false evidence had been given and the forged document used on the trial of a suit in the Deputy Collector's Court, in which one Imam Khan, a zamindar, sought to recover arrears of rent from the appellant Sabsukh. The Deputy Collector found in favour of the claim, and upon appeal the Collector took the same view, dismissing the appeal in the following words: "I believe the receipt to be a clumsy forgery and now reject the appeal." Thereupon Imam Khan, the before-mentioned plaintiff, presented a petition for sanction of prosecution in accordance with the provisions of Ss. 468, 469, Criminal Procedure Code, and upon such petition the Collector made the following endorsement: "There is no rule of practice as to giving sanction in revenue cases; sanction is being given in criminal cases: the applicant is at liberty to bring the complaint in the Criminal Court separately: there is no need for sanction." Accepting this as a sanction Imam Khan proceeded with his prosecution and ultimately convicted the three appellants. The three questions upon which I wish to have the opinion of the Full Bench are as follows:—(i) Is a Revenue Court a Civil Court in the sense of Ss. 468 and 469, Criminal Procedure Code? (ii) Can the Collector's endorsement on the petition for sanction, as above set out, be considered a "sanction" within S. 470, Criminal Procedure Code? (iii) Can this Court now, under the words "at any time" in S. 470, Criminal Procedure Code, itself give the required sanction, assuming the second question to be answered in the negative?

JUDGMENTS OF THE FULL BENCH.

[535] STUART, C. J.—* * * * In answer to the first of these questions, I am of opinion that a Revenue Court is a Civil Court within the meaning and intent of Ss. 468 and 469, Criminal Procedure Code. The mischiefs against which these sections are directed are the giving of false evidence and using as genuine a forged document. By "Civil Court" here I understand any Court established for the administration of civil justice as distinguishable from a Criminal Court. To hold otherwise would be to give to Revenue Courts and their suitors unlimited powers of prosecution in such cases, for which no intelligible reason has been attempted to be offered, or could possibly be given, the essence of such offences

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being the perjury or false swearing and falsehood common to all Courts which act upon written or spoken evidence, and it could not for a moment be contended that a Revenue Court is not such a Court. My attention was directed to S. 435 of the Criminal Procedure Code, which provides for contempts of Court in certain cases, and in regard to which the Court before which the contempt has been committed is described as "any Civil, Criminal, or Revenue Court." But these words, so far from demonstrating that the term Civil Court in Ss. 468 and 469, Criminal Procedure Code, was intended to be used in its restricted sense as distinguishable from a Revenue Court, to my mind, when attentively considered, lead to the very opposite conclusion. This will clearly appear if we read these two sections along with S. 435, especially in regard to one of the offences mentioned in S. 435, namely, the offence defined in S. 228 of the Indian Penal Code. This offence is also included within the category of offences to be found in S. 468. It will thus be at once seen that, if we exclude the Revenue Court from S. 468, we bring that section into direct collision with S. 435. S. 435 mentions the offences, including that under S. 228, Indian Penal Code, which it contemplates "as committed in the view or presence of any Civil, Criminal, or Revenue Court," and it goes on to provide that "the Court may cause the offender, whether he be a European British subject or not, to be detained in custody, and, at any time before the rising of the Court on the same day, may take cognizance of the offence, and adjudge the offender to punishment, by fine not exceeding Rs. 200, and, in default of payment, by imprisonment in the civil jail for a period not exceeding one month, unless such fine be [536] sooner paid. In every such case, the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence. If the offence is under S. 228 of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which such public servant was sitting, and the nature of the interruption or insult offered." Here we have provision made for all the three kinds of Courts, the Civil and Revenue as well as the Criminal, taking notice of, and punishing for, without complaint or commitment, the offence mentioned in S. 228, Indian Penal Code, while if the very same offence is prosecuted for under S. 468, there must be a "complaint," but the offence "shall not be entertained except with the sanction of the Court before which it was committed." This, however, is not inconsistent with S. 435, which provides for the case of the Court taking summary cognizance of, and punishing for, the offence committed before itself, for which purpose, it is obvious, no separate or express sanction is necessary, the Court showing its mind in that respect by the summary proceeding provided for. Now, quite consistently with this view, S. 468 contemplates the same offence being entertained, not in the summary form provided for by S. 435, but by complaint and commitment, in which the recorded sanction of the Court before which the offence was committed is necessary, because from the nature of the case that consent cannot otherwise be made to appear, and the same argument of course applies to all the other offences mentioned in S. 468, Criminal Procedure Code. This reasoning appears to my mind to be conclusive for holding that the term "Civil Court" in that section is meant to include those Civil Courts at least mentioned in S. 435 as distinguishable from Criminal Courts, and that therefore we are not driven to what I must call the incongruity—I might go the length of saying the mischievous incongruity—of holding that an offence that can be summarily entertained and punished by a Revenue Court, cannot be entertained or punished by the more deliberate procedure of complaint and

commitment under S. 468. It is our duty to make the law as consistent and rational as we possibly can and not to leave its apparent contradictions and inconsistencies unsolved without every effort of explanation and reconcilement being used, and for that purpose to apply such principles of reasonable exposition as will fairly remove these contradictions and **[537]** inconsistencies, by showing that they are only apparent and not real. And in doing this we simply, in my opinion, fulfil the duty incumbent on us to give such a degree of just expansion to the letter of the law as will effectually satisfy its spirit and intendment, and we would not do that, in the case before us, if we excluded Revenue Courts from the provisions of S. 468, Criminal Procedure Code.

My answer to the second question is that the Collector's endorsement on the petition for sanction was not "sanction" within the meaning of S. 470, Criminal Procedure Code. On the contrary, it appears to me to be rather in the nature of a refusal to give sanction; for the Collector ends his endorsement with these words: "There is no need for sanction," and he must be taken therefore not to have given it.

As to the third question I entertain considerable doubts, although if we have the power, I do not think we should under the circumstances be justified in giving sanction at this stage of the case. If the Revenue Courts were as a jurisdiction generally subordinate to this High Court we, of course, could give sanction, but whether under the words "at any time" in S. 470 we could now give such sanction so as to validate the trial, conviction, and sentence before the Judge, is a question attended with considerable difficulty. I rather incline to the opinion that the words "at any time" were intended to mean at any time during the trial, seeing that it is for the purpose of such trial that the sanction is required, and without it the trial could not proceed, and that after conviction and sentence there is nothing to follow for which the sanction may be asked. The question, however, whether the Revenue Courts are, as a jurisdiction, legally and technically subordinate to this High Court is also a very difficult one. They may be subordinate in a certain sense, *i.e.*, in those cases where there is an appeal to this Court within Ss. 189, 190 and 191 of the Rent Act XVIII of 1873, but in regard to all other cases there is no appeal and no subordination. This is shown by the plaint in the revenue suit which is included in the record before us, and from which it appears that the suit was to recover rent, Rs. 36, principal, and Rs. 5-1-0, interest, in all Rs. 41-1-0. It is, therefore, quite clear that so far as this case is concerned there is neither subordination on the part of the Collector nor control on our part. That, however, I quite **[538]** admit, is a different question from the general proposition I have indicated, *viz.*, whether in the light of jurisdiction generally the Revenue Court is amenable to the High Court? I rather incline to the opinion that as a jurisdiction the Revenue Court is not subordinate to the High Court. The policy of the Act (upon which I express no opinion) was clearly to exclude all interference whatever by the Civil Courts, and especially by this High Court, for it was in consequence of judgments by this Court which were deemed inconvenient by the Revenue authorities that the Rent Act XVIII of 1873 was passed. Therefore as a general question I should hold that the Revenue Courts were not subordinate to this Court, and that conclusion lends considerable force to the case before us, seeing that it was not one which could by any means be brought under our appellate or revisional jurisdiction. Another difficulty has been stated, *viz.*, whether under S. 15 of the High Courts' Act this Court has any control or superintendence over the Revenue Courts. That again

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depends upon whether the Revenue Courts are subject to our appellate jurisdiction within the meaning of the Act. But that again depends on what is there meant by "appellate jurisdiction." Does it mean appellate jurisdiction generally, or can it be held to be understood as appellate jurisdiction within the limited meaning and application of the Rent Act? The latter, as it appears to me, cannot be taken as the true construction. The kind of subordination and control given us in certain cases by the Rent Act is something different from, because less than, the "superintendence" mentioned in S. 15 of the High Courts' Act. By these remarks I have indicated the doubts and difficulties which appear to me to stand in the way of a distinct answer to Mr. Justice Straight's third question, although, under any circumstances, I should be opposed to giving sanction in the present case.

PEARSON, J.—I entertain no doubt that a Revenue Court is a Civil Court within the meaning of the term "Civil Court" as used in Ss. 468 and 469 of the Criminal Procedure Code. In those sections Civil Courts are broadly distinguished from Criminal Courts. There is no reason to suppose that by the terms "any Civil Court" only the ordinary Civil Court is meant. The object in view is to prevent wanton, groundless or malicious prosecutions of the offences therein mentioned, by requiring the sanction of the **[539]** Courts in or before or against which those offences may be committed to the prosecution of them. It is impossible to suppose that the restriction thereby imposed on such prosecutions is applicable only to such offences committed in or before or against the ordinary Civil Courts, and not equally to similar offences committed in or before or against the Revenue Courts which, not less than the ordinary Civil Courts, try and determine suits of a civil nature.

I am of opinion that the Collector's order on the petition praying for sanction of prosecution in the case before us cannot be held to have given the sanction prayed for. On the contrary, under a mistaken view of the law, and under an impression that sanction was unnecessary, that officer distinctly declined to give his sanction, and left the petitioner to proceed in the matter of his own motion.

I am further of opinion that sanction cannot now be retrospectively given to the present proceedings, although fresh proceedings may be sanctioned by competent authority. Sanction is an essential preliminary to the institution of proceedings and the entertainment of a complaint.

The foregoing remarks embody my views on the three points referred to the Full Bench.

SPANKIE, J.—I confess that I entertain doubts in answer to the first question whether a Revenue Court is a Civil Court in the sense of Ss. 468 and 469 of the Criminal Procedure Code. A Revenue Court has been defined in Cl. (9), S. 3 of Act XIX of 1873. In S. 93 (*a*) of Act XVIII of 1873 the Courts of Revenue are distinguished from other Courts, and certain suits are made cognizable by Courts of Revenue and no other Courts, and as Courts they have their own procedure, *vide* S. 104 of the Act.

In S. 204 (*a*) if the presiding officer of a Revenue Court considers that any question or issue involving a point of law is more proper for the decision of a *Civil* Court, such officer is to act in the manner prescribed by the section. Here Civil Courts are distinguished from Revenue Courts. Again in S. 205 (*a*) on a question of a power to take cognizance in any suit instituted or on any appeal presented in a Civil or Revenue Court, the Judge or presiding officer may refer **[540]** the matter to the High Court. Here again the two Courts are clearly distinguished. S. 435 of the Code of Criminal Procedure in Chapter XXXII provides for certain

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cases of contempt committed in the view or presence of any Civil, Criminal, or Revenue Court. Here are three Courts clearly distinguished. But under S. 467, in all offences under Chapter X of the Penal Code, not including those falling within Ss. 435 and 436 of the Criminal Procedure Code, no *complaint whatever* (except where the proviso attached to the section applies) can be entertained without the sanction or except on the complaint of the public officer concerned, or of his official superior. When we come to the words of S. 468 of the Criminal Procedure Code, the reference is to the offences under the sections cited before or against a *Civil* or *Criminal* Court, and in such cases sanction is required, and it is the same with S. 469. If Revenue Courts are included in the word "*Civil*," why are the three Courts distinguished separately in S. 435? It may be asked why should sanction be necessary in Civil Courts and not in Revenue Courts? This I cannot explain: nor am I bound to explain the reason. But after the recognition by the Code of the Revenue Courts, something more appears to me to be intended than the use of the word "Civil" as opposed to Criminal. I admit that in S. 19 of the Penal Code "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, &c. But a Judge is also a "public servant" (S. 21), and the definition is intended to apply to the sections in the Penal Code which relate to Judges and public servants, and "Civil" is doubtless broadly opposed to "Criminal." The reference in S. 2 of the Rent Act to this section of the Penal Code and the illustration (*a*) makes the Collector a Judge for the purposes of the Penal Code and no further. I simply say that S. 435 recognizes the three Courts, and Ss. 468 and 469 recognize two only. It may, however, be observed that S. 643 of the Civil Procedure Code, which replaces Ss. 16, 17, and 19 of Act XXIII of 1861, provides the procedure in cases pending before any Court (to which of course the Code applies), when there appears to be sufficient ground for sending for investigation to any Magistrate charges of certain offences under the Penal Code. As the Courts have the power to act thus conferred upon them by **[541]** S. 643 of Act X of 1877, it may be that it was thought desirable that sanction should be given in those cases of complaint in which the Court itself had not taken action, and this with a view to check baseless complaints. But I cannot find any such power given by the procedure in Revenue Courts to the presiding officers of those Courts. In the draft of the new Code of Criminal Procedure as amended, I find that S. 196 amends Ss. 467 and 468, by clauses (*b*) and (*c*), so as to prevent any possible doubt arising on the point referred to us, because it refers to offences committed before or "against any Court," and therefore all recognized Courts are included, and sanction of the Court or of some other Court to which it is subordinate is required. In S. 476 of the amended draft Bill the words "any Court" again are used, and any Court is empowered to send an accused to the Magistrate. If this were the wording of the present Code, and S. 467 included all the sections in S. 196 of the proposed amended Act, then we would have easily disposed of the present reference, as any Court could have sent the accused to the Magistrate for inquiry on a charge of giving false evidence. But under S. 478 the words "any Civil Court" are used, and a larger power is given to such Court in cases in which the offence is triable by the High Court or Sessions Court exclusively. Here it may be that, although all Courts may send an accused person to the Magistrate for inquiry into offences, only the regular Civil Courts may in certain cases actually themselves commit the offenders. I may also add that in S. 480,

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which is to replace S. 435 of the present Code, in respect of certain cases of contempt, the words "Revenue Court" are not used. It is sufficient that the offence is committed in the view or presence of "any Court." I think, therefore, I have shown that there is some room for doubt whether, under the wording of Ss. 468 and 469 of the Criminal Procedure Code now in force, any sanction is required before a prosecution for giving false evidence in a Revenue Court is entertained. I say room for doubt, for it does seem anomalous that no provision has been made for such a case as that referred to us in the Revenue, when full provision for similar offences has been made in regard to the Civil Courts. I should have been glad if it had been otherwise and to have concurred with my honourable colleagues on this question as on the others referred to us.

[542] In reply to the second question I do not find that the Collector's endorsement on the petition for sanction amounts to, or can be considered, a sanction within the meaning of S. 470 of the Criminal Procedure Code.

In answer to the third question, I consider that, if sanction is necessary, it is too late for this Court at this stage of the case to grant it. The blot occurs at the outset. There was no jurisdiction to entertain the complaint in the first instance, if sanction was necessary. The error too was not one that occurred after the complaint was entertained, and therefore might be condoned under the terms and subject to the proviso of S. 283 of the Code of Criminal Procedure.

I may add that I cannot find that the Board of Revenue has ever made any rules under S. 211 of Act XVIII of 1873 and S. 256 of Act XIX of 1873 for the practice and procedure of Revenue Courts on complaints of the nature before me.

STRAIGHT, J.—In reply to the first question submitted by me to the Full Bench for its opinion, I have to say that, in my judgment, the Revenue Court is a Civil Court in the sense of Ss. 468 and 469, Criminal Procedure Code. I think that the alternative expressions "Civil or Criminal Court" are intended to include all tribunals concerned in the administration of Civil or Criminal Justice, before which "judicial proceedings" are held, as defined in the interpretation clause of the Criminal Procedure Code. I have in vain sought to discover any intelligible reason why a distinction should have been drawn by the Legislative authorities between Revenue Courts on the one hand and Civil and Criminal Courts on the other. Sanction appears to be just as desirable and necessary in either case. Moreover by S. 2 of the Rent Act (XVIII of 1873) it is specifically provided that illustration (*a*) of S. 19 of the Penal Code shall be read as if it applied to that Act, the effect of which is to declare that a Collector exercising powers under Act XVIII of 1873 (as in this case) is a Judge. Therefore you have a "Judge" and a "judicial proceeding," which it must be admitted is of a Civil character. It is true that the Rent Act draws a distinction between Revenue and Civil Courts, but that is merely for convenience of expression and to avoid confusion, and in no way interferes with the **[543]** Revenue Court falling within the generic term Civil Court, as used in Ss. 468, 469 of the Criminal Procedure Code. Consequently I think the Collector's sanction to the institution of the prosecution ought to have been given, and that without it the whole of the proceedings before the Magistrate and the Court of Session are void.

In answer to the second question, I am very clearly of opinion that the order endorsed by the Collector on the complainant's petition can by no twisting of terms or distortion of language be construed into a sanction.

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As to the third question, I do not think that the words "*at any time*" in S. 470, Criminal Procedure Code, give the Court power, after conviction and upon appeal or revision, to grant a sanction, and so to validate proceedings otherwise invalid from their inception to their close. It appears to me that, for the purpose of determining what those words mean, Ss. 468, 469, and 470 must be read together, and so treating them, the construction seems to be that a complaint for any of the enumerated offences shall not be entertained, except when the sanction of the Court before or against which an offence has been committed is previously obtained. In other words, if I take the correct view, the required sanction is a condition precedent to the very first commencement of the prosecution. The term "complaint," as used in the Criminal Procedure Code, has a perfectly intelligible meaning and requires no definition on my part. Apart from this, it appears to me there is a provision of the Code that places any question upon the point I am now discussing almost, if not entirely, beyond dispute. I refer to S. 142, which enacts that nothing in that or the preceding section shall "authorize a Magistrate to *entertain a complaint* of an offence without sanction, where such offence by any law in force may not be entertained without sanction." I may also point out that in S. 466, Criminal Procedure Code, the sanction there provided must be given "before the commencement of the proceedings." Under all the circumstances already adverted to, and endeavouring to place a reasonable and practical construction on the words "at any time," I cannot bring myself to give them the enlarged interpretation contended for by the Junior Government Pleader. To do so would appear to me to open the door to **[544]** the very mischief the Act was intended to guard against, namely, the indiscriminate institution of prosecutions by private persons for offences against public justice committed in contempt of and against Civil or Criminal Courts, for their own ends and objects, without any check. If my view of the section is incorrect, then there is nothing to prevent a person, except the watchfulness of the Magistrate, from putting the criminal law in motion to harass or oppress another with whom he has been unsuccessful in litigation, and to defer obtaining or attempting to obtain the sanction of the Court before which his suit has been tried until the latest possible moment. To my mind prosecutions for the offences enumerated in Ss. 468 and 469 must have the stamp and countenance of the offended Court, otherwise they fall to the ground. My answer therefore to the third question submitted is in the negative. Upon receipt of the decison of the Full Bench, I will dispose of the appeal.

OLDFIELD, J.—I quite concur in the view of the law taken by Mr. Justice Straight.

The case having been returned to the Judge making the reference, the following order was made:

STRAIGHT, J.—The practical effect of the decision of the Full Bench, upon my reference of this case, is that the whole of the proceedings against the appellants from the commencement must be quashed; the investigation before the Magistrate and the trial in the Sessions Court being invalid by reason of the absence of the Collector's sanction to the institution of the prosecution. The charge is of so serious a character that the matter cannot be allowed to rest, and in the interest of public justice it is essential that the accused, who seem to have been most properly convicted on the facts, should not escape by reason of the technical difficulty that has arisen. There must, therefore, be a re-trial, and I accordingly order that the record be remitted to the Magistrate of the District through the Sessions Judge. Application must be made to the Collector for his

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sanction to the proceedings, and his attention must of course be called to the judgment of this Court as to the legal necessity for its being given. When the sanction has been obtained the prosecution must be continued in ordinary course to committal, and after that to trial before the Court of Session. Of course should the accused be again convicted, the Sessions Judge will, in inflicting [545] punishment, have regard to the length of time during which they have already undergone imprisonment.

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PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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JAGA NATH PANDAY (*Plaintiff*) *v.* PRAG SINGH (*Defendant*).

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1. *Grant of land rent-free and revenue-free—Reg. XIX of 1793, S. 10—Reg. XLI of 1795, S. 10—Act XVIII of 1873 (N.W.P. Rent Act), S. 30, Act XIX of 1873 (N.W.P. Land Revenue Act), S. 79.*

A grant of land rent-free and revenue-free is null and void and liable to resumption, with reference to the above quoted laws and regulations.

2. *Suit for possession of land granted rent-free and revenue-free—Jurisdiction of Civil Court.*

A suit for the possession of land, granted rent-free and revenue-free, or as it is called "krishnarpan" land, is cognizable by the Civil Courts.

ORDER OF REFERENCE TO THE FULL BENCH.

PEARSON, J., and OLDFIELD, J., referred to the Full Bench the questions whether the grant to the plaintiff in this case was null and void, and whether the suit by the plaintiff was maintainable and properly instituted in the Civil Court, the order of reference being as follows:

[547] OLDFIELD, J.—The suit has been brought by the plaintiff to recover possession of certain *krishnarpan*, or rent-free land, on the ground that a grant thereof, exempt from the payment of rent to the grantor, was made to him by the former owner, Rajah Ramadhin, and that the defendant who has purchased the estate in which the land is situated has dispossessed him. It seems sufficiently shown that there was a complete gift of this land to the plaintiff on the part of the Rajah, his name was entered in the revenue papers in respect of the holding, and the rents, though collected by the Rajah's agent, were collected on the plaintiff's behalf, and for his benefit and enjoyment, but a question arises whether the grant is one of those which are null and void by the express provisions of the law.

The law applicable to the province of Benares is Regulation XLI of 1795, S. 10, which, *mutatis mutandis*, re-enacts S. 10, Regulation XIX of 1793, and by it all grants for holding land exempt from the payment of revenue, whether exceeding or under fifty bighas, that have been made since the beginning of the Fasli year 1196, or that may be hereafter made, by any other authority than that of the Governor-General in Council are declared null and void, and no length of possession shall be hereafter [548] considered to give validity to any such grant, either with regard to the property in the soil or the rents of it; and every person who now possesses or may succeed to the proprietary right in any estate, or who now

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holds or may hereafter hold any estate in farm of Government, or of the proprietor, or any other person, and every officer of Government appointed to make the collections from any estate or taluq held khas, is authorized and required to collect the rents from such lands at the rates of the pargana, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or taluq in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of such dispossession or annexation to any officer of Government. The invalidity of these revenue-free grants was affirmed by S. 28, Act X of 1859, the only alteration in the law being that the proprietor was henceforth to dispossess and collect the rents and re-annex the land to the estate by application to the Collector and not on his own authority. Then S. 30, Act XVIII of 1873, and S. 79, Act XIX of 1873, were enacted as follows:—"And whereas all grants (whether in writing or otherwise) for holding land exempt from the payment of rent which have been made since the first day of December, 1790, by any authority other than that of the Governor-General in Council, were declared by Bengal Regulation XIX of 1793, S. 10, to be null and void, and like provisions have been by divers Regulations applied to the several parts of the territories to which this Act extends, and the said Regulation XIX of 1793 also provided that no length of possession should be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it, is hereby enacted as follows":—and then follow provisions for the resumption of such grants. It will be seen that the language of the above sections differs from that of the old Regulations to which they refer in this important particular, namely, that whereas the grants in the old Regulations are called grants of land held exempt from payment of revenue, the same grants are referred to in Acts XVIII and XIX of 1873 as grants of land exempt from the payment of rent.

The question which arises in the case before us is whether the grant, which appears to be one of the proprietary right in certain [549] land included in the area of a revenue-paying estate, without any reservation of rent to the grantor, but which is not claimed to be held exempt from payment of revenue to Government, is to be considered to be one of those grants to which the laws above cited apply. Before the enactment of Acts XVIII and XIX of 1873 it was a much vexed question whether the Regulations were not intended to apply only to grants of land exempt from payment of revenue, as something different from rent, and to grants where the land had been separated from the revenue-paying area, and therefore not to such a grant as we have before us; and the question will be found fully argued in the case reported in 9 Weekly Reporter, page 1. It was there held by the Calcutta High Court, though some of the Judges dissented, that "the grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent is valid, as against the heir of the grantor or a purchaser from him by private sale of the zemindari, and that under S. 10, Regulation XIX of 1793, such heir or purchaser is not entitled to resume the land." But on the other hand, there is a decision of the Sudder Dewany Adawlat, North-Western Provinces, June 8th, 1865 (1), which appears to hold that grants of land exempt from the payment of rent are such as were contemplated by the old Regulations, and are null and void, but the current of the previous decisions seems certainly opposed to this view, as also is a reported case of a later date of this Court, No. 1503, March 27th, 1868 (2).

(1) S.D.A., N.W.P., 1865, p. 333. (2) H.C.R., N.W.P., 1868, p. 186.

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It may be, however, that it was the intention of the Legislature by importing into S. 30, Act XVIII of 1873, and S. 79, Act XIX of 1873, the words "exempt from the payment of rent," in referring to the law of the old Regulations, to set the matter at rest, and to make grants of land exempt from the payment of rent, such as the one in question, null and void, or it may be that a suit of this nature is not now maintainable in a Civil Court, with reference to other provisions of Acts XVIII and XIX of 1873.

JUDGMENTS OF THE FULL BENCH.

[550] STUART, C. J.—I am quite clear that the Civil Court could entertain this suit, and on this point I agree with Mr. Justice Pearson that the contention to the contrary is so unreasonable as to be at once rejected. It could not for a moment be argued that the plaintiff's claim comes within the express words either of S. 95, Act XVIII of 1873, or of S. 79, Act XIX of 1873, nor could it be shown to do so within the meaning of these two sections, because under these Acts an application for resumption of a grant of this nature might have been preferred to the Revenue Court by the former owner, Rajah Ramadhin Singh.

As to the subject of the suit itself, I am very much of Mr. Justice Spankie's opinion that the Regulations and Acts mentioned in the referring order do not apply to it, or at least are not necessary to its disposal, for on the facts found by the Judge the plaintiff has in special appeal evidently no case whatever. But, assuming that the Regulations and Acts referred to apply, I am clearly of opinion that they must be read so as to render this grant null and void. I must, however, observe that, for the purposes of such a case as this, the difference between the language of the two old Regulations referred to and that to be found in Acts XVIII and XIX of 1873 is in my opinion more apparent than real. S. 10, Regulation XIX of 1793, which is re-enacted by S. 10, Regulation XLI of 1795, enacts and declares that all grants for holding land exempt from the payment of revenue, whether exceeding or under fifty bighas, that have been made since the beginning of the Fasli year 1196, or that may be hereafter made, by any other authority than that of the Governor-General in Council, are null and void," and it then goes on to make the following important and general declaration that "no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil *or the rents of it*": and further on the Regulation provides that, "Every officer of Government appointed to make collections from any estate or taluq held khas is authorized and required to collect *the rents* from such lands at the rates of the pargana, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or taluq in which it may be situate, without making a previous application to a Court of Judicature, or sending previous or **[551]** subsequent notice of such dispossession or annexation to any officer of Government." It appears to me that these enactments destroy every possible right and interest which the grantee might have claimed in the subject of the grant, including not only land exempt from the payment of revenue but land out of which rents might be collected, and that therefore Acts XVIII and XIX of 1873 merely re-enact what had previously been the law, by necessary construction, under the Regulations referred to. In my view of the case, therefore, the plaintiff's suit and also the appeal to the Division Bench should be dismissed.

PEARSON, J.—On the first of the two questions referred to the Full Bench, my opinion is that the grant claimed in this suit is null and void.

he grant was not merely a grant of the proprietary right in the land, which was the subject of it, but it was intended to convey the grantee the whole yield or rent of the land undiminished by the payment of the Government revenue thereon assessed, which the grantor took upon himself to pay. There was no intention to injure or defraud the Government, but the effect of the arrangement was to shift the payment of the revenue from the land itself on to the shoulders of the grantor. I concur with the District Judge in the view that the grant was illegal under the laws cited by him and is liable to resumption. The Legislature apparently holds every bit of land to be, as it were, hypothecated for the revenue due from it, and will not allow the burden to be shifted elsewhere.

On the second question raised by the referring order, I am not prepared to hold that the suit is not cognizable by the Civil Court. It must be admitted that the loose language of S. 95 of Act XVIII of 1873 affords some ground for the contention that, inasmuch as an application for the resumption of the grant might have been preferred to the Revenue Court by the grantor, therefore this suit by the grantee to be maintained in possession of the grant is excluded from the cognizance of the Civil Courts; but the contention is so unreasonable that one feels bound to reject as unreasonable any construction of the language of the section which would support it.

SPANKIE, J.—The learned Judges who refer this case for the opinion of the Full Bench remark that the question for consideration **[552]** is whether the grant, which appears to be one of proprietary right in certain land included in the area of a revenue-paying estate, without any reservation of rent to the grantor, but which is not claimed to be exempt from payment of revenue to Government, is to be regarded as one of those grants to which Regulations XIX of 1793 and XLI of 1795 and Acts XVIII and XIX of 1873 apply. We are also asked whether the plaintiff's suit is maintainable and properly instituted in the Civil Court.

The terms of the Regulations are that all grants for holding land exempt from payment of revenue, whether exceeding or under fifty bighas (1), that have been made since the beginning of the Fasli year 1196, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil or the rents of it. S. 30, Act XVIII of 1873, and S. 79, Act XIX of 1873, recite that, " Whereas all grants (whether in writing or otherwise) for holding land exempt from the payment of rent, which have been made since the first day of December, 1790, by any authority other than that of the Governor-General in Council, were declared by the Bengal Regulation XIX of 1793, S. 10, to be null and void, and like provisions have been by divers Regulations applied to the several parts of the territories to which this Act extends, and the said Regulation XIX of 1793 also provided that no length of possession should be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it, it is hereby enacted," &c., &c., &c. Undoubtedly there is a difference between the Regulations and Acts. In the former the grants are spoken of as " exempt from the payment of revenue," and in the latter as " exempt from the payment of rent."

The learned Judges remark that before the enactment of Acts XVIII

(1) Note by the Judge —In S. 10, Regulation XIX of 1793, whether exceeding or under one hundred bighas : but Regulation XLI of 1795 is more particularly concerned with this case.

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and XIX of 1873, it was a much vexed question whether the Regulations were not intended to apply only to grants of land exempt from the payment of revenue, as something different from rent, and to grants when the land has been separated from the revenue-[553]paying area, and therefore not to such a grant as the one set up in this case. They refer to the decision of the Calcutta High Court in *Muhammad Akil* v. *Asad-un-nisa Bibee* (1), and to a decision of the Sudder Dewany Adawlat, North-Western Provinces, *Rajah Dilsukh Rai* v. *Kurban Ali* (2), and to one of this Court in *Ahmad-ullah* v. *Mithoo Lall* (3). In the first cited case it was held that a grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent is valid as against the heir of the grantor or a purchaser from him by private sale of the zemindari, and that under S. 10, Regulation XIX of 1873, such heir or purchaser is not entitled to resume the land. The Calcutta High Court's ruling has all the weight of authority, and the decision of the Chief Justice, Sir Barnes Peacock, appears to me to be unanswerable.

It must, however, be admitted that S. 30 of Act XVIII of 1873 and the corresponding section of Act XIX of 1873 have adopted the view taken by the Sudder Dewany Adawlat of these Provinces in their decision cited above, and have declared that the former Regulations referred to rent and not revenue, and therefore, assuming that the Legislature is authorized to interpret S. 10, Regulation XIX of 1873, as it pleases, we probably are bound to give effect to the law as it is laid down in these later Acts. I do not, however, think that we need consider this part of the case at greater length, for I doubt whether the Regulations or the Acts apply to the particular case before us. The appeal was one from an appellate decree, and I observe that the Judge finds as a fact that Jagar Nath Panday was never put in possession of the land: that the rents of the land in dispute were collected along with the rents of the other lands of the village by the Rajah's agent, by whom a part of the money thus collected was occasionally paid to Jagar Nath Panday. It would also seem that the revenue of the land was paid by the Rajah to Government (this indeed is shown by the proceedings before the Deputy Collector), and the rent of the land in dispute was collected as usual by his agent, and therefore all that the plaintiff acquired by the transaction was a portion of the share of the produce of the land which [554] would otherwise have been retained by the Rajah himself. It was as if a portion of the zemindar's own income was reserved as a charitable allowance for Jagar Nath Panday. It was not even assigned by any written instrument. If this was the position, I do not consider that there was any grant within the terms of Regulation XIX of 1793 as extended to Benares by Regulation XLI of 1795, and I, therefore, do not think that those Regulations or the Acts of 1873 would apply to the case. This suit appears to have been one with which a Civil Court had jurisdiction to deal.

OLDFIELD, J.—S. 30, Act XVIII of 1873, and S. 79, Act XIX of 1873, declare grants of land exempt from the payment of rent to be null and void and resumable, with the exception of the rent-free grants especially reserved from the application of S. 79 by the provisions of Ss. 80, 81, 82, Act XIX of 1873. The plaintiff, therefore, cannot succeed in his suit.

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(1) 9 W.R., 1.
(2) S.D.A., N.W.P., 1865, p. 333.
(3) H. C. R., N.W. P., 1868, p. 186.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

SAFDAR ALI KHAN (*Plaintiff*) *v.* LACHMAN DAS AND OTHERS (*Defendants*). [11th December 1879.]

2 A. 554 = 5 Ind. Jur. 92.

1. *Release—Stamp—Registration.*

A letter, by which a person releases his right to the security of certain immoveable property hypothecated to him, cannot operate as a release and be received in evidence, unless duly stamped and registered.

[R., 17 B. 235 (237), 33 C. 613 (622) = 10 C.W.N. 551 = 3 C.L.J. 576.]

2. *Reception in evidence of unstamped and unregistered document—Objection in first appeal—C.P.C., 1859, S. 350—C.P.C., 1877, S. 578.*

An appellate Court may admit and consider an objection to the reception, in evidence, of an unstamped and unregistered document. (3 B.L.R. 126, *discussed*).

[R., 2 N.L.R. 121 (122).]

3. *Agreement induced by fraud, voidable.*

A person, who is induced by fraud to relinquish a lien on immoveable property, in favour of an innocent subsequent purchaser in good faith, is entitled, when the true facts become known, to enforce the lien against such purchaser.

[Not Appl., 11 C.L.J. 551 (554) = 6 Ind. Cas. 159 = 37 C. 589 (595).]

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JUDGMENT.

[555] STRAIGHT, J.—This was a suit brought by the plaintiff, appellant, to recover the sum of Rs. 20,375, principal and interest, on a bond, dated the 18th of June, 1875, executed by the defendant Afzal Ali. The plaintiff also sued the defendant Lachman Das for the amount under another bond of the same date, whereby he had given security for the loan and interest, and hypothecated certain properties scheduled in the deed, including 20 biswas of mauza Chand Khera, pargana Amroha, the bounds and limits whereof were duly and properly detailed. The plaintiff further prayed for enforcement of lien against the property hypothecated.

The defence put forward by Afzal Ali substantially amounted to this, that he was a mere dummy in the transaction, that Lachman Das was the real borrower, and that the bond on which it was sought to make him liable was fictitiously executed in his name for some motives of expediency. Lachman Das admitted his liability under the security-bond, and that he did in the first instance hypothecate the several properties therein specified, but he went on to allege that, with the consent of the plaintiff to an agreement of the 16th December, 1876, the mauza of Chand Khera was withdrawn from the list, and 2½ biswas of mauza Kelsa and a shop, together **[556]** with a note of hand for the amount of the loan of one Sahu Sham Saran Das, treasurer of Rampur, were substituted.

The Subordinate Judge held that Afzal Ali and Lachman Das were both responsible for the payment of Rs. 20,375, and that the mauza of Chand Khera had been exempted from the operation of the security-bond of the 18th June, 1875, with the sanction and consent of the plaintiff. For reasons that will presently appear, when we come to the facts, Sheikh Ali-ud-din had come into the suit as a defendant by making certain objections to the plaintiff's claim, and had formally been made a party to it

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under an order of the Court of the 6th September, 1878, pursuant to S. 32, Act X of 1877. His interference related solely to mauza Chand Khera, and as appears from what has already been stated, he was successful in securing the exemption of that property from the decree. The Subordinate Judge ultimately passed an order in plaintiff's favour for the amount of his claim by enforcement of lien on the property hypothecated in the security-bond of June, 1875, excluding mauza Chand Khera and substituting in lieu thereof the $2\frac{1}{2}$ biswas of Kelsa already mentioned. From this decision the plaintiff appealed and the following shortly state his grounds of appeal : (i) That mauza Chand Khera has been exempted on illegal and insufficient evidence : (ii) That a letter of the plaintiff of the 3rd May, 1877, being without a stamp and unregistered, ought not to have been received in evidence, as it was put in to prove the relinquishment of an interest in immoveable property above the value of Rs. 100 : (iii) That even if there had been any relinquishment by the plaintiff it was only conditional and was so regarded by the defendant Sheikh Ali-ud-din : (iv) That plaintiff was no party to the document of the 16th December, 1876, put forward by Lachman Das and never gave his consent to it.

The facts of the case appear to be as follows : The plaintiff is a native gentleman of some position resident at Rampur. The two defendants Afzal Ali and Lachman Das both come from Moradabad or thereabouts, while the third, Ali-ud-din, is a pleader living and practising there and in the district. It seems altogether indifferent to the question we have to decide whether the Rs. 20,000 were advanced to and for the use of Afzal Ali or Lachman Das. Certain **[557]** it is that they are both liable for its re-payment, and we accept without hesitation the finding of the Subordinate Judge as to their joint and several responsibility to the plaintiff.

The substantial point for our consideration, as in the determination of it all the other pleas in appeal must be disposed of, is, was the Subordinate Judge right in law and fact in excluding mauza Chand Khera from enforcement of lien and in substituting for it the $2\frac{1}{2}$ biswas of mauza Kelsa and the shop ?

The loan had been made and the two bonds executed on the 18th June, 1875. At some time after that and before the end of 1876 Lachman Das, under circumstances most strongly indicative of fraud, sold to the defendant Ali-ud-din out and out, for a sum of Rs. 9,500, the mauza of Chand Khera, concealing the hypothecation already made to the plaintiff, and acting as if the property were free and unincumbered and capable of disposal. It is impossible to avoid making the remark in passing, that it seems very strange that the defendant Ali-ud-din, a pleader, who could readily have searched the district register of charges on immoveable property, never took the precaution to do so, though by this simple and to him necessarily well-understood proceeding, he might have ascertained, what only came accidentally to his knowledge, namely, that the very mauza he had bought was already incumbered to the plaintiff at the time of his purchase. Naturally Ali-ud-din, when he became aware of the cheat that had been practised on him, was very indignant and threatened Lachman Das with prosecution, who, in his alarm to escape from the consequences of one fraud, seems to have thought the best way out of his difficulty was to commit another. For this purpose he opened communications with the plaintiff, the object of which was to induce him to accept $2\frac{1}{2}$ biswas of mauza Kelsa, a shop, and a note of hand of the treasurer of Rampur, in lieu of mauza Chand Khera. A proposal to this

effect embodied in writing appears to have been prepared and forwarded by Lachman Das on or about the 16th December, 1876, but no formal signature of the plaintiff to it was ever obtained, and it was not till the 3rd May, 1877, that a letter was written by the plaintiff to the defendant Ali-ud-din, by the terms of which it is contended the document of December, 1876 was accepted and Chand Khera was exempted from the bond of the 18th June, 1875. According to Ali-ud-din, this [558] set at rest all his fears, he was content to let his bargain with Lachman Das stand, and abandoned his threatened prosecution. If his mind was so completely set at rest by the plaintiff, it seems strange, to say the least of it, that on the 1st July, 1877, he requested Lachman Das to execute a deed of agreement, which, after recapitulating all the circumstances relating to the sale, proceeded to hypothecate certain properties as security for the carrying out the contract. The remaining facts to be enumerated are but few. It turned out that the 2½ biswas of mauza Kelsa, which Lachman Das had put forward as his own, did not belong to him but to his minor nephew, and it is curious to observe, in his judgment, that the Subordinate Judge seems to have studiously kept this—the most important fact—in the background. The real struggle now is necessarily between the plaintiff and Ali-ud-din, indeed, as parties to the suit, the other defendants may be dismissed from our consideration.

The suit brought by the plaintiff is on his bond of June, 1875, and he claims to enforce the hypothecation against Chand Khera as if the documents of December, 1876, and 3rd May, 1877, had never been written. The defendant Ali-ud-din, who is in possession of Chand Khera under his purchase, put forward those two documents as evidence of his title and showing that the plaintiff released Chand Khera from the bond of 18th June, 1875. One of the pleas in appeal sets up a technical objection to the admission of the letter of the plaintiff of the 3rd May, 1877, and it was argued before us that, having regard to the terms of the deed of December, 1876, to which this referred and expressed its acceptance of, this document must be considered a release, or, in other words, an instrument "purporting to extinguish a contingent interest to and in immoveable property" and as such, not only liable to stamp but to registration under S. 17, Act III of 1877. We are of opinion this contention is correct and that the letter does amount to a release. It was in that very sense and for the purpose of fixing responsibility on the plaintiff as to the exemption of Chand Khera from the bond, that the defendant Ali-ud-din tenders it, and indeed without it, it is not very easy to see what sort of defence he could have made. The document therefore ought to have been stamped and registered and should not have been admitted in evidence in [559] the lower Court, though it does not seem that there any objection was taken. But it does not appear necessary to the decision of the case for us to pass any formal or deliberate expression of opinion upon these two questions, so far as they are made matter for objection to the admissibility of the release of the 3rd May, 1877, in this Court. As to its acceptance in proof without stamp, there is a judgment of Sir Barnes Peacock in *Mark Ridded Currie* v. *S. V. Mutu Ramen Chetty* (1), wherein acting upon the terms of S. 350, Act VIII of 1859, with which S. 578, Act X of 1877, closely corresponds, he held "that the error, if any, of receiving the document without a stamp, did not affect the merits of the case or the jurisdiction of the Court, although it might have affected the Government revenue." It should, however, be noticed that this decision only disposes

(1) 3 B.L.R. 126.

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of the objection within the terms of S. 350, so far as it was a fit ground for appeal from the finding of the lower Court. The difficulty that presents itself to our minds is as to how far this Court, sitting in appeal from an original decree and therefore having to deal with evidence as well as law, can fail to notice an objection to its receiving as proof and taking cognizance of a document which is both unstamped and unregistered? It may be, that so far as it relates to the finding and order of the lower Court it has no force, but "non constat" that when brought under our notice we are not to entertain it. So to the question of registration the same observations apply, only with greater force, for registration can hardly be called a matter "affecting the Government revenue," when it is obviously intended to prevent fraud by parties to instruments of a certain description. Upon this point a decision of West and Pinhey, JJ., in *Basawa* v. *Kalkapa* (1) was quoted, which seems to bear directly upon the whole subject of registration and to treat it from a practical and intelligible point of view. We must not, however, be taken as expressing any definitive opinion upon these two questions, though it is irresistible to remark that at first sight the argument seems a strange one, as has been before remarked, that a Court of Appeal, where it is dealing with fact as well as law, is to accept and treat as evidence that which two Acts have in prohibitory language declared shall not be received. Upon one point, however, we feel no doubt, namely, that an objection may properly be taken in this Court to an unstamped document and that **[560]** we are bound to entertain it. In that case we may direct that the document be stamped and the penalty imposed, but for the unregistered instrument there is no "*locus penitentiæ*," if the time has run out within which it should have been presented for registration, and we are powerless to give any assistance. We have already said that, for the purpose of our disposing of this appeal, it does not appear to us necessary to express any final opinion upon these two questions, indeed from our point of view and the conclusion at which we have arrived we think it sufficient to deal with the case upon the first ground of appeal. Our judgment would have been the same whether the letter of the 3rd May, 1877, be shut out or admitted. But with the object, as far as lies in our power, of finally disposing of the litigation, we have accepted that document as part of the evidence in the case, and have accorded to it all the importance and weight requested by the respondent Ali-ud-din. Even had the agreement, as it is called, of the 16th December, 1876, been signed by the plaintiff, it would have made no difference, to our minds, in the result of this appeal, and this for the very simple reason, that the fraud of Lachman Das, by whose misrepresentations and false pretences as to the $2\frac{1}{2}$ biswas of mauza Kelsa, the plaintiff was induced to substitute them for the twenty biswas of mauza Chand Khera, vitiates the whole transaction, documents and all, and restores to operation in its precise terms the bond of the 18th June, 1875, with its appended security. That there was positive, direct, and deliberate fraud, and that it acted immediately and directly on the mind of the plaintiff is a matter beyond all controversy, and how would it be possible for us as a Court of Equity, as well as of Law, to allow such a contract, whether verbal or written, under such circumstances to stand? It is abundantly clear that the plaintiff would never have altered his security had he been aware that he was surrendering twenty biswas for $2\frac{1}{2}$ biswas, as to which his hypothecator had no title, and his whole action in the matter, as deposed to by the witnesses,

(1) 2 B. 489.

goes to show that he implicitly believed in the honesty and *bona fides* of Lachman Das. We fail altogether to remark any laches or negligence of any sort on the part of the plaintiff to disentitle him to the relief he asks, on the contrary he appears to have acted in a perfectly straightforward way and to have fallen a victim to the falsehoods of a clever cheat, who was driven to his wit's end to escape from prosecution, and, as it would **[561]** seem, from well merited conviction. That Ali-ud-din had still some suspicions about Lachman Das, after his receipt of the letter of the plaintiff's of the 3rd May, 1877, is plainly evidenced by the agreement of the 1st July of the same year, but this has in no way affected us in our view of the facts or the decision of the case, though it is a strong indication that the defendant Ali-ud-din had considerable doubt as to the safety of his purchase. That Ali-ud-din has his remedies, either in the Civil or Criminal Courts, or both, is a matter beyond dispute, but however *bonâ fide* his purchase, he cannot set it up to defeat the lien of the plaintiff on mauza Chand Khera under his bond of 18th June, 1875, in satisfaction of the amount and to the extent, for which, it will, with the other properties hypothecated, share as security. The fraud of Lachman Das towards the plaintiff goes back to the inception of the transaction and renders all subsequent proceedings in reference to the property in suit void and of no effect.

The appeal will therefore be allowed and the decision of the lower Court reversed, so far as relates to its order exempting mauza Chand Khera from the operation of the bond of 18th June, 1875. For purposes of convenience and to avoid mistakes we think it best to say in terms, that a decree is passed in plaintiff's favour for Rs. 20,000, and interest to this date, at the rate specified in the bond, against Mir Afzal Ali, Lachman Das, and Ali-ud-din, by enforcement of lien against 20 biswas of mauza Chand Khera, 2½ biswas of mauza Kelsa, and 20 biswas of mauza Ismailpur, as specified and defined in the schedule to the bond of 18th June, 1875, and thereby hypothecated. The whole of the costs in this and the lower Court are to be paid by Lachman Das.

1879 DEC. 11. — APPELLATE CIVIL. — 2 A. 554 = 5 Ind. Jur. 92.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

AUDH KUMARI AND OTHERS (*Defendants*) *v.* CHANDRA DAI (*Plaintiff*) AND PRAN DAI AND SITA DAI (*Defendants*).

[15th December 1879.]

1879 DEC. 15. — APPELLATE CIVIL. — 2 A. 561.

Hindu law—Right of succession of daughters to father's estate.

Comparative poverty is the only criterion for settling the claims of daughters, *inter se*, on their father's estate. (2 Bom. H.C.R. 5 and 6 Bom. H.C.R. 183, *F.*).

[Appr., 23 B. 229.]

Bishan Prasad died without male issue, leaving four daughters at his death, *viz.*, Chandra Dai, Son Dai, Pran Dai and Sita Dai. In the suit filed separately by each of the first two daughters against certain persons for the possession of a moiety (each) of Bishan Prasad's separate immoveable property, claiming by right of inheritance, the defendants contended, amongst other things, that Bishan Prasad had two other daughters, Pran Dai and Sita Dai, and that such daughters, being in indigent circumstances,

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APPELLATE CIVIL.

2 A. 561.

were entitled to his estate to the exclusion of Chandra Dai and Son Dai, who were persons of wealth, and that Bishan Prasad having four daughters, Chandra Dai and Son Dai had no right to moieties of his property. During the pendency of these suits Pran Dai, admittedly a daughter of Bishan Prasad, and Sita Dai preferred petitions to the Court of first instance, in which they respectively claimed to be entitled to the whole estate of Bishan Prasad. The first Court without making them parties to the suits, but, hearing the suits together, gave Chandra Dai and Son Dai decrees against the defendants in these terms: "That decrees be given in favour of the plaintiffs, but so as not to interfere with the rights of the other daughters." On the High Court remanding the suits to the Court of first instance, directing it to make Pran Dai and Sita Dai defendants, and to determine whether Sita Dai was a daughter of Bishan Prasad, and whether either Chandra Dai or Son Dai had any right of inheritance as against Pran Dai or Sita Dai, and, if any, what was the extent of such right, Pran Dai and Sita Dai were made defendants in these suits. Pran Dai set up the same defence to both suits, *viz.*, that she was entitled to succeed to the whole of her father's estate, the material portion of her written statement being: "The defendant is utterly indigent and she is a widow: she is so necessitous that she is unable to procure the necessaries of daily life—food and clothing: Chandra Dai and Son Dai are very wealthy, while Sita Dai, who is poor as compared with Chandra Dai and Son Dai, is in better circumstances than the defendant, and her husband is alive: under these circumstances the defendant is, under Hindu law, the sole heir to her father's estate; in her presence Chandra Dai and Sita Dai cannot be regarded as heirs and entitled to their father's property." Sita Dai set up a similar defence to the suits the material portion in her written statement being as follows: "The defendant is utterly indigent and destitute: as against her Chandra Dai, or Son Dai, or Pran Dai, her sisters, who are wealthy, have no right; Bishan Prasad gave Chandra Dai and Son Dai an estate of considerable value, besides jewels and money: he also gave Pran Dai an annuity of Rs. 25: the defendant alone is destitute, and her husband's family is very poor: under these circumstances the defendant alone is entitled to succeed to her father's estate." The first Court finding that Sita Dai was a daughter of Bishan Prasad observed with reference to the question whether Chandra Dai or Son Dai were entitled to a share in the estate as against Pran Dai and Sita Dai: "In the opinion of this Court the four daughters have equal rights: the word indigent (*nirdhan*), as understood in the Hindu Law, is not applicable to any of the four daughters: Sita Dai and Pran Dai have already been held by this Court not to be paupers: as none of the four daughters is *nirdhan*, it is not necessary for the Court to see that the husband of one is possessed of less property than that of the others: if in determining the question of indigence and wealth regard were had to the amount of money and property possessed comparatively by different parties, and the person who possessed more was regarded wealthy, and one who possessed less indigent, every person would be indigent with reference to the person who was in better circumstances than he, and wealthy with reference to the person who was in worse circumstances: thus there would be hardly any person to whom the words wealthy and indigent would not be equally applicable; therefore the contention that the plaintiffs are wealthy is useless: in the same manner, the allegations of Sita Dai and Pran Dai as to their comparative indigence are undeserving of consideration: the fact is, that none of the four daughters lack the

necessaries of life, that is, no one of them is so poor as to be unable to procure food: no one of the four lives by begging, the word *nirdhan* means an indigent person who may have been reduced to starvation."

JUDGMENT.

[564] PEARSON, J.—We consider it to be well established by the evidence on the record that Sita Dai is the daughter of Bishan Prasad and sister of the plaintiff in the connected suit. The lower Court's finding on the point appears to be quite right, and the objection taken to it by the plaintiff, respondent, is disallowed. It is also well established, in our opinion, that the plaintiff in this suit as well as her sister, the plaintiff in the other suit, are in much better circumstances than their sisters Pran Dai and Sita Dai. The two plaintiffs married two brothers, sons of Bindesri Prasad, Pandey, who was a man of considerable wealth, to shares in which their husbands have succeeded. At the time of their marriage Bishan Prasad made over a valuable estate, known as Sitapur, comprising 811 acres, to Bindesri Prasad aforesaid, for their maintenance. It appears, however, that the estate really remained in Bishan Prasad's own possession until his death in 1877, and that the profits of it were given to them. Their husbands possess considerable property and keep horses and elephants. On the other hand it is shown by the evidence that Pran Dai is a widow, whose husband pre-deceased his father, and who now lives with her mother, and has very scanty means of subsistence. Her husband's father was apparently a poor man. Sita Dai's husband is alive, and has some extremely minute shares in several villages, which yield a profit of about Rs. 21 per annum altogether, and it is in evidence that his shares in nine out of the twelve villages are encumbered with a mortgage. There can be no doubt, we think, that Pran Dai and Sita Dai are, as compared with their sisters, the plaintiffs in these suits, poor and needy. The lower Court has ruled that, inasmuch as they are not beggars, they are not so indigent as to be entitled, under Hindu law, to succeed to **[565]** the property in suit, the estate left by their father, in preference to and by exclusion of their more affluent sisters. In that ruling we are not prepared to concur. The original Sanskrit word which has been translated indigent has also been translated unprovided and unendowed. Commentators are said to differ as to whether provision or endowment by a father or by a husband is meant. Without deciding the controversy we may observe that the plaintiffs in these suits have abundant provision made for them both by their father and by their husbands, while their sisters have not been similarly provided for. We find that in two cases which have been brought to our notice, decided by the Bombay High Court, *Bakubai* v. *Manchhabai* (1) and *Poli* v. *Narotum Bapu* (2), it has been held that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. Accepting the view of the law taken by the Bombay High Court as correct, we have no alternative but to decree the appeal and dismiss the plaintiff's suit with costs.

(1) 2 B.H.C.R. 5.

(2) 6 B.H.C.R. 183.

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APPEL-LATE CIVIL.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

KURAY MAL AND OTHERS (*Defendants*) *v.* PURAN MAL (*Plaintiff*).

[15th December 1879.]

2 A. 565=4 Ind. Jur. 653.

2 A. 565= 4 Ind. Jur. 653.

Joint mortgage—Purchase of share by a mortgagee—Redemption of share.

The right of one mortgagor to redeem the whole of a joint mortgage rests upon its joint character; and when that is broken by the mortgagee purchasing the share of one of the mortgagors, the right ceases, and one of the mortgagors cannot redeem more than his share against the will of the mortgagee. (13 M.I.A. 404, *F.*).

[**F.**, 28 A. 155 (156)=A.W.N. (1905), 225. 29. A. 262 (263)=A.W.N. (1907), 49=4 A.L.J. 74; **R.**, 21 B. 619 (626), 20 A. 23 (27) (**F.B.**)=17 A.W.N. 163, 6 O.C. 223 (227); 6 O.C. 279 (284); **D.**, 5 A. 276 (277)=3 A.W.N. 31.]

Subsequent to the joint mortgage of an estate by its proprietors to one Bhajan Lal, the mortgagees purchased the share of Durabi, one of the mortgagors, in such estate. In a suit by the plaintiff against the mortgagees wherein he claimed to redeem the share in such estate of one of the mortgagors which he had purchased, and also the share of one Badipan, another of the mortgagors, it was contended for the defendants that the plaintiff was not entitled to redeem the share of Badipan. Both the Courts below decreed plaintiff's claim as brought. The defendants preferred an appeal to the High Court.

JUDGMENT.

[566] SPANKIE, J.—The judgment of the lower appellate Court appears, I think, open to the objection taken. The pleader for the appellants refers to a decision of the Privy Council which, however, he did not cite in support of his arguments. The precedent of the Court, *Mahtab Singh* v. *Misree Lal* (1), to which we were referred, does not affect the case before us in any direct way. I was at first disposed to consider that the decision in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (2) was one which applied injuriously to the appellant's case. But on looking into the case, in which I was a party to the judgment, I find that the decision of the Judicial Committee of the Privy Council overruled the latter part of the judgment. It further appears that the decision of the Privy Council to which appellants refer is that in the case of *Nawab Azimut Ali Khan* v. *Jowahir Singh* (3) which is the very case to which I have alluded above.

I gather from the judgment of the Privy Council on the point now at issue that in respect to shares in which a mortgagee under a joint mortgage has not himself bought the equity of redemption, he retains his character as mortgagee, though he has purchased the equity of redemption in other shares. Thus the plaintiff here, who has become the representative of a mortgagor of a particular share, is entitled to redeem his own particular share in the joint mortgage, of which the joint character has been broken up, but he **[567]** cannot redeem, against the will of the mortgagee, the share of Badipan, another shareholder. I would therefore decree the appeal and reverse the decision of the lower appellate Court in

(1) H.C.R., N.W.P., 1867, p. 88. (2) H.C.R., N.W.P., 1866, p. 3.
(3) 13 M.I.A., p. 404.

so far as it relates to the share of Badipan, and I would modify the decree accordingly with costs in proportion to decree and dismissal.

OLDFIELD, J.—I concur in the order proposed by Mr. Justice Spankie. The right of one mortgagor to redeem the whole mortgage rests on the joint character of the mortgage, and when that has been broken, the right ceases, and he cannot redeem more than his share against the will of the mortgagee.

CRIMINAL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA *v.* FOX [16th December 1879.]

2 A. 522.

1. *Crim. Pro. Code, 1872, S. 297—Revisional powers of the High Court.*

The High Court exercised its revisional powers by taking judicial notice of a letter from the Government enquiring "whether in the opinion of the High Court the judgment of the Magistrate was legal and equitable" and by disposing of it under S. 297, Crim. Pro. Code.

[F., 7 A.W.N. 144.]

2. *Penal Code, Ss. 299, 304, 321, 323—Murder—Intention.*

Where a person, irritated by the lazy and inefficient manner in which the punkha cooly was managing the punkha, gave him some blows, and the cooly died of the injuries he had received, *held*, that as the evidence in the case showed that the blows were not heavy or severe, and that the spleen of the deceased was in a very diseased condition, the accused could not have had in view the cooly's death as a probable or even possible consequence of his acts, and that he was guilty only of hurt under S. 323.

[F., 1 A.W.N. 112, 1 A.W.N. 132=3 A. 776, L.B.R. (1872–1892) Cr. 179 (182).]

JUDGMENT.

[523] STUART, C. J.—This case was first brought to the notice of the Court by a letter from the Government of these Provinces, dated the 11th November last, in which letter it was inquired "whether in the opinion of the High Court the judgment of the Magistrate was legal and equitable." On reading this letter it occurred to me that, instead of returning an answer to it in the same form, it would be better for the Court to take judicial cognizance of it and to dispose of it under S. 297 of the Criminal Procedure Code. That course was adopted and the record sent for. I should state that I adopted this course of action in order to avoid the discussion and inconvenience experienced by the Government and this Court in the well-known *Fuller's Case*, and also in order to avoid the suggestion that was made in that case that the Court, although consulted by the Government in its judicial capacity, had not heard and determined the matter in the usual way, but simply by letter in reply to the Government.

The case has now according to the course of the Court come on for hearing and disposal by myself, both prosecutor and accused being professionally represented, the Government by Babu Dwarka Nath Banarji, the Junior Government Pleader, and the accused by Mr. Chatterji, barrister and advocate of this Court. Both these gentlemen submitted their arguments very fairly, although it did not appear that there was any serious difference between them as to the legal aspect of the case. I

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2 A. 522.

have very carefully considered all that they advanced, and I have also very anxiously perused and examined the evidence, and I have arrived very clearly at the conclusion that, in the first place, the conviction of Fox under S. 323 of the Indian Penal Code was right, and that the sentence of a [524] fine of Rs. 200, or, in default, one month's rigorous imprisonment, was one which it was within the discretion of the Magistrate to order, although I myself would have been satisfied with a penalty of less severity. But the fine has I believe been paid, and under all the circumstances of the case I am not disposed to interfere with the sentence by reducing it now.

I observe it is suggested in the police report that the offence was one under S. 304 of the Indian Penal Code, *viz.*, culpable homicide not amounting to murder, that is, homicide committed without premeditation. But in order to a conviction under such a charge, it is incumbent on the prosecutor to prove that the assault or blow which caused death was committed or inflicted so recklessly as to show that the offender was utterly regardless of the consequences of his act. But in the present case the evidence falls considerably short of such a degree of criminality: it simply amounts to this, that very early on the morning of the 30th August last Fox, dissatisfied and irritated by the lazy and inefficient manner in which the punkha cooly Tulsia was managing the punkha, pulling it slowly and nodding in a sleepy manner while doing so, went up to him and struck him one or more blows, on what part of his person does not very clearly appear, whether on the head or on the side, or other part. One thing however is clear, and is not disputed, that Tulsia's death was the result of the injuries he had so received. But on a fair view of the evidence it would in my view be unreasonable to hold that Fox was actuated by the reckless vindictiveness contemplated by S. 304. He simply under a feeling of annoyance at the inefficient manner the punkha was being pulled by Tulsia, and under what may be called a sudden impulse, struck him in the way described. The blows were not heavy or severe, and if Tulsia had been in a healthy condition of body, it is probable that he would not have materially suffered from them. But he was not in a healthy state. The evidence of Doctor Hilson shows that his spleen was in a very diseased condition, more than double the natural size, and thus the weakness of the poor man and his so quickly succumbing is explained. And I observe that the police report which states Fox's offence as one falling under S. 304, Indian Penal Code (culpable homicide not amounting to murder), yet strangely admits that Fox "had only seen the deceased for the first time on the morning he struck him (30th [525] August), as before that he was serving with Sergeant Justice of the Government Railway Police." Doubtless the blow or blows accelerated Tulsia's death, but that such a result was contemplated or was carelessly disregarded by Fox as possible, it is in my opinion on the evidence impossible to believe. Fox appears merely to have acted from a sudden feeling of annoyance, and to have vented that feeling by an assault, which on a healthy person would have been attended with no injurious consequences.

I cannot conclude this judgment without noticing the allusion the Magistrate makes to the recorded opinion of the Court in *Fuller's Case*. He refers to paragraphs 17 and 18 of the Court's letter in that case, which deal with the procedure which it is the duty of a Magistrate to follow. But I may be permitted to refer to other portions of that same letter and of my own minute which appear to me very clearly to expound the law to be applied to the present case. In paragraph 24 of the Court's letter in *Fuller's Case* it is stated that "By the law of India, as by the

law of England, a person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby *accelerating* the death of that other, is deemed to have 'caused his death.' Nevertheless, every causing of death does not amount to the offence of culpable homicide. Unless it be proved that a person who has caused the death of another caused death with the intention—(i) to cause death; (ii) to cause bodily injury likely to cause death; (iii) to cause bodily injury as he knew to be likely to cause death to the person to whom the harm is done; or (iv) to cause bodily injury to any person sufficient in the ordinary course of nature to cause death with the knowledge; (v) that he was likely by his act to cause death; or (vi) that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death—the person who has caused death cannot by the law of India be convicted of culpable homicide of either description." And in paragraph 25 of the letter it is explained :—"Nor can a person be convicted of the offence of *voluntarily* causing grievous hurt, unless it be proved that he caused one of the descriptions of hurt defined in the Code as grievous hurt, either by means whereby he intended to cause such hurt, or by means which at the time of employing those means he knew or had reason to believe to be likely to **[526]** cause it (Indian Penal Code, section 39)." And the Court then goes on to remark in paragraph 26 that "in Fuller's case there was no evidence that he had committed any of the kinds of hurt defined in the Code as grievous hurt; and although a person is by law presumed to know and to intend the ordinary and probable result of his acts, the result could hardly be declared ordinary or probable; while the circumstances rebutted the presumption of intention or knowledge to commit either culpable homicide or grievous hurt." The same principle as to motive and intention is also explained in my own minute in *Fuller's Case*. In paragraph 23 of that paper I say, "It would appear from the medical evidence that the spleen of the deceased was in such a diseased state that very slight violence, either from a blow or fall, would have been sufficient to have caused death. Indeed, it is plain that a mere accident to the man, such as his tripping while walking or running, might have had this fatal result; but that there is nothing in the case to show that such extreme and perilous sensibility of body was known to, or could have been reasonably suspected by, Mr. Fuller; and *his guilt or criminal responsibility would have been the same, and neither more nor less, if Kathwaru had not died.* The letter of the Government of India goes on to state that 'the death of Kathwaru was the direct result of the violence used towards him by Mr. Fuller,' and His Excellency in Council observes that 'the High Court assumes the connection between the two events as being clear,' but adding 'yet, on reading Mr. Leeds' judgment, he does not find that gentleman ever considered the effect, or even the evidence of this connection.' The portion of the Court's letter (*i.e.*, the Court's first letter to the Local Government) thus referred to is in these terms:—'The medical evidence shows that the spleen was in a diseased condition; that death was caused by the rupture of the spleen; that this injury might have been caused by moderate violence or by a fall; and that there were no external marks of injury on the body. Under these circumstances, it appears that no great violence was used, and that the accused neither contemplated nor could have foreseen that severe hurt would have resulted from the degree of violence exerted by him, much less that it should have been followed by the lamentable result of death.' It will be observed that Mr. Fuller's not very violent blow and Kathwaru's death are here stated as connected facts,

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[527] but not in such a way as to show Mr. Fuller's culpability in regard to the death. In fact, it is unnecessary to dwell on the mere fact of the connection between the two circumstances, *the material and vital question being, not whether the death did in fact result from the blow, but whether Mr. Fuller had such a guilty knowledge of the probable consequences as to make him really responsible for the fatal occurrence.* But there is nothing in the record to show any such guilty knowledge on his part or that he intended to occasion a hurt which would ordinarily or probably cause death, and every circumstance ought to have been distinctly proved, and not left to any kind of inference or suspicion." And with respect to Mr. Leeds' judgment I observed "that it distinctly states the fact of the blow or assault, as it may be called, and also Kathwaru's ultimate death, but it does not state, and with great respect and deference, I submit it very properly does not state, these as necessarily connected facts against Mr. Fuller in the way of measuring his culpability."

The law thus laid down appears to me exactly to apply to the present case. It is impossible to conclude that Fox could have had in view the cooly's death as a probable or even possible consequence of his acts, and the measure of his culpability is therefore not that fatal result, but only the blows themselves, inflicted, as these were, suddenly, under an impulse momentarily excited and not arising from any actual malice against the man.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

1879 DEC. 16. APPELLATE CIVIL. 2 A. 567.

RAMJAS *(Defendant)* v. BAIJ NATH *(Plaintiff)*.

[16th December 1879.]

2 A. 567.

Decree passed ex parte *in first appeal—Refusal to re-hear appeal—Appeal from such decree—C.P.C. (1877), Ss. 560, 584 and 588 (v).*

S. 560 of the C.P.C. is not mandatory, but permissive and discretionary.

A person, against whom a decree is passed *ex parte* in first appeal, is not bound to apply for a re-hearing under that section. Nor does his failure to appeal, under S. 588 (*v*), from an order refusing a re-hearing, preclude him from appealing, under S. 584, against the *ex parte* decree itself.

[**Appr.**, 8 A. 354 (358, 364) (**F.B.**)=6 A.W.N. 110; **D.**, 4 A. 387 (405) (**F.B.**).]

JUDGMENT.

[567] STUART, C.J.—This is a second appeal in a suit brought to recover Rs. 2,926-15-6, principal and interest, from the defendant's person and property under a bond, or rather two bonds, dated, respectively the 28th November, 1870, and the 8th March, 1876. The [568] reasons of appeal are exclusively on the legal merits of the case, and there is not in them the slightest allusion to any peculiarity of procedure before any of the Courts below. It is, however, now objected on behalf of the respondent that the present appeal does not lie, inasmuch as the last order by the Judge was one refusing to re-hear the appeal before him under S. 560 of the Code of Civil Procedure, against which order the appellant might have appealed to this Court, and not having done so, he cannot now prefer a second appeal from the decree of the Judge on the merits of the case.

What actually occurred was this :—The Subordinate Judge, by a decision, dated the 22nd December, 1877, dismissed the suit, and the case then went on appeal to the Judge, the defendant not appearing in that appeal. The Judge, nevertheless, heard the appeal *ex parte* on the merits, and by a judgment, dated the 17th June, 1878, reversed the decision of the Subordinate Judge, remarking at the end of his judgment that "the respondent had the ordinary notice served on him of the appeal having been made, but he has failed to defend it." Instead of at once appealing to this Court, as he might have done under S. 584 of the Code, against the Judge's order, the defendant applied to the Judge for a re-hearing of the appeal to him, under S. 560, and the Judge, for reasons which do not appear, excepting that the defendant had not attended to the notice of appeal served upon him, refused to re-hear the appeal, and it is argued that by this procedure the plaintiff is prevented from falling back on the Judge's first judgment on the merits of the case and preferring the present second appeal to this Court.

I am, however, clearly of opinion that such an objection is untenable. S. 560 of the Code of Procedure is not mandatory, but permissive and discretionary. It provides that "when an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him (exactly as happened here), he may apply to the Appellate Court to re-hear the appeal." The proceeding indeed evidently contemplated by this section is merely an additional privilege or facility given to respondents, who may or may not avail themselves of it, but it in no way interferes with respondents in other respects, nor could it have been intended to deprive them of any other rights of procedure to which under the Code they are entitled, such as their right of second appeal under S. 584 of the Code; and **[569]** there certainly is not the slightest indication in S. 560 of any such intention. The objection therefore altogether fails. I may add that I have the less hesitation in coming to such a conclusion in the present case, since after a very careful examination of the record I cannot find that the requirements of S. 560 were duly observed by the Judge when he refused to re-hear the appeal to him. There is a proceeding before the Judge, dated the 19th August, 1878, reciting the application for a re-hearing, and it does not appear from this proceeding that the respondent was allowed the opportunity provided by S. 560 of proving that he was prevented by sufficient cause from attending when the appeal was called on for hearing, all that the Judge's order states being that he was "satisfied that notice was duly served and that the respondent had received full information regarding the appeal," without a word relating to the important question whether sufficient cause had not been shown by the respondent for not attending when the appeal was called on for hearing. The reason assigned by the Judge was clearly not enough, for although notice had been served and the respondent was fully aware that the appeal was coming on, he yet might have been able to show sufficient cause for his absence, and if so he had a clear right to have the appeal re-heard. It is satisfactory, therefore, in the interests of justice, that the present appeal has been preferred, and of its competency I have not the least doubt.

SPANKIE, J.—Pandit Bishambhar Nath, for respondent, took a preliminary objection to the hearing of this appeal. It appears that the case was decided originally *ex parte* on the 17th June, 1878, by the appellate Court. Ramjas, defendant (now appellant), petitioned the Court for a re-hearing of the appeal. But the Court held that notice had been duly served upon him, and that he had had full information that the appeal had been filed. The Judge, therefore, refused to re-hear the case. It is urged

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that the defendant should have adopted the course provided by Cl. (*v*), S. 588, Act X of 1877, that is to say, he should have appealed to this Court from the order of the Judge refusing under S. 560 of the Act to re-hear the appeal; as he did not follow this course defendant cannot appeal from the Judge's decision of the 17th June, 1878.

[570] The terms of S. 560 of Act X of 1877 are permissive. When an an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him, he may apply for a re-hearing, and if it be proved that the respondent was prevented by sufficient cause from attending when the appeal was called on, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him. From any order refusing to re-hear an appeal there is an appeal under S. 588, Cl. (*v*). but the appeal is not from the decree passed in appeal, but from the order of refusal to re-hear it, if a petition to that effect has been filed and rejected. The decree in appeal remains in force. I do not find it anywhere laid down in the Code that there shall be no appeal from a decree passed in appeal *ex parte*. By not appealing from the order rejecting his application for a re-hearing, respondent might have lost the opportunity of getting his case more completely heard by the appellate Court, and thereby he may have placed himself in an unfavourable position before this Court, if he desired to appeal from the lower appellate Court's decree on the appeal, still I do not see that he is debarred from instituting a second appeal, provided he undertakes to show that the decree is open to objection on any of the grounds mentioned in S. 584 of Act X of 1877. I would therefore reject the preliminary objection.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Straight.

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CRIMINAL JURISDICTION.

2 A. 570.

EMPRESS OF INDIA v. BHUP SINGH AND ANOTHER

[31st December 1879.]

Crim. Pro. Code, 1872, Ss. 44, 296—Discharge of accused person—Sessions Judge suggesting a revival of proceedings—Commitment—Penal Code, Ss. 363, 417, 420.

Where, on the acquittal of an accused person charged under S. 417, I.P.C., the Sessions Judge forwarded the record to the District Magistrate, and suggested that he should direct the Subordinate Court to inquire into any offence, which the evidence on the record showed to have been committed, other than that in respect of which he was discharged, and the Magistrate committed the accused to the Sessions upon charges under S. 363, 420, I.P.C., *held* that as there was no "direction to commit," that is to say, to send the discharged person at once to the Sessions Court without further enquiry, the Sessions Judge's suggestions were not contrary to S. 296, Crim. Pro. Code, and the commitment could not be impeached.

[R., 2 A.W.N. 105.]

JUDGMENT.

[571] STRAIGHT, J.—In this case the two accused persons were originally charged before Mr. Hewitt, Assistant Magistrate of Agra, at the instance of one Bhagwan Singh, under S. 417 of the Penal Code. After investigation the prosecution failed and a discharge was passed under S. 215, Criminal Procedure Code, the Assistant Magistrate at the same time making an order for compensation against Bhagwan Singh, on the

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ground that his complaint was frivolous and vexatious. Against this order for compensation and of discharge, Bhagwan appealed to the Court of Session, and the then officiating Judge, Mr. Gardner, having made some remarks in writing on the case, remitted the record to the Magistrate of the District, who made the case over to Kedar Nath, Deputy Magistrate, who then proceeded with an inquiry against Bhup Singh and Umrao Singh, based upon Ss. 363 and 420 of the Penal Code, ultimately committing them for trial to the Court of Session. On the 11th of October the order for compensation passed against Bhagwan Singh by Mr. Hewitt was quashed by this Court, having been made in a case other than a summons case and therefore being *ultra vires*. The committal of Bhup Singh and Umrao Singh having taken place on the 30th of September, the case came on for hearing at the Sessions Court on the 22nd November, when objection was taken to the jurisdiction of the Judge to try it, on the **[572]** ground that the commitment was informal and illegal, having been made in consequence of the remarks in writing of the Officiating Sessions Judge of the 26th July, which virtually amounted to a "direction to commit" under S. 296, Criminal Procedure Code, and had been so regarded: this direction the Judge had no power to make, the offences charged against Bhup Singh and Umrao Singh not being "Sessions cases," or in other words "exclusively triable by a Court of Session." Upon this objection, taken "*in limine*," the Sessions Judge declined to proceed with the case and remitted the whole of the proceedings and papers to this Court with the object and intention, I presume, that the commitment should be quashed.

The case for the accused, or in other words in support of my setting aside the proceedings against them, has been very fully and ably argued by Mr. Colvin, though the whole of his contention has been based on an entire misconception of the character of the document of the 26th of July. I am clearly of opinion that it is not nor was it ever intended to be a "direction to commit." On the contrary, as far as I understand its terms, the Officiating Sessions Judge carefully guarded himself against making any order of that kind and simply relegated the record to the Magistrate of the District, for him to take such steps in the matter as he might think proper. The Magistrate upon consideration of the facts appearing in the evidence, under S. 44, Criminal Procedure Code, referred the case for investigation to his subordinate Kedar Nath, who had full power to hold the necessary inquiry, and, if he considered the case one that ought to be tried by the Court of Session, to commit it thereto in accordance with the provisions of S. 196, Criminal Procedure Code. Whether that investigation did or did not take place in consequence of the remarks of the Officiating Sessions Judge of the 26th July appears to me quite immaterial: there was no "direction to commit" in the sense of S. 296, Criminal Procedure Code, that is to say, to send the discharged accused at once to the Sessions Court, without further inquiry. The observations of the Judge, which it was quite competent for him to make under the proviso at the end of S. 296, Criminal Procedure Code, even if they did amount to a "direction," seem to suggest to the Magistrate of the District, that he should, as he properly might, direct the Sub-**[573]** ordinate Court to inquire into any offence, other than that on which the order of discharge had been passed, which the evidence on the record showed to have been committed. It appears to me that the inquiry upon the charge under Ss. 363 and 420 of the Penal Code were rightly held by the Deputy Magistrate, and that there is no pretence for impeaching his commitment. The cases of *Queen* v. *Seetul Pershad* (1) and *Petition of*

(1) H. C. R., N. W. P., 1878, p. 168.

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Mohesh Mistree (1) are clearly distinguishable from the present, and my view of this matter in no way involves disagreement with any of the authorities quoted. The records are returned to the Sessions Judge, and he is directed to proceed with the trial of the accused Bhup Singh and Umrao Singh, under Ss. 363, 420 and $\frac{109}{420}$, in ordinary course.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

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COHEN (*Defendant*) *v.* THE BANK OF BENGAL (*Plaintiff*).

[2nd January 1880.]

2 A. 598=5 Ind. Jur. 151.

Bill of exchange—Evidence Act I of 1872, S. 92.

The drawer of a bill of exchange cannot be allowed to set up an oral agreement that contradicts or operates in defeasance of its terms.

Where, therefore, a Bank discounted bills drawn by a consignor of goods on his consignee against his consignments, and, having been unable to recover from the consignee who had accepted the bills, sued the consignor, the latter was not allowed to set up an oral agreement that the Railway-receipts for the consignments, sent through the Bank, were not to be delivered to the consignee before payment,

[F., 25 C. 401 (405).]

JUDGMENT.

[599] SPANKIE, J.—The liability of appellant under ordinary circumstances is not denied, and it may be said that his entire case stands or falls with the allegation, that the railway receipt which accompanied the bill was not to be parted with to Cohen Brothers until they had paid the amount of the bill, and it is urged that the Bank did part with the receipt before the bill had been discharged, and therefore the appellant was no longer liable. It is admitted by appellant in his third plea that the determination of this point was the true issue in the suit.

I did not understand that it was seriously contended that appellant was not at liberty to offer evidence of the agreement or understanding set up by him. But I am disposed to hold that the oral agreement set up is not one that contradicts, varies, adds to, or subtracts from, the terms of the contract, and that both provisos 2 and 3 of S. 92 of the Evidence Act might apply to his case.

I do not, however, think that it is necessary to consider this point at any length, because it appears to me that both the lower Courts have disposed of the averment, which raises a question of fact. Was or was there not any such oral agreement? The first Court found **[600]** that the railway receipt was taken from appellant for the satisfaction of Cohen Brothers, on whose letter of credit the amount of the bill was advanced to appellant, and for no other reason. The lower appellate Court must be regarded as having the issue before it in the words of the second plea in the memorandum of appeal below, "that the conduct of the plaintiffs debarred them from recovering in the suit against defendant."

(1) 1 C. 282.

The Judge sets out in his judgment the contention of defendant that plaintiffs had failed to recover the value of the bill, and made over the railway receipt to Cohen Brothers without realising upon their acceptance, and therefore he was not liable. The lower appellate Court refers to the finding of the first Court, that it was at the request of Cohen Brothers, and for their satisfaction, that the railway receipt was taken by the plaintiff and forwarded with the bill of exchange for acceptance. The Judge then observes, that on a full consideration of the facts elicited he sees no cause to distrust the finding, and that he agrees with the lower Court as to the facts. The finding seems to me to dispose of the plea as to any separate oral understanding between the parties that the railway receipt was not to be given up until the amount of the bill had been paid.

The appeal having come as a second appeal, we cannot interfere with the finding of fact on the point, and so the legal admissibility of the evidence to prove the understanding does not arise so far as the appellant is concerned, for he relies upon it. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—This was a suit brought to recover the sum of Rs. 2,500, with a further amount for interest and protesting charges due upon a bill of exchange, dated 2nd August, 1878, drawn by the defendant, appellant, upon and accepted by Cohen Brothers and Co. of Calcutta, in favour of the respondent Bank, and payable twenty-one days after date. The defendant pleaded in substance, that the bill was not discounted by the Bank upon any security of his, but upon the strength of a letter of Cohen Brothers and Co., and a certain railway receipt for goods, which two documents will be more particularly adverted to presently. He also alleged an understanding between himself and the Bank, that the railway receipt was not to be parted with to Cohen Brothers and Co., until they had paid the [601] amount of the bill to the Bank. The defendant further pleaded that as the Bank had already brought a suit against Cohen Brothers and Co. and obtained a decree, there should be no second suit against him for the amount of the bill. Both the lower Courts found in favour of the plaintiff Bank, and decreed the claim. The defendant now appeals and his pleas raise the same questions as those already detailed.

The facts of the case would appear to be as follows:—The defendant, Mr. A. M. Cohen, resides and carries on business at Cawnpore. The Bank of Bengal, whose head offices are in Calcutta, has a branch at Cawnpore under the management of a Mr. Sterndale. On the 13th June, 1878, the following letter was received from the firm of Cohen Brothers and Co., then carrying on business in Calcutta, by the Secretary and Treasurer of the Bank of Bengal:—

"Dear Sir: We request the favour of your instructing your Cawnpore agency to take Mr. A. M. Cohen's drafts on us, to the extent of Rs. 5,000, from time to time as may be required, which we undertake to honor and pay till we countermand this. Mr. A. M. Cohen is an old resident of Cawnpore and no doubt well-known there. The drawings will be against hides and other produce to our consignment. As requested, we will advise him when sending railway receipts to us to do so through your Bank."

The authorities at the head-office of the Bank appear to have acceded to this arrangement, and instructions were given to the Cawnpore branch to honour the drafts of Mr. A. M. Cohen on Cohen Brothers and Co. On the 2nd August, 1878, the bill for Rs. 2,500, on which the suit is based, was drawn by Mr. Cohen, and discounted by the Bank at Cawnpore, and was handed over with a railway receipt for goods, valued at Rs. 2,800,

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for transmission to Calcutta, and acceptance there by Cohen Brothers and Co. In due course, namely, on the 5th August, the bill was accepted by them, and thereupon the railway receipt was handed over to them, and in ordinary course, no doubt, the goods were obtained and disposed of in the ordinary way of their business. Before the twenty-one days of the bill had run Cohen Brothers and Co. would seem to have got into financial difficulties, and when it matured and was presented for payment, they were unable to meet it. A suit was consequently [602] brought against them in the Calcutta High Court upon the bill and judgment was recovered, but no satisfaction by execution or otherwise was obtained. Consequently the present suit was brought against the defendant, as drawer, and he being resident at Cawnpore, it was instituted in the Court of the Subordinate Judge there.

It has been argued on the part of the defendant, appellant, that the bill was in reality discounted on the faith of Cohen Brothers and Co.'s letter of June 13th, already set out; that it was only handed over to the Bank on the distinct understanding that the railway receipt, which accompanied it, was not to be parted with to Cohen Brothers and Co., until they had paid the amount of the bill, and that the Bank by committing a breach of this condition had determined the liability of the defendant.

It is impossible to accept this contention. It is more than doubtful whether any such defence as that which has been set up is properly admissible, even under Cl. 3, S. 92 of the Evidence Act. The whole argument for the defendant has proceeded upon a somewhat loose view of the law relating to contracts, as far as it affects negotiable instruments, and the relative position of drawer, payee, and acceptor of a bill of exchange seem to have been entirely lost sight of. S. 92 of the Evidence Act was no doubt framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a written contract, and this Court must take care, in placing a construction upon it, not to create a precedent, that would open the door to indiscriminate parol proof of transactions, where written documents have recorded what has passed between the parties. It is perfectly intelligible why there are authorities which go to show, that a defence may be set up to an action on a bill of exchange to the effect, that there was no consideration for it, but it is equally plain, that a defendant may not allege an oral agreement, that contradicts or operates in defeasance of a clear contract, which appears upon the face of a written instrument. The law upon this point may be found fully discussed in *Alrey* v. *Crux* (1), the circumstances of which case are not altogether unlike those involved in the present suit. If the contention of the defendant is correct, that he drew [603] the bill and handed it to the Bank on the understanding that the railway receipt was not to be given up to Cohen Brothers and Co. till they had paid the Rs. 2,500, his position as drawer would have involved no liability, and the instrument itself would in reality not be what it purports. What necessity was there, under such circumstances, to make it run twenty-one days, when it was intended practically to be a draft payable on demand, and how could the acceptors, who were ignorant of any such arrangement, be bound by it? Had the Bank refused to deliver the railway receipt to Cohen Brothers and Co., when they had accepted the bill on the 5th August, and damage or loss had been sustained by such refusal, it is difficult to see what defence there would have been to an action at their instance. The defendant was the consignor of the hides,

(1) L.R., 5 C.P., 37.

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the firm of Cohen Brothers and Co., the consignees, and any conditions or terms, such as those set up by the defendant, as having been agreed to between himself and the Bank, cannot in an action on a bill of which the consignees, who knew nothing of any such condition or terms, were the acceptors, be prayed in aid by him to escape his liability. If the defence is worth anything it must be taken to its fullest extent, the effect of which must be to render the bill of August 2nd absolutely inoperative, except against an acceptor, who is in entire innocence of the circumstances under, and the condition upon which, it was drawn. This position is irreconcilable not only in law, but according to all commercial practice and custom. The Bank of Bengal would, indeed, be carrying on a strange business if, at the ordinary rate of discount, it made advances and acted as an intermediary in the fashion suggested by the defendant This version of the transaction is altogether at variance with common knowledge and ordinary mercantile procedure, while the position taken up by the Bank is in accordance with all well-understood and commonly practised mercantile custom. It is perfectly obvious, that at the time the letter of June 13th was written the Bank authorities had requested, as an earnest of the *bona fides* of the transactions, that in discounting the bills of A. M. Cohen the railway receipts should pass through their hands, and to suggest that they even intended to be or ever were bailees for A. M. Cohen is absurd. In the most usual and well understood fashion he, as consignor, was drawing on his consignees against his consignment, **[604]** and was obtaining discount to very nearly the full value of the goods. What profit, proportionate to the risk, the Bank was to make, if it was merely acting as agent for the defendant, in the manner suggested by him, it is not very easy to see. Nor is it at all comprehensible, why Cohen Brothers and Co. were to go through the form of accepting a bill, if the goods in respect of which their acceptance was to be given were only to come into their hands upon payment of cash. The whole case set up by the defendant appears to be untenable and impossible, and I am of opinion that each and all of his pleas fail. Although I differ with Mr. Justice Spankie, as to the admissibility of the defence set up to this claim in point of law, this will in no way interfere with or prevent our decision of this case. The lower Courts have effectually and fully disposed of the questions of fact raised in issue upon all the pleas put forward, and with their findings we cannot interfere, though I may say I entirely agree with them. The appeal must be dismissed with costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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BANS BAHADUR SINGH AND OTHERS (*Objectors*) *v.* MUGHLA BEGAM AND OTHERS (*Decree-holders*).

CHUNNI BAI (*Objector*) *v.* NAROTAM DAS (*Decree-holder*).

[3rd January 1880.]

2 A. 604.

Appeal to Privy Council—Security for costs of respondent—Execution of Privy Council decree against surety—C.P.C., 1877, Ss. 253 and 610.

Under Ss. 253 and 610 of the C.P.C., an order or decree of the Privy Council can be executed against sureties who, on behalf of the opposite party, have given

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security, either for costs or for the whole decree-amount that might become due from such party.

Per SPANKIE, J., and STRAIGHT, J.—*Contra.*

The words of S. 610 seem simply to provide for the enforcement of decrees or orders of the Privy Council, according to the same method as original decrees are executed by the Court passing them, but they create no liability and establish no specific responsibility, in the surety, such as is created by S. 253.

[**Diss.**, 12 C. 402 (405), 15 C. 497 (502); **F.**, 8 A.W.N. 13, 17 A. 99 (102)=15 A.W.N. 19; **Cons.**, 15 M. 203 (211, 212); **R.**, 3 A. 809 (811), 13 M. 1 (2), 25 B. 409 (414), 2 Bom. L. R. 203 (205), 31 B. 128 (133); **D.**, 7 M. 284, 32 C. 494 (499)=9 C.W.N. 372=1 C.L.J. 118.]

Nur-ul-lah Khan desiring to appeal from the decree of the High Court, dated 17—3—1873, reversing the decree, dated 9—4—1872, passed in his favour, filed as directed by the High Court a security bond, dated 8—7—1873, in which Bans Bahadur Singh and certain other persons jointly hypothecated certain immoveable property as security for costs of the respondent. Nur-ul-lah Khan's appeal having been dismissed by the Privy Council on 22—2—1878, and he having been directed at the same time to pay the costs of the respondent, the decree-holder on 18—7—1878 applied for execution of this order against the judgment-debtor and the sureties, seeking to recover the costs incurred by him in the Privy Council by the attachment and sale of the property hypothecated by the sureties as security for such costs. The sureties objected.

REFERENCE TO THE FULL BENCH.

[605] OLDFIELD, J., and STRAIGHT, J., referred to the Full Bench the following question:—"Whether the decree-holders can recover the costs of the appeal to the Privy Council, which have been decreed to them, by executing their decree against the sureties, who, before the passing of the decree of the Privy Council, have become liable as sureties for the payment of such costs." A similar question was raised in another case which subsequently came before Spankie, J., and Straight, J., who ordered that it should also be laid before the Full Bench, and the two cases were heard and disposed of together by the Full Bench.

JUDGMENTS OF THE FULL BENCH.

[606] STUART, C. J.—In my opinion our answers to these two references ought to be in the affirmative. I have looked into the records for the terms of the surety-bonds in both cases, and I find that in one the bond absolutely secures the costs of the Privy Council to the extent of Rs. 4,000, and in the other case the surety-bond is not limited to the costs of the Privy Council appeal, but covers the whole decree appealed against, including the decretal amount of Rs. 11,853-7-10 and the costs. The legal question, however, is the same in both references, and must be answered in the same way.

The sections of the Code of Procedure to be considered are Ss. 610 and 253. S. 610 provides that:—"Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Courts which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may

be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." It will be observed that the words here employed are large and general, ordering execution of decrees of the Privy Council according to the rules, that is, *all* the rules, applicable to the execution of original decrees, and there is no exception from them of sureties or of S. 253, or of any other sections or provisions in the entire chapter. Now these rules for the execution of original decrees are comprised in Chapter XIX of Act X or 1877, and they begin with S. 223 and end with S. 343. By S. 253, which thus forms part of the rules applicable to the execution of original decrees, it is provided that: "Whenever a **[607]** person has, before the passing of a decree in any original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. To my mind the plain effect of this provision, which is thus made part of the law provided by S. 610, is that sureties for the execution of decrees of the Privy Council are placed in precisely the same position, and have precisely the same liability, as sureties for the performance of decrees in original suits, and may be proceeded against in the same summary manner, for under S. 253 sureties have no litigious and contentious rights, but simply become liable for whatever may be decreed against their principals. There appears to me to be no difficulty whatever in applying this section to the execution of Privy Council decrees, and the effect of it when read with S. 610 is that the words in S. 253, "before the passing of a decree in an original suit," mean, under S. 610, "before the passing of a decree in an appeal to the Privy Council."

It appears to me not unimportant to observe that S. 610 is immediately preceded by provisions dealing with the subject of security for the costs of the respondent, and for the security to be taken for the due performance of Privy Council decrees and of orders made by that supreme tribunal. Thus by S. 602 it is provided that, if the certificate for an appeal to the Privy Council be granted, the appellant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, "give security for the costs of the respondent," and by S. 603 it is provided that, when such security has been completed, the Court may, among other things, declare the appeal admitted. S. 604 provides that, at any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon. Then S. 605 provides for other and further security being taken for the expense of translating, transcribing, printing, &c., certain portions of the record; and by S. 606, if the appellant fails to comply with the order of the Court directing such security to be found, it is provided that "the proceeding shall be stayed, and the appeal shall not proceed without an order on this behalf of Her Majesty in **[608]** Council, and in the meantime execution of the decree appealed against shall not be stayed." This section is, as I view it, very relevant to the question before us, showing, as it evidently does, the great importance attached in the mind of the Legislature to compliance with the pecuniary and necessary conditions attached to the privilege of appeal to Her Majesty in Council, the object plainly being to prevent the time of the Privy Council being taken up with idle and frivolous appeals. S. 608

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again provides for security being taken, under other and further circumstances, from the respondent or the appellant in the Privy Council; and S. 609 is so important and germane in my view to the question involved in these references that I give it at length: "If at any time during the pendency of the appeal, the security so furnished by either party appears inadequate, the Court may, on the application of the other party, require further security. In default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, *issue execution of the decree appealed against as if the appellant had furnished no such security*. And if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit."

It is thus abundantly evident that the subject of security for costs in the Privy Council was very much and very anxiously in the mind of the Legislature when it enacted S. 610, and the conclusion appears to me irresistible that, by the use of the words "in the manner and according to the rules applicable to the execution of original decrees," the intention beyond all doubt was to import into the procedure for the execution of Privy Council decrees the provisions of S. 253: although irrespective of these sections immediately preceding S. 610 I should have held that by force of its direction the liability of sureties under S. 253 was distinctly applicable to sureties under S. 610. And indeed without such a reading S. 610 would appear to be of little use, even if the term "original suit" was meant solely to apply to the proceedings in the first Court. **[609]** But I agree with my colleagues Mr. Justice Pearson and Mr. Justice Oldfield that the term "original suit" includes the proceedings in the appellate Court, the suit being the same throughout, and I also agree with them that the expression "decree in the original suit" is not necessarily the same thing as a decree of the Court of first instance. Indeed, having regard to the course litigation generally takes in this country, the words "before the passing of a decree in an original suit" apply not merely to the first decree in a suit, but to a final decree in an original suit after the whole course of procedure by appeal has been exhausted, including even the decree by the Privy Council. And when to this is added the express provision of S. 610, there seems to be an end to all doubt, that the true intent and meaning of the law is to place parties who have undertaken the more limited liability of being sureties before the passing of a decree by the Privy Council, in the same position as sureties who have become liable before the passing of a decree in an original suit. To say the least the law in question is capable of such a reading, and there seems to be no intelligible reason in justice or in legal policy against its practical application.

My colleagues Mr. Justice Spankie and Mr. Justice Straight, who dissent from the majority of the Court, after noticing the course of decision under S. 204, Act VIII of 1859 (which undoubtedly supports the opinions I am now expressing), wind up their views on this part of the case with the observation that it is plain that the whole current of opinion went to regard a surety as a party to the suit, but that under existing legislation execution is limited to suretyship undertaken before the passing of a decree in an original suit. My answer to these suggestions, however, is that, so far as the execution of a decree is concerned, a surety is as much now as he was under the former law of procedure a party to the suit,

although that may be in a very limited sense, for, as I have already remarked, sureties have no litigious or contentious rights of their own, but simply offer their direct liability for whatever is decreed against their principals. My honorable colleagues further, with reference to the argument as to the expediency of sureties being in every stage liable, and the anomaly of refusing to extend the operation of S. 253, suggest that these are matters of which upon a simple question of construction **[610]** no notice can be taken. But with the greatest deference to them the argument *ab inconvenienti* is of the greatest importance and ought not to be disregarded, and its force, added to the other considerations I and my colleagues who agree with me have urged, reasonably if not irresistibly, lead to the conclusion at which we have arrived.

Concurring therefore with Mr. Justice Pearson and Mr. Justice Oldfield my answer to these references is in the affirmative in both cases.

OLDFIELD, J.—It appears that in these cases, appeals having been preferred to Her Majesty in Council from decrees of this Court, the appellants before us became sureties for the costs of the respondents, and the appeals having been dismissed with costs, the question arises whether the respondents can recover their costs by proceeding to execute their decrees against the sureties or should proceed against them by regular suits. S. 610, Act X of 1877, provides the procedure for enforcing orders of Her Majesty in Council; it runs as follows: "Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." We have therefore to ascertain the manner and rules applicable for the execution of original decrees, and we find these in Chapter XIX, treating "of the execution of decrees," under the heading *E*, "Of the mode of executing decrees," and among them in S. 253 is the following rule, "Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner **[611]** as a decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

We have here clearly a rule and manner laid down for enforcing a decree of an original Court against a person who has, before passing of the decree in the original suit, become liable for the performance of the same or any part thereof, and we must apply the above rule and manner to the enforcement of the order or decree of Her Majesty in Council in the case of a person who has, before the passing of the decree of Her Majesty in Council, become surety for its performance. By the terms of S. 610 the rules applicable to the enforcement of original decrees are made applicable to the enforcement of the orders and decrees of Her Majesty in Council, and amongst them clearly those which apply to sureties for costs of a decree. This was undoubtedly the course laid down in S. 204, Act VIII of 1859, and has been followed by this and other Courts. The

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only material difference between the terms of S. 204, Act VIII of 1859, and S. 253, Act X of 1877, is that the terms of the former section are, "whenever a person has become liable as security for the performance of a decree," whereas in the latter they are, "whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same," the material addition being the words "in an original suit," and these words were probably added to show (possibly with reference to certain decisions under Act VIII of 1859, S. 204,—*Ram Kishen Doss* v. *Hurkhoo Singh* (1), *Gujendro Narain Roy* v. *Hemanginee Dossee* (2), *Chutterdharee Lall* v. *Rambelashee Koer* (3) that the provision applies only to persons who have become sureties for the performance of a decree in the course of the suit and prior to the decree, and not afterwards, and was not intended to draw any distinction between persons becoming sureties before passing of decrees of a Court of first instance, and those becoming sureties after passing of the decree of the Court of first instance and before that of the appellate Court. The term "original suit" includes the proceedings in the appellate Court, the suit being the same throughout, and the **[612]** term "decree in the original suit" is not the same thing as "decree of the Court of first instance." Could the term, however, be so interpreted, I should still be disposed to hold that the operation of S. 610 will be to make the provisions of S. 253, "mutatis mutandis," applicable to execution of decrees of Her Majesty in Council in cases of persons becoming before the decree surety for its performance. I may add that no reason has been shown why the Legislature should intend to make a difference in the manner of execution between the case of persons becoming sureties for the performance of the decree of a Court of first instance, and those becoming sureties for the performance of the decree of the appellate Court or that of Her Majesty in Council. I would answer the question referred in the affirmative.

PEARSON, J.—For the reasons stated by my honorable colleague Mr. Justice Oldfield, I concur with him in answering in the affirmative the question referred to the Full Bench.

STRAIGHT, J. (SPANKIE, J., concurring)—The question submitted to the Full Bench in this, as well as the kindred reference in First Appeal from Order, No. 38 of 1879, is substantially identical and may, for the purposes of brevity and convenience, be discussed and disposed of in a single judgment. The main point for our consideration is, Can sureties for an appellant in an appeal to the Privy Council, which is dismissed, be directly proceeded against in the execution department in the same manner as the judgment-debtor? In order to reply to this inquiry it is necessary very closely to examine the provisions of Ss. 253 and 610 of Act X of 1877. Applying the attention first of all to S. 610, that will be found to regulate the procedure to enforce orders of the Queen in Council, and the following directions are given as to the procedure to be followed by a person who wishes to carry into execution any such order. He must apply to the Court from which the appeal to the Privy Council was immediately preferred, by petition, to which should be attached a certified copy of the decree and order sought to be enforced. Then the Court is to send the order to the lower Court which passed the *first decree* in the suit, and this latter Court is specifically directed to "enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of **[613]** its original decrees." It is next necessary to see what these rules are to which reference is here made. They may be found in Chapter XIX of Act X of 1877, which is intelligibly headed

(1) 7 W. R., 329. (2) 13 W. R., 35. (3) 3 C. 318.

"*Of the execution of decrees*" and under several heads treats of the following incidental matters :—

1.—The Court by which decrees may be executed.
2.—Application for execution.
3.—Staying execution.
4.—Questions for Court executing decree.
5.—Mode of executing decrees.
6.—Attachment of property.
7.—Sale and delivery of property.
8.—Resistance to execution.
9.—Arrest and imprisonment.

Now it is argued by those, who contend for a reply in the affirmative to the question under consideration, that S. 253 of this chapter, providing as it does for the execution of a decree against a surety, supplies one of the rules "in the manner and according to which" the enforcement of orders of the Queen in Council under S. 610 is to be carried out. In other words, that the effect of the two sections, when read together, is to put surety and judgment-debtor on precisely the same footing in execution. Upon a careful examination we find it quite impossible to adopt any such view. We must take the words as they are and not wander afield to try and reconcile suggested inconsistencies in the Act, or drop out a sentence, introduced, as we will show, intentionally into a clause, for the purpose of securing uniformity. What are the terms of S. 253? "Whenever a person has, before the passing of a decree in an original suit, become liable as a surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

The corresponding provision of the former Civil Procedure Code, VIII of 1859, contained no such words as "before the passing of a decree in an original suit"; on the contrary the language **[614]** of S. 204 was of the most general kind and fixed no point of time at or before which a person becoming a surety fixed his liability and rendered himself liable to all the consequences to which his principal was subject. The decisions that were quoted in the course of the argument were upon cases, that had arisen under this earlier Act and to us appear clearly distinguishable from the present. Though under S. 204, Act VIII of 1859, the Courts held, that it did not apply to parties who became sureties after a decree, they nevertheless were unanimous or nearly so in declaring, that the word decree was not confined to that made in the original suit, but that the security given might be enforced against a surety in execution of an appellate decree. In fact it is plain, that the whole current of opinion went to regard a surety as *a party to the suit*, under S. 11 of Act XXIII of 1861, the corresponding section to which of Act X of 1877 is 244.

Under existing legislation, however, execution is limited to a suretyship undertaken "before the passing of a decree in an original suit." Though S. 583 provides for the execution of appellate decrees and S. 610 of orders passed by the Queen in Council according to the rules prescribed in Chapter XIX, there is not to be found in the whole of its 120 clauses one word that authorises enforcement of execution against a surety, except when he has taken upon himself that character "before the passing of a decree in an original suit." The argument, as to the expediency of sureties being in every stage liable and the anomaly, the existence of which it is argued we are countenancing, by refusing to extend the opera-

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tion of S. 253, are matters of which upon a simple question of construction we can take no notice. Still as to this latter point we can well understand why a difference may fairly be drawn between a surety who undertakes his liability before the passing of the decree in the original suit, and so to speak identifies himself with and becomes a party to it, and another who comes upon the scene at a later stage, when litigation has proceeded a considerable distance on the road either to the lower appellate Court, the High Court, or the Privy Council.

The decree in the *original suit* practically passes against the surety, and so far as he is liable under it, it is that decree, which is [615] enforced against him, and not any security-bond he may have entered into subsequent to the passing of that decree. The Ss. 583 and 610 do not confer any greater power on the Court that made the decree appealed, than it already possesses under Chapter XIX of the Code. If that Court extends the action of S. 253, and drags within its operation a surety who has not become liable before the passing of an original decree, it is acting "*ultra vires*" and any order passed to that effect would in our judgment be illegal and void. For it would not only be enforcing a liability undertaken after the passing of its own decree, but one created under a surety-bond, the responsibility upon which no Court had definitely determined in any decree or order.

Now it should be observed that S. 253 has a twofold character. First, it continues in mitigated shape a personal liability to execution without process originally introduced in a novel and somewhat startling form in S. 204 of Act VIII of 1859, and next it details the machinery by which such liability is to be enforced without the ordinary intervention of a suit in summary fashion. The only reservation made in the surety's favour is that he is to have sufficient notice. The words of S. 610, however, seem simply to provide for the enforcement of decrees or orders of the Queen in Council according to the same method as original decrees are executed by the Court passing them, but they create no liability, and establish no specific responsibility in the surety. In the argument for the respondents upon S. 253 it is ingeniously sought to mix up liability and machinery and to treat them as one and the same, but the decree is one thing, the mode of executing it another. At any rate having regard to the fact that the phrase "before the passing of the decree in the original suit" is not to be found in S. 204 of Act VIII of 1859 but appears for the first time in S. 253 of the Act now in force, we must assume that it was introduced for some good purpose, and that purpose, if words mean anything, would seem to be to limit a new and somewhat arbitrary liability, existing outside the actual parties to the suit, to those persons who from its institution had *quâ* guarantors so to speak, vouched for its *bonâ fides* by becoming sureties before the passing of the first decree. It is the decree of the original Court determining the liability of plaintiff or defendant, as the result may [616] be, that by special provision carries also with it the liability of the surety against whom it may be executed, but the decree of the appellate Court or the order of the Queen in Council is not declared to have attaching to it any such contingency, and while it is perfectly intelligible, that to put in force S. 610 the machinery of S. 253 may be used, it seems equally clear to us, that the words "before the passing of a decree in an original suit" are prohibitory to an extended application of the section for the further purpose of establishing an exceptional liability.

For the reasons and upon the grounds we have adverted to we are of opinion that the question raised in this reference must be answered in the negative.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

NAND RAM AND OTHERS (*Defendants*) *v.* MUHAMMAD BAKHSH (*Plaintiff*). [7th January 1880.]

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JAN. 7.
APPELLATE CIVIL.
2 A. 616.

2 A. 616.

Dismissal of appeal for default—Appeal from such order.

There is no appeal from an order under S. 556, C.P.C., dismissing an appeal for default.

[**F.**, 3 A. 519 (521), 12 A.W.N. 2; **R.**, 16 B. 23 (25), 15 A. 359 (361), 121 P.R. 1907 (**F.B.**)=51 P.W.R. 1907.]

JUDGMENT.

[616] STUART, C. J.—We cannot entertain this appeal. The Judge having proceeded under S. 556 of the Civil Procedure Code, the defendants ought to have applied to the Judge of the District for the re-admission of the appeal to him under S. 558, and the only further procedure open to the defendants was by an appeal to this Court from the Judge's order under S. 588 as amended by Act XII of **[617]** 1879, S. 90 (27), but not having proceeded before the Judge under S. 558, there is no appeal to us, and the order of the Judge made under S. 556 is now final.

The Judge must be assumed to have done his duty according to law and the course of his Court, and with the exception of a vague suggestion as to the defendant not having known when his appeal to the Judge was coming on for hearing, nothing is stated to us against such an assumption, which we feel assured in this case is a very just one. In any case the appeal to this Court, being wholly incompetent, must be rejected with costs.

STRAIGHT, J.—In this case an appeal was preferred to the Judge of Meerut from a decision of the Assistant Collector of Bulandshahr. The 26th November, 1878 was fixed for the hearing, but though the parties attended Court on that day the case was not called on. It was ultimately disposed of on the 18th February, 1879, the Judge, owing to the absence of the appellant, dismissing the appeal under S. 556 of Act X of 1877. The matter now comes to this Court in second appeal.

I am of opinion that no such appeal lies to this Court. The order made by the Judge was, as has been remarked, passed under S. 556 of the Civil Procedure Code, and the course the appellant should have pursued was to make an application under S. 558 for re-admission of his appeal within thirty days from the date of the Judge's decree. All the points now urged in his behalf would have gone far to establishing the "sufficient cause" mentioned in that section, and had the Judge improperly or unreasonably refused such an application, his order would then, under S. 588 of Act X of 1877, have been appealable. This appeal is dismissed with costs.

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JAN. 8.

APPEL-LATE CIVIL.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

JUALA PRASAD (*Plaintiff*) *v.* KHUMAN SINGH (*Defendant*).

[8th January 1880.]

2 A. 617=5 Ind. Jur. 154.

2 A. 617= 5 Ind. Jur. 154.

Bond for money—Interest post diem—*Damages.*

Where a bond for the re-payment of money, within a certain time, does not contain any stipulation as to interest after the time fixed, such interest should be treated as damages, and, in the absence of *laches* or unreasonable delay on the part of the plaintiff in bringing his suit, could be awarded on the basis of the rate stipulated for in the bond.

[Appl., 8 A. 486 (490)=6 A.W.N. 216; **D.**, 21 C. 274 (277).**]**

JUDGMENT.

[619] STRAIGHT, J.—The question as to the amount of interest to be allowed to the plaintiff, subsequent to the expiration of the four years for which the bond was given, has been properly treated by the lower appellate Court (1) as one of damages. Upon consideration we think that, having regard to the length of time, that has elapsed since the bond (2) ran out, to the date (3) on which this suit was instituted, the sum decreed by the Subordinate Judge is equitable and his decision must stand. But for the plaintiff's laches we should have thought the amount agreed (4) by the defendant to be paid under the bond was a reasonable basis on which to estimate the subsequent damages. The appeal is dismissed, but each party must pay his own costs.

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JAN. 8.

APPEL-LATE CIVIL.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

SHIBBAN LAL (*Plaintiff*) *v.* TILOKE CHAND AND OTHERS (*Defendants*). [8th January 1880.]

2 A. 619.

2 A. 619.

Partition—Act XIX of 1873 (N.W.P. Land Revenue Act), Ss. 113 and 114.

The orders made appealable under S. 114 of the Land Revenue Act, are those passed under S. 113 on objections preferred under S. 111 before partition is ordered, and involving questions of title or proprietary right arising out of such objections. Orders, passed subsequent to partition and relating to details as to the distribution of the lands partitioned, are not appealable.

JUDGMENT.

[620] OLDFIELD, J.—Shibban Lal made an application, under S. 108 of Act XIX of 1873, for a perfect partition of his share in Pasvara.

(1) Both the lower Courts held that, in the absence of any stipulation regardin the interest to be paid after the bond became due, the plaintiff was entitled to such interest at a reasonable rate, in the way of damages, and having regard to the great delay in the institution of the suit, they determined that eight annas per cent. per mensem was a reasonable rate, and accordingly awarded the plaintiff interest from the date the bond became due to the date of the suit at that rate.

(2) The date of execution of bond was the 4th February, 1866.

(3) Time of institution of suit, November, 1878.

(4) Rate of interest in the bond, one rupee per cent. per mensem.

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JAN. 8.
APPELLATE CIVIL.
2 A. 619.

The Assistant Collector issued the usual notification and served notices as required by law, requiring co-sharers who may object to the partition to appear before him on a specified day, and no objectors appearing he directed that the partition should be made and gave the necessary directions for carrying his order into effect. In the course of carrying out his order for a partition and of assigning the lands to each share-holder, Tiloke Chand and others claimed certain plots as belonging to them in severalty and demanded that those should be assigned to them, and the Collector decided that some of those plots belonged to one of the objectors and one was held in common. Shibban Lal appealed from this decision to the Judge, who has dismissed the appeal, holding that no appeal lay to his Court. The question in second appeal is, whether the Judge's order is correct. It appears to us to be so.

The only provision which allows appeals from decisions of a Collector in course of partition proceedings is contained in S. 111 of Act XIX of 1873, and by that section it is only orders and decisions passed by the Collector of the District or Assistant Collector under S. 113 for declaring the rights of parties which are held to be deci-[621]sions of a Court of Civil Judicature of first instance, and open to appeals to the District or High Court under the rules applicable to regular appeals to those Courts. Now the orders and decisions passed under S. 113 are those on any question of title or proprietary right which arises out of objections preferred by co-sharers in possession in reply to the notice served on them under S. 111, by which they are required to state their objections to the partition taking place, that is, orders and decisions on a question of title or proprietary right arising properly out of objections preferred before any order has been made for effecting a partition, and referring to general questions of right and title affecting the right of the parties to claim partition, and not to such questions as have been decided in the case before us, which relate to the ownership of particular plots of land in the mauza, and which have arisen out of objections made after a partition has been ordered, and in proceedings taken for carrying it out, and which relate to details as to the distribution of the lands which form the subject of partition. In no way can it be held that the Collector's decision was passed under S. 113 so as to give a right of appeal. We therefore affirm the order of the Judge and dismiss this appeal with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1880
JAN. 9.
APPELLATE CIVIL.
2 A 621 = 5 Ind. Jur. 154.

TEJPAL, GUARDIAN OF KUNDAN LAL, MINOR (*Plaintiff*) *v.* KESRI SINGH (*Defendant*). [9th January 1880.]

2 A. 621 = 5 Ind. Jur. 154.

Bond for money—Stipulation for compound interest—Penalty.

A stipulation in a bond for money that interest shall be payable half-yearly, and that, if not so paid, it shall be added to the principal and bear interest at the stipulated rate, is not one of a penal nature.

[F., 1 N.L.R. 9 (12)].

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JAN. 9.
APPEL-LATE CIVIL.

JUDGMENT.

[622] PEARSON, J.—A stipulation in a bond that the interest on the principal sum lent shall be paid six-monthly, and, if not paid, shall be added to the principal and bear interest at the same rate, has never been held to be one of a penal nature. We are, therefore, constrained to allow the plea in appeal and to modify the lower appellate Court's decree by decreeing the claim in full with costs in all Courts.

2 A. 621 = 5 Ind. Jur. 154.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1880
JAN. 10.
APPEL-LATE CIVIL.
2 A. 622.

RAM SUBHAG DAS (*Plaintiff*) *v.* GOBIND PRASAD AND ANOTHER (*Defendants*). [10th January 1880.]

2 A. 622.

Computation of limitation—Limitation Act, 1877, S. 14.

Under S. 14 of the Limitation Act, the only period of time, which the plaintiff can claim to have excluded, is that during which he has been prosecuting his suit in a Court, which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. The time, during which he was not prosecuting his suit in any Court, or the period of such prosecution where the inability of the Court to entertain his suit arose from his own fault, such as misjoinder of plaintiffs, cannot be excluded.

[Overruled, 22 A. 248 (255) (F.B.) = 20 A.W.N. 69; Not F., 10 C. 86 (88); **Appr.**, 12 A. 207 (208) = 10 A.W.N. 76.]

Suit for compensation on the ground that the defendants had publicly assaulted the plaintiff on 21—9—1877 and thereby injured him in reputation, mind and body.

JUDGMENT.

[624] OLDFIELD, J.—The question with which we have to deal in this appeal is whether the suit has been instituted within the term allowed by the Law of Limitation. The cause of action accrued to the plaintiff on the 21st September, 1877, and it appears that he and his brother jointly instituted a suit against defendants in the Court of the Subordinate Judge on the 26th August, 1878, and it was removed for disposal to the Court of the Judge, and the plaint was returned to the plaintiiffs on the ground of misjoinder of plaintiffs on the 16th September, 1878. A plaint was then filed by plaintiff in the Court of the Judge on the 23rd September, 1878, and the Judge rejected it on the 1st October, 1878, on the ground that it should be filed in the Court of the Subordinate Judge, and the plaintiff was directed to file it accordingly. The plaintiff appealed to the High Court from this order, and the order was affirmed on the 28th January, 1879. On the 8th February, the plaintiff applied to the Judge for a return of the plaint in order that he might file it in the proper Court, and having obtained it on the 10th April he filed it in the Court of the Subordinate Judge on that day. Now as the cause of action accrued on the 21st September, 1877, the time allowed by law for instituting the suit would expire on the 21st September, 1878, and calculating to the 10th April the suit will be six months and twenty [625] days after time, unless the plaintiff can show that the excess period should be excluded in computing the period of limitation under the provisions of S. 14 of the Law of Limitation. But looking to the proceedings taken it is clear that at most the

1880 JAN. 10. APPELLATE CIVIL. 2 A. 622.

only time which plaintiff might claim to exclude under the provisions of S. 14 would be from the 23rd September, 1878 to the 10th April, 1879, when he was prosecuting the suit in the Court of the Judge and in the High Court. But assuming that he could satisfy us that the whole of that period should be excluded, the present suit instituted on the 10th April, 1879 will still be beyond time. The plaintiff cannot claim to exclude from the computation any other period, for from the 26th August, 1878 to the 16th September, 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of the Court to entertain it did not arise from defect of jurisdiction or other cause of a like nature, but from misjoinder of plaintiffs, a defect for which plaintiff must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and cannot claim to have that period excluded. The appeal fails, as there is no reason to interfere with the order as to costs, and we dismiss it with costs.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, and Mr. Justice Spankie.

1880 JAN. 12. APPELLATE CIVIL. 2 A. 625.

HASAN ALI AND OTHERS *(Plaintiffs)* *v.* MAHRBAN *(Defendant)*.

[12th January 1880.]

Muhammadan law—Missing person—Indian Evidence Act, S. 108—Bengal Civil Courts Act, S. 24.

In a suit, between Muhammadans, to enforce a right of inheritance, the Muhammadan law must form the rule of decision, (Bengal Civil Courts Act, S. 24). The question, whether a missing person is alive or dead, arising in such a suit, must be decided with reference to the principles of Muhammadan law on the subject, and the Evidence Act has no application.

Per STUART, C. J.—Under the Muhammadan law, inheritance to the property or share of a missing person cannot open, but must remain in abeyance, until ninety years have elapsed since his birth, or until his death is proved.

Per PEARSON, J., and SPANKIE, J.—Where a person is missing, at the time when he has a right to inherit, his heir cannot hold his share either as heir or as trustee. (1 A. 53 (F.B.), *D.*).

JUDGMENT.

[627] STUART, C. J.—I generally concur in the view taken in this case by the Subordinate Judge (1), who, however, appears to have very unnecessarily occupied himself with the consideration of the Evidence Act, and with the remarks of the select committee of the Legislative Council thereon. The suit is brought by the plaintiffs for the establishment of their rights to property on the allegation that the inheritance to them has opened by the disappearance and death, during his father's lifetime, of one Farzand Ali (2) With respect to this Farzand Ali the facts appear to be these:—He left his home and his family in 1857, the year of the mutiny,

(1) The lower appellate Court held, on the question whether in this case the Muhammadan law relating to a missing person should be applied, or whether it should be presumed with reference to S. 108 of Act I of 1872 that Farzand had pre-deceased his parents, that, under the provisions of S. 24 of Act VI of 1871, the Muhammadan law was applicable, distinguishing the present case from the case reported in 1 A. 53. Applying Muhammadan law, the Court held that, inasmuch as a period of ninety years had not elapsed from the date of Farzand's birth, it could not be presumed that he was dead.

(2) One of the heirs to the property of his parents.

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APPELLATE CIVIL.

2 A. 625.

at which [628] time he would appear to have been about 30 years old, and therefore, if alive when this suit was instituted, his age would then have been about 51 years. He has not since been heard of, but there is nothing on the record to prove his death. Under these circumstances the first question is, what is the law to be applied to the case? The parties are Muhammadans, and the question raised in the suit being one regarding succession and inheritance, the 24th section of the Bengal Civil Courts Act VI of 1871 immediately applies, and the Muhammadan law must, in the words of S. 24, form "the rule of decision," and the Evidence Act has no application whatever. The only question therefore is, what, on the facts stated, is the Muhammadan law on the subject? This question may be answered without doubt or difficulty, and it is simply this, that for ninety years from the date of his birth the property of a missing person is kept in abeyance, the principle of Muhammadan law appearing to be that, in the absence of proof to the contrary, the missing person is presumed to be alive. This rule of the Muhammadan law appears to be the result of all that is to be found in the leading authorities on that law,—Macnaghten, Baillie, and others. Now, applying this rule of Muhammadan law so stated, it is clear that the property of Farzand Ali cannot be claimed by the plaintiffs, but must be in abeyance until the expiry of ninety years from his birth, that is, for about forty years yet to come, unless in the meantime evidence is obtained proving his death. The Subordinate Judge appears to have correctly applied this rule of Muhammadan law to the facts of the case, and I would therefore affirm his order and dismiss the present appeal with costs.

I should add that the Full Bench case of *Parmeshar Rai* v. *Bisheshar Singh* (1) is quite consistent with the view I have taken of the facts in the present case. There the suit was brought for the avoidance of a deed of mortgage executed to the detriment of the plaintiff's reversionary rights, and it was therefore held that the provisions of S. 108 of the Evidence Act should be applicable. I was absent from the Court when this judgment was given and I express no opinion as to whether I consider it right or wrong. But the opening sentences of the judgments of Turner, J., who was acting [629] for me, and of Pearson, J., clearly support the view I have taken in the present case. This portion of the judgment of the Full Bench is as follows:—"The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance; were they claiming it, inasmuch as Janki Rai has been missing for only eight or nine years, their claim might be inadmissible under Hindu law. But they are claiming nothing belonging to him." And the judgments of Spankie, J., and Oldfield, J., are to the same effect.

SPANKIE, J.—This being a suit for inheritance under the Muhammadan law, that law will apply to it, in regard to the missing person, Farzand Ali. The Full Bench ruling in *Parmeshar Rai* v. *Bisheshar Singh* (1) of this Court is not in conflict with this opinion. The lower appellate Court therefore was not wrong in holding that the case must be governed by Muhammadan law. These remarks dispose of the first plea.

On the second plea it appears to me that the judgment of the lower appellate Court (2) is wrong and that the Munsif (3) was right.

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(1) 1 A. 53.

(2) For the judgment of the lower appellate Court, see *supra*.

(3) The first Court being of opinion that Farzand was in all probability dead, held that, inasmuch as he was missing at the death of his parents, he had forfeited his right to succeed to a share in their estates, and the defendant could claim no right through him and it gave the plaintiffs a decree.

According to the Muhammadan law of inheritance, a missing person is considered as living in regard to his own estate, so that no one can inherit from him, and dead in regard to the estate of another, so that he does not inherit from any one, and his estate is reserved until his death can be ascertained, or the term for a presumption of it has passed over. I find a summary of the law quoted from well-known authorities and cited in the Madras edition of Macnaghten's Muhammadan law, referred to by Babu Shama Charan Sirkar in his printed Tagore Lectures.—"Thus, if he (the missing person) had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside, but such share is not reserved **[630]** in trust for him and his heirs, but delivered to the other heirs, who would have taken it if he had been dead; if he returns after this, he will be entitled to his share, but if he does not return, it devolves on the heirs who came into possession at the former distribution, but not to the heirs of the missing person." Again: "If a missing person be a co-heir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus, in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case, the daughters will take half the estate immediately, as that must be their share at all events, but the grand-children will not take anything, as they are precluded on the supposition of their father being alive."

Farzand Ali became lost during the lifetime of his parents, and his daughter, the defendant, according to the view of the law expressed above, could not, under the circumstances, inherit.

For these reasons I would decree the appeal and reverse the judgment of the lower appellate Court and restore that of the Munsif with costs.

STUART, C. J., and SPANKIE, J., differing on a point of law, the appeal was referred, under S. 575 of Act X of 1877, to Pearson, J.

FINAL JUDGMENT.

PEARSON, J.—The property in suit did not belong to Farzand Ali, the missing man, but would have been more or less inherited by him, had he survived his parents. The plaintiffs are his sisters and a cousin, who married one of them; the defendant is his daughter, and, if she be not entitled to the property, they are. Her contention is that her father is still alive, and, if the contention be true, it is apparent from the rules of Muhammadan law cited by my learned colleague Spankie, J., that she is not entitled to hold the property either as heir or trustee, although Farzand Ali may be entitled to it should he return. The plaintiffs do not assert that he is dead, but nothing has been heard of him since he disappeared in 1857, and the strong probability is that he died in the lifetime of his parents, in which case his daughter could not inherit, through him, any portion of their estate. This being so, in concurrence with **[631]** Spankie, J., I decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

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JAN. 12.

APPEL-LATE CIVIL.

2 A. 631.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

MAYA RAM AND OTHERS (*Defendants*) *v.* LACHHO (*Plaintiff*).

[12th January 1880.]

2 A. 631.

Pre-emption—Record-of-rights.

Where the greater portion of land in a village is divided into a number of *thokes*, each *thoke*, belonging to a number of sharers, the remaining land being held in common by all the co-sharers in the village, and the record-of-rights provides for a right of pre-emption among sharers of the same *thoke*, such right cannot be claimed as regards a share in one *thoke* by a sharer in another *thoke*, on the ground that he is a sharer in the common lands along with all the sharers in the village.

JUDGMENT.

[631] OLDFIELD, J.—The property in this suit, comprising the share in mouza Tholai belonging to Mahummad Ibrahim Khan, was sold by him to the defendants under a deed of sale dated 1st March, 1878, and the plaintiff claims the same by right of pre-emption under the *wajib-ul-arz*. The lower Court decreed the claim, and one of the objections taken in appeal is that, under the pre-emption clause in the administration-paper on which the plaintiff relies as her ground of action, she is not entitled to recover the property. The clause is as follows :—"Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer **[632]** should be effected by him in favour of his own brothers and nephews who may be sharers, and in case of their refusal in favour of the other owners of the thoke: if they refuse to make the purchase, the transfer may be effected in favour of any one." The plaintiff does not come under the first description of persons named who have a right of pre-emption, and it only remains to be seen if she is a sharer in the vendor's thoke. It is shown from the record-of-rights, and there is no dispute on this point, that there are three thokes in this mouza, namely, the thoke of Ibrahim Ali Khan, vendor, the thoke of Musammat Lachho, plaintiff, and the thoke of Musammat Bhawani. Each of these thokes comprised a certain amount of the land of the mouza, which has been divided and formed into separate thokes. Thus the thoke of Ibrahim Ali Khan comprises 316 bighas 5 biswas, that of Musammat Bhawani 99 bighas 17 biswas, and that of the plaintiff 316 bighas 4 biswas. Besides the lands thus divided into thokes, there are some lands in the mouza left undivided and held in common by the sharers of the different thokes in which they have an interest in proportion to their fractional shares, but these lands do not form part of the thokes, but were left undivided when those thokes were formed. That this is the constitution of the mouza is clearly shown by a reference to the record-of-rights, where the total of land divided and comprising each thoke is first given, and then is entered the common land, as something outside the thokes.

Now plaintiff is not a sharer in the vendor's thoke, that is, in the divided land held by him separately, but she is, in common with all the sharers of the different thokes, a sharer of the common lands left undivided, and it is contended that on this ground she has a right of pre-emption.

But this contention fails; the thoke as already stated is not composed of the common lands but of those divided, and a sharer in the former will not from that circumstance become a sharer in a thoke. The plaintiff not having shown that she is a sharer in the vendor's thoke has no right of pre-emption under the clause in the administration-paper. We therefore decree the appeal, and reverse the decree of the lower Court, and dismiss the suit with all costs.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

1880 JAN. 15. — APPELLATE CIVIL. — 2 A. 633.

GOBARDHAN DAS (*Defendant*) *v.* GOKAL DAS (*Plaintiff*).

[15th January 1880.]

2 A. 633.

Oral conditional mortgage—Reg. XVII of 1806.

Property made over to a person on the condition that, if the money borrowed from him be not re-paid within a certain time, it shall become his absolute property, becomes such property on failure to pay, without the issue of a notice of foreclosure under S. 6 of the Reg. XVII of 1806, the provisions of which apply only to holders of deeds of conditional mortgage.

[Not F., 50 P.R. 1906.]

Kishen Das early in 1869 gave his creditor Gokal Das possession of certain premises purchased by him and made over to him the deed of sale, dated 11—2—1862, executed in his favour, on the oral understanding that the premises should become the absolute property of Gokal Das if he did not re-pay the debt in two or three months. Some months later, he became an insolvent and in the schedule of immoveable property filed by him he stated as follows:—"I received the sum of Rs. 1,000 in the month of Phagun, Sambat 1925, as a loan from Gokal Das, Gujrati, and for the re-payment thereof deposited the title-deeds of a piece of land at Muttra, in the North-Western Provinces, with this creditor, and I also agreed that in case I was not able to pay the amount the land would absolutely belong to him." In the statement of his immoveable property filed in the same Court he stated:—"A piece of land at Muttra, in the North-Western Provinces, mortgaged to my creditor No. 34 (Gokal Das) for Rs. 1,000 on condition that in case I am not able to pay the amount within two or three months he will be absolutely entitled to the land." Gokal Das who remained in undisturbed possession of the premises until 10—2—1877, having been disturbed on 10—2—1877 by the defendant, a purchaser of the same premises from Jagan Nath, the son of Kishen Das, instituted the present suit wherein he claimed amongst other things a declaration of his proprietary rights to the premises and to be maintained in possession thereof and the cancellation of the sale deed executed in favour of the defendant. Both the Courts below gave him a decree. The lower appellate Court held as follows, in respect of the contention by the defendant that the possession of the plaintiff of the premises was only that of an equitable mortgagee, and that consequently he could not impugn the sale to Gobar Dhan Das by Jagan Nath:—"In the case of *Goordyal* v.

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Hunskoonwer (1) the High Court said,—'It has been settled that a conditional sale may by the agreement and acts of the parties become absolute without (foreclosure) proceedings under the Regulation,'—and this appears to me to be the case here: I accordingly find that Gokal Das acquired the proprietary title to the property in suit in 1869, and that he has therefore the right to sue for the avoidance of the sale made by Jagan Nath to Gobar Dhan Das."

The defendant preferred an appeal to the High Court.

2 A. 633.

JUDGMENT.

[634] PEARSON, J.—The provisions of Regulation XVII of 1806, to which the first ground of appeal refers, are only applicable to the holders of deeds of conditional mortgage. The plaintiff was not the holder of such a deed; and the provisions of the Regulation aforesaid were not therefore applicable to him. This being so, we must hold that according to the condition on which the property was made over to him he became the owner of it after **[635]** the expiry of three months from the date on which it was made over to him, in consequence of the amount of the loan not having been re-paid to him. It thus appears that he had acquired a full proprietary right and title to the property before Kishen Das' insolvency. Accordingly we affirm the decree of the lower Courts and dismiss the appeal with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

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APPELLATE CIVIL.

BASANT LAL AND ANOTHER (*Plaintiffs*) *v.* TAPESHRI RAI (*Defendant*).

[15th January 1880.]

3 A. 1.

Registration—Act VIII of 1871, Ss. 17, 18.

A document, by which the obligor, in consideration of a loan of a sum less than Rs. 100, agrees to lease certain lands to the obligee for one year, and undertakes to be responsible for any damages arising from failure to comply with the terms of such agreement and hypothecates immoveable property till the conditions of the agreement should be fulfilled, is a hypothecation bond for the amount of the loan; and there being no stipulation for interest or any other sum by which the principal amount may be augmented, and the damages stipulated for depending on a contingency which may or may not happen, and respecting which nothing can be anticipated at the time of registration, the document is one which does not require registration. But it could not be used to enforce a lien against property hypothecated to any extent greater than the amount of the loan. (1 A. 274 observed on).

Per STUART, C.J.—Such an instrument is essentially a usufructuary mortgage.

Per OLDFIELD, J.—On the pleadings in the case, it is unnecessary to decide whether it should have been registered as a lease.

[R., 5 A. 447 (448), 10 C.P.L.R. 10 (11), 12 C.P.L.R. 96 (98).]

JUDGMENT.

[3] STUART, C. J.—The two principal questions raised in this appeal are (i) what is the nature of the instrument on which the plaintiffs sue to recover? and (ii) does it require registration in order to be received in evidence and enforced against the property mentioned in it?

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(1) H.C.R., N.W.P., 1867, p. 176.

The instrument is as follows:—I, Najib-un-nissa Bibi, &c., do hereby declare that I, the executant, being in need of meeting my own necessity, have, on a promise to give land for sowing indigo in 1284 Fasli, borrowed Rs. 99-8-0, as a *zar-i-peshgi* advance, from Babu Basant Lal and Babu Ganga Prasad Singh, proprietors of the godown at Bisauli in pargana Nizamabad: that I promise and write that I shall get first class sugarcane and barley producing 24 bighas of land in mauza Bhurra Makbulpur, pargana Nizamabad, as selected by the karindas of the said godown, measured by the large chain consisting of three Ilahi yards, *i.e.*, 20 biswas, according to Mr. Duncan's pole or *latha* as used at the said godown, at the end of the month of Chait 1283 Fasli: that the said agents of the godown are to irrigate the land mentioned above from pucka and kutcha wells, canal, lake, and ponds, in any way they think proper, and raise indigo: that they are to lay out their own money for the purpose of beating up the indigo leaves, at the time of beating up: that after setting off the rent of the said land at Rs. 4 per bigha, together with the patwari's charges against the *zar-i-peshgi*, both principal and interest, whatever surplus will be found due to me I shall recover from the proprietors of the said godown: that the proprietors of the said godown are to relinquish the land sown with indigo at the end of Bhadon, 1284 Falsi, after cutting the indigo stumps; that we shall then settle the land used for planting indigo with any tenant we like: that if we (God forbid) fail to give the whole land, or interfere with the sowing of indigo seed or irrigation thereof, or should any one else interfere or turn up the indigo (seed), the proprietors of the godown shall have the power to recover damages for loss, according to the practice of the godown, at Rs. 40 per bigha (regarding the deficiency in the quantity of land or on account of the land in respect of which over-turning or ejection may take place or irrigation be interrupted) together with the principal *zar-i-peshgi* amount [4] from me, the executant: that if I fail to pay, the proprietors of the godown are at liberty to recover from my person and property; that until the fulfilment of the conditions of the agreement we hypothecate our four-anna right and property in mauza Bhurra Makbulpur, agreeing not to transfer it in any way, and that should we do so, it would be void."

I am clearly of opinion that this instrument is not a mere lease but an instrument in the nature of a usufructuary mortgage. For let us observe its terms. On the recital that Najib-un-nissa Bibi, the party making it, for herself and her minor sons and daughters, was "in need of meeting my own necessity," it stipulates that she shall receive a *zar-i-peshgi* advance of Rs. 99-8-0 from the parties in whose favour the instrument is granted, and in consideration of that advance she promises to lease to the plaintiffs 24 bighas of land at a rent of Rs. 4 per bigha for a period commencing from Chait 1283 to Bhadon 1284 (*i.e.*, for about 17 months), the land to be selected by the defendant; and it goes on to provide "that the proprietors of the godown are to relinquish the land sown with indigo crop at the end of Bhadon 1284 Fasli, after cutting the indigo stumps, that we shall then settle the land used for planting indigo with any tenant we like," and that should she fail in performance of her part of the contract she should pay damages at the rate of Rs. 40 per bigha together with the *zar-i-peshgi* advance, and if she should fail to pay these damages and the advance, the parties with whom she contracts should be at liberty to recover from her person and property; and it then expressly provides "that until the fulfilment of the conditions of the agreement, we hypothecate our four-anna right and property in mauza Bhurra Makbulpur, agreeing not to transfer it in any way, and that should we do so, it would be void." Such an instru-

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ment is, in my opinion, essentially a usufructuary mortgage, and I observe that Mr. Macpherson in his work on the Law of Mortgages in Bengal and the North-Western Provinces, 5th Ed., p. 8, so describes it. He there says: "*Zar-i-peshgi* leases, or leases granted on a sum of money being advanced, are on the same footing as pure usufructuary mortgages, and are dealt with as such"; and in support of this opinion he refers to numerous [5] authorities; and the learned author adds: "but this is only when there is a power of redemption reserved to the lessor either expressly or impliedly." In the present case we have not only an express hypothecation and for a distinct term, but the power to redeem is clearly implied, not only from that term itself, but from the proviso "that the proprietors of the godown are to relinquish the land together with indigo crop at the end of Bhadon 1284 Fasli, after cutting the indigo stumps, that we shall then settle the land used for planting indigo with any tenant we like."

Being then an instrument of this nature the next question is, whether it requires registration in order to be put in force against the property hypothecated by it? I am clearly of opinion that it does not require registration. The registration law to be considered in such a case is that provided by Act VIII of 1871, and the document in the present case clearly falls within the instrument mentioned in sub-section 1 of S. 18 of that Act as an instrument of value less than Rs. 100 in respect of immoveable property. It was suggested at the hearing that the question of the registration of such an instrument as this came within the principle of several rulings of this Court by which it appears to have been held that, in estimating the value to be considered in such cases, the interest agreed to be paid should be taken into account, and a judgment of my own, sitting with Turner, J., was referred to as showing this—*Darshan Singh* v. *Hanwanta* (1). In that case the bond which was unregistered was for a sum of Rs. 99 together with interest at 2 per cent. per mensem, and for that debt the defendants hypothecated certain property. In our judgment, which was delivered by Turner, J., and concurred in by me, it is stated that the bond "secured the re-payment of Rs. 99 *plus* Rs. 6 the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered, we cannot act upon it." I have again looked at the bond in that case, and I observe it stipulates for the re-payment of the Rs. 99 with interest thereon at the rate of two per cent., "payment to be made in Sambat 1928." It would appear to have been considered by us that this absolutely and beyond the control [6] of the parties postponed payment till that date, and if so undoubtedly the amount was over Rs. 100 and the bond required registration, and our judgment does not fall within the rulings of this Court to which I have referred. It may possibly be that we were mistaken in reading the bond as we did, and that the condition as to payment in Jaith, Sambat 1928, was introduced merely for the convenience of the lender of the money who might then demand it, but possibly there was nothing to prevent the borrower paying up the Rs. 99, if he had the money, almost immediately or very soon after the execution of the bond, so as to make the debt less than Rs. 100, and that would have been the true value for the purposes of registration. But I suppose all that was considered at the time of our judgment, and that we were well advised as to the facts when we stated that Rs. 99 *plus* Rs. 6 for interest "was the least sum that could have been recovered under the instrument." But if it were otherwise and the bond simply acknowledged a debt of Rs. 99 which could have been re-paid

(1) 1 A. 274.

with interest, no matter how soon, then I am inclined to think our judgment was wrong and that the only certain criterion of value for registration is the principal sum. In the present case our attention was directed to rulings of certain of the other High Courts laying down this principle, and particularly one by the High Court of Bombay (1), where it was decided that for the purpose of registration the principal sum alone was to be looked at. It appears unnecessary to consider such conflicting rulings in the present case, although I may remark that I have received a very strong impression that the Bombay Courts are right and our course of decision to the contrary has been mistaken, and so soon as the question is again raised here I hope it may be referred to the Full Bench for serious and deliberate consideration. In the present case, however, we need not occupy ourselves with any such discussion, as the value relating to the immoveable property is simply Rs. 99-8-0 without any stipulation as to interest or any other payment by which the principal sum may be augmented; the damages stipulated for depending on a contingency which may or may not happen and respecting which nothing can be anticipated at the time of registration. The decree of the lower appellate Court must therefore be modified so as to **[7]** allow the plaintiff to recover the Rs. 99-8-0 from the hypothecated property, the decree of the lower appellate Court in other respects remaining good.

OLDFIELD, J.--It appears that Najib-un-nissa Bibi for self and as guardian of her minor children executed a deed called a "*sattah*," dated 15th March, 1876, in favour of the plaintiffs, by which she covenanted to lease to them certain lands, and she at the same time hypothecated to them by the said "*sattah*" a four-anna share in mauza Bhurra Makbulpur for the re-payment of a sum of Rs. 99-8-0, advanced to her as a loan, and for damages payable by her in the event of her failure to fulfil the conditions of the contract. A 5½ annas share including the hypothecated four-anna share was subsequently sold by one of the sons to Tapeshri Rai and Mahesh Rai and Ram Lal, the two latter being represented in this suit by Kunjan Singh. Tapeshri Rai bought 3½ annas and obtained a mortgage on the remaining two-annas share and the others bought a two-annas share. The plaintiffs now bring this suit against the vendors, purchasers, and mortgagee, to recover Rs. 1,059-6-0 by sale of the hypothecated four-annas share, the sum they claim being the sum they advanced and the damages to which the vendors became liable for failure to fulfil the terms of the "*sattah*," and for which amount the share was hypothecated, and they base their claim on the "*sattah*." The plaintiffs and executants of the "*sattah*" entered into a compromise; Kunjan Singh, defendant-purchaser, confessed judgment; and Tapeshri Rai, who it will be seen is interested in the whole four-annas share hypothecated in the "*sattah*," as out of 5½ annas which belonged to the executants he purchased 3½ and holds a mortgage on the remaining 2 annas, disputed the claim on the ground, *inter alia*, that the claim to enforce the hypothecation of four annas under the "*sattah*" necessarily failed, inasmuch as that instrument should have been registered, as it created a lien over the property for more than Rs. 100, and being unregistered was inadmissible in evidence. The first Court decreed the claim, exempting two of the children of Najib-un-nissa. Tapeshri Rai appealed to the Judge and raised the same objection as to the registration, and the Judge held that the objection was valid, and he set aside so much of the **[8]** decree as enforced the hypothecation under the *sattah* against the property.

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(1) 2 B. 353.

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APPELLATE CIVIL.

3 A. 1.

The plaintiffs have preferred a second appeal making Tapeshri Rai alone respondent, and they urge that the instrument does not require registration as it does not create any interest in immoveable property of the value of Rs. 100 and upwards, and further that the Judge could not modify the decree in respect of defendants who did not appeal; and there is an objection as to costs.

Looking at the instrument in question, which is called a "*sattah*," I find that by its first clause the executant declares that she has taken a loan of Rs. 99-8-0 from plaintiffs on the promise that she shall lease the land for farming indigo for the season of 1284 Fasli, and she covenants to have measured, and to put plaintiffs in possession, in Chait 1283 Fasli, of 24 bighas of land to be selected by the plaintiff's agent, to be held by them on lease from Chait 1283 to Bhadon 1284 at a rent of Rs. 4 per bigha, and it is stipulated she shall receive the surplus rent after deducting the amount of the loan with interest.

The executant binds herself to pay the plaintiffs damages at a certain sum per bigha for loss sustained by failure on her part to fulfil the conditions of the agreement, and she hypothecates a four-anna share in mauza Bhurra Makbulpur as security for the re-payment of the sum advanced and the damages she may become liable for.

I am unable to put quite the same construction on this document that the Chief Justice does. The first portion of the instrument appears to me to be a simple lease or agreement to lease and not to a "*zar-i-peshgi*" lease, or lease granted on a sum of money being advanced of the nature of a usufructuary mortgage. It is true that such leases often are on the same footing as pure usufructuary mortgages, but it will be seen from Macpherson on Mortgages, 5th Ed., p. 9, that "this is only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be one in the nature of a mortgage."

[9] I find no such indication here. The land was leased for a fixed period at the end of which the lease terminated: provision was made for the recovery of the whole advance out of the rent payable to the lessor by the lessee and the land was in no way mortgaged as security for the re-payment of the sum advanced. I am not called on, looking to the pleadings, to say whether this instrument should have been registered as a lease.

The last portion of the instrument, however, undoubtedly effects an hypothecation of a four-annas share of the mauza, and the only question which is raised in this appeal for our decision under the Registration Law is whether this portion of the instrument creates a mortgage to the value of Rs. 100 and registration was in consequence compulsory under S. 17 of the Act of 1871. I think not: for the only certain sum secured by the hypothecation is Rs. 99-8-0, and the instrument cannot be held in the terms of the law to purport or operate to create any right, title, or interest of greater value than that sum.

The particular objection taken to the inadmissibility of the instrument in evidence with which we have to deal fails, and so far the first ground of appeal is valid, but the instrument cannot be used to enforce a lien to any greater extent than Rs. 99-8-0 against the property in suit.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

GANGA BISHESHAR (*Defendant*) *v.* PIRTHI PAL (*Plaintiff*).

[19th January 1880.]

2 A. 635 = 5 Ind. Jur. 212.

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APPELLATE CIVIL.

2 A. 635 = 5 Ind. Jur. 212.

Hindu law—Father's power to alienate ancestral property.

An alienation, made by a Hindu father, of joint ancestral property, which is not made with the consent of his son or for any purpose allowed by Hindu law, can be set aside, at the suit of his son, not only to the extent of the son's share, but altogether.

[F., 16 M. 84 (85), 4 Bom.L.R. 883 (890) ; **R.**, 29 B. 51 (54).**]**

Pirthi Pal, the son of Debi Prasad, sued in July, 1878, his father and the defendant Ganga Bisheshar, the father-in-law of his sister, for the cancellation of a deed of gift of certain ancestral property, executed by his father, on 25—4—1872 (two years after his sister's marriage) in favour of the latter, on the ground that it was contrary to Hindu law.

The Court of first instance determined that the plaintiff had not consented to the gift, observing as follows :—" The consent of the plaintiff has not been proved in any way : had he consented he would have been made to affix his signature to the deed of gift ; no documentary evidence is forthcoming to establish his consent." It further determined that the deed of gift should be cancelled altogether. The lower appellate Court concurring in the opinion of the Court of first instance, observed :—" I do not consider it is proved that the deed was executed with the consent and admission of the plaintiff ; it was so necessary a point to legalise the father's action in this particular, that if the son. the plaintiff, had been a consenting party, it is scarcely credible that this should not have been clearly shown at the time by some entry in the body of the deed or by making the son a witness to the deed : this is the finding of the lower Court, and I concur in it : I quite acknowledge that the oral testimony in this point is decidedly better for the defendant, appellant, than for the plaintiff, respondent, but I cannot credit it sufficiently against strong probabilities and the absence of all documentary evidence, nor can I accept the copy of a deposition of Pirthi Pal, dated 24th July, 1874, as sufficient to prove his knowledge and acquiescence : it is too roundabout a story, and even if allowed that the plaintiff did know at that time, I cannot admit that by the law-texts quoted, he can be held to have ratified the act and to be barred from bringing this suit : the first quotation is from Tagore Law Lectures, 1871, p. 7:—' He can interdict acts of waste, but if he does not do so and is cognisant of the transaction, and specially if he derives any benefit from it, he will be held to have impliedly consented to it.'—Well, he most certainly did not derive any benefit, and the force of the passage, I take it, turns upon that, as does also the quotation in the case of *Gopal Narain Mozoomdar* v. *Muddomutty Guptee* (1)—' of which he is aware and of which he has had the benefit.' The appellant making so great a point of the son's consent and admission virtually acknowledges that without such consent and admission the act of the father is illegal, and the quotations and precedents,—Tagore Law Lectures, 1871, p. 12, ' As early as 1824, the question, &c' : Woodman's Digest

(1) 14 B.L.R. 32.

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of Bengal Law Reports, p. 284, 16 : Vyavastha Chandrika, Vol. i, pp. 35 and 36, S. 31—put forward by the respondent are, I think, conclusive and definitive, this being undeniable joint undivided property : but the appellant does deny it or attempts to throw doubt on the applicability of the above quotations and precedents by quoting the cases—*Venkataramayyan* v. *Venkatasubramania Dikshatar* (1) and *Deendyal Lal* v. *Jugdeep Narain Singh* (2). But these are special cases relating to forcible sales not to free-will transactions, and in the heading of the latter is this—'*Quære.*—Whether, under the law of the Mitakshara, in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid'? I hold these precedents as irrelevant and the latter telling rather against than for the appellant who put it forward."

The defendant preferred an appeal to the High Court.

JUDGMENT.

[637] SPANKIE, J.—The appellant before us was the appellant before the Judge, and he urged, first, that the deed impeached had been executed with the consent and admission of the plaintiff-respondent, who had remained silent from 1872 to 1878, having thus ratified his father's act; secondly, that the plaintiff could not sue under any circumstances to set aside the gift save with respect to his own share, *viz.*, two annas and two pies in the property in suit. The Subordinate Judge held that there was no proof of consent on the part of the plaintiff and no sufficient evidence of acquiescence in what was done by the father. He also appears to hold that the plaintiff could sue to set aside the deed altogether, and not only in regard to his own share. We must not lose sight of these objections which the Court below had to determine. Before us the first plea goes beyond the objections urged before the lower appellate Court and contends that, as the transfer was not made for any illegal or immoral purposes, the suit was not maintainable. The other pleas go to the plea of consent and acquiescence and **[638]** that of the limitation of plaintiff's right to sue to the extent of his own share only.

With respect to the plea of consent and acquiescence, I do not think that we can interfere with the Judge's finding. The admission of the Judge that the evidence on this point on the part of appellant is preferable to that on the part of defendant does not extend beyond the parol evidence. He assigns reasons for not crediting this evidence, and on the entire evidence before him he arrives at the same conclusion at which the first Court had arrived. The finding therefore is not one with which we could interfere on this appeal. I understand the finding of both the lower Courts to be that the transfer was not made for any necessary purpose allowed by the Hindu law. The deed of gift appears to have been made by the father in performance of a promise to give a dowry to his daughter. But I am not aware that the performance of such a promise can be regarded as a lawful purpose justifying alienation under the Hindu law. It was not necessary for the support of the daughter, it was not for any religious or pious work, nor was it a pressing necessity. Daughters must be maintained until their marriage and the expenses of their marriage must be paid. But in this case the gift was not made at the time of the marriage. It was not executed until two years after the marriage. There is, I think, force in the Subordinate Judge's observations that the great stress laid upon the alleged consent, acquiescence, and aid of the plaintiff in effecting

(1) 1 M. 358.

(2) 3 C. 198.

the transfer, is a circumstance going to show that without such consent the transfer was illegal. The first plea, upon the Subordinate Judge's finding, in my opinion, fails.

I have already given my opinion regarding the second plea. As to the third, the property being admittedly joint and undivided, and the gift not having been made with the consent of the plaintiff, and not being for any purpose allowed by the Hindu law, the plaintiff was at liberty to set it aside altogether; and in arriving to this conclusion the lower appellate Court does not appear to have misunderstood any of the precedents cited before him. I would dismiss the appeal and affirm the judgment with costs.

PEARSON, J.—I concur.

1880 JAN. 19. — APPELLATE CIVIL. — 2 A. 635 = 5 Ind. Jur. 212.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

1880 JAN. 19. — APPELLATE CIVIL.

MATHURA PRASAD (*Plaintiff*) *v.* DURJAN SINGH AND ANOTHER (*Defendants*). [19th January 1880.]

2 A. 639 = 5 Ind. Jur. 214.

Bond for money—Compound interest—Penalty—Interest post diem.

Where a bond for money stipulates for payment of interest at Rs. 1-12-0 per cent. per mensem, payable half-yearly, and, in default, for payment of compound interest in future, the stipulation for compound interest is not a penal one; and the bond contains a stipulation to pay *post diem* interest at the stipulated rate; and, even without it, the obligee would be entitled, after the due date, to interest at the same rate, which is not unreasonable.

[R., 1 N.L.R. 9 (12).]

2 A. 639 = 5 Ind. Jur. 214.

JUDGMENT.

[640] SPANKIE, J.—The first condition of the deed was that the money borrowed should be re-paid with interest at the rate of Re. 1-12-0 per cent. per mensem on Katik Sudi Puran Mashi, Sambat 1930. The next condition is that for the further satisfaction of the creditor the debtor hypothecates certain property until re-payment of the loan, promising not to alienate the same in any form or shape. The third condition is that the debtor will pay interest every six months, and if he fails to do so, he will pay compound interest in future. Then comes the fourth condition that if he fails to pay the loan with interest at the stipulated time, the creditor shall be at liberty to realise the money from the debtor personally and from his property in the best way he can. The case appears to me to be very similar to that of *Baldeo Pandey* v. *Gokal* (1) to which I was a party. If the debtor was unable to re-pay the money at the stipulated time, the creditor would allow it to remain out with the debtor on the understanding that the property hypothecated remained hypothecated for principal and interest until re-payment. The stipulation regarding the payment, not the rate, of interest is perhaps rather a declaration as to the mode of payment than a condition. But there is the condition in case of failure "to pay compound interest for the future," that is to say, until re-payment. I fail to perceive on what principle it should be assumed that the creditor would allow his money, payable

(1) 1 A. 603.

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at a particular date, to remain unpaid, but would content himself with less interest than that at which he originally lent the money. I hold that the deed [641] contains a contract for the payment of interest after due date at the rate of Re. 1-12-0 which was payable before due date, and that on any default compound interest might be charged. If I did not hold this view, I should then be of opinion that the plaintiff was entitled to the interest claimed, as there does not seem to be anything unreasonable in the rate agreed upon as interest for the money lent or in the arrangement provided in case of default.

2 A. 639 = 5 Ind. Jur. 214.

The Subordinate Judge has found that the covenant to pay compound interest must be regarded as a penal clause in the deed. I do not think that it is so, and there is nothing in the law which forbids a decree for such interest when there has been an agreement to pay it. I would modify the judgment and allow compound interest which has been disallowed by the Subordinate Judge, thus decreeing the appeal with costs.

OLDFIELD, J.—I concur in the proposed order.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

1880
JAN. 19.
APPEL-LATE CIVIL.

NAND RAM (*Defendant*) *v.* RAM PRASAD (*Plaintiff*).

[19th January 1880.]

2 A. 641 = 5 Ind. Jur. 261.

1. *Suit for money on account stated—Limitation Act, 1871, Sch. II, Art. 62.*

Where, on a certain day, the book containing the accounts of two parties is examined, and a balance is struck in favour of one of them, and orally approved and admitted by the other, a suit, brought for such balance, "on the basis of the account book" is a suit on accounts stated within the meaning of the Art. 62, Sch. II of the Limitation Act, 1871, and would be within time, if it is within three years from the date on which the balance was struck and admitted.

[Not F., 23 A. 502 (504) = 21 A.W.N. 150.]

2. *Entry of balance due not signed by debtor—Stamp Act XVIII of 1869, Sch. II, No. 5.*

An entry of the balance struck in the creditor's account, which is not signed by the debtor, is not a note or memorandum of the kind mentioned in No. 5, Sch. II, of the Stamp Act, 1869.

JUDGMENT.

[642] STRAIGHT, J.—This was a suit brought by the plaintiff, respondent, to recover the sum of Rs. 4,765, principal and interest, on the basis of an account-book. The plaintiff carries on business at Cawnpore under the style of Nand Ram and Babu Ram, while the defendants trade at Shikohabad as Nand Ram and Golab Chand. As far back as the year 1869 there were dealings between the plaintiff and defendants, the latter forwarding goods for sale to Cawnpore, drawing on the plaintiff against such goods, and occasionally making purchases through him for the purposes of their business at Shikohabad. On the 9th of October, 1875, Mohan Lal, one of the defendants, was at Cawnpore, and upon that day the accounts between the two firms were gone into and a balance was struck, the amount ascertained as being due from the defendants to the plaintiff being Rs. 4,198-4-9. Upon a promise of Mohan Lal to pay Rs. 3,598-4-9 of this amount within two weeks the plaintiff undertook to forego the other Rs. 600, which were, however, to be recoverable, if the debt was not paid within the time specified. The Rs. 3,598-4-9 were not

paid according to promise, and ultimately upon the 2nd April, 1877, the present suit was brought. For the purposes of this judgment it is sufficient shortly to say that the pleas of the defendant Nand Ram were to the effect, that the claim was barred by limitation, that Mohan Lal had no authority to bind his firm at the adjustment of accounts; and in this and the lower appellate Court the further ground was taken, that the entry in the plaintiff's books of the balance struck was in the nature of a note or memorandum of the character contemplated by No. 5, Sch. ii, Act XVIII of 1869, and that not being stamped it was inadmissible in evidence to take the claim out of limitation. Further, that as such a note or memorandum, being liable to only a one anna stamp, and not having been stamped at the time of execution, it was useless according to the provisions of S. 28 of the Stamp Act of 1869. The first Court decreed the plaintiff's claim and that decision was upheld by the Judge.

[643] It has been found as a fact that Mohan Lal had full authority on the 9th of October, 1875, to act on behalf of the defendant's firm in the adjustment of the accounts, and the only points to be considered by us in special appeal appear to be, first, Is the plaintiff's claim barred by limitation? secondly, Is the entry in the books of the plaintiff, striking the balance, one that requires a stamp, as provided by No. 5, Sch. ii of the Stamp Act of 1869?

The matter was very fully argued before us on the part of the appellants, but the contentions of their learned pleader were based upon a misconception of the nature of the claim. The form of action "on accounts stated" is a perfectly well-understood one, and the use of the term "on account-book" in the present plaint is only another way of describing a suit of such a description. It must be taken as proved that upon the 9th October, 1875, the accounts of the transactions between the plaintiff and the defendants were submitted to Mohan Lal, and that the items were checked and the balance struck was approved by him upon that date. In effect it comes to this, that upon such day the sum of Rs. 4,198-4-9 was found to be due from the defendants to the plaintiff on accounts stated between them. Consequently, I am of opinion that the form of the plaintiff's present claim properly falls within Cl. 62 of the second schedule of Act IX of 1871; that it was competent for the plaintiff to bring his suit within three years of that date for the total balance struck; and that having instituted the present proceedings on the 2nd April, 1877 he is within time.

As to the second point taken on behalf of the appellants, I do not think that the entry in the ledger of the plaintiff stating the balance on the debit side of the defendants' account, which was approved and admitted by Mohan Lal, is a note or memorandum of the kind mentioned in No. 5, Sch. ii of the Stamp Act of 1869. As I intimated at the time of the hearing, I think that the writing therein contemplated is intended to be signed by the person to be charged with it, admitting that an account due to him has been balanced, or that a debt payable by him is due. Such entry as we have in the present case is no evidence of the admission of liability, but it is evidence of the debt being due and of the **[644]** account having been stated. This latter fact being proved it was competent for the lower Courts to accept Mohan Lal's acknowledgment, oral though it be, and they would appear most properly to have found the liability of the defendants established. I would dismiss the appeal with costs.

STUART, C. J.—I entirely approve and concur in my honourable and learned colleague's examination of this case. It is quite clear that the

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2 A. 641 = 5 Ind. Jur. 261.

three years' limitation had not run and that the suit was within time, and that being so, perhaps the question respecting the admissibility of the note or memorandum which was argued to fall within the terms of No. 5, Sch. ii, Act XVIII of 1869, is not very material. But I may observe that I agree with Mr. Justice Straight that this is not such a note or memorandum, and that to be liable to stamp-duty it ought to be signed or otherwise proved as a note or memorandum separate and distinct in itself, and not as here, as a mere summing up in the way of a continued account without any special acknowledgment. The appeal is dismissed with costs.

CRIMINAL JURISDICTION.

PRESENT :

Mr. Justice Straight.

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JAN. 19.
CRIMINAL JURISDICTION.
2 A. 644 = 5 Ind. Jur. 262.

EMPRESS OF INDIA *v.* AJUDHIA. [19th January 1880].

2 A. 644 = 5 Ind. Jur. 262.

Crim. Pro. Code, 1872, Ss. 314, 452, 454, 455—Trial for more offences than one—Conviction—Penal Code, S. 71.

Where, in the course of one and the same transaction, an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although, for purposes of trial, it may be convenient to vary the form of charge, and to designate not only the principal but also the subsidiary crimes alleged to have been committed, yet in the interest of simplicity and convenience, it is best to concentrate the conviction and sentence on the gravest offence proved.

Such a course was adopted in a case where the accused was charged under Ss. 380, 457, I.P.C., with one and the same offence, and was sentenced to three years' rigorous imprisonment on the charge under S. 457, I.P.C., and was acquitted of the offence under S. 380.

[**F.**, L.B.R. (1872—1892), 390, 8 C.P.L.R. 7 (8) (Cr.) : **R.**, 10 A. 58 (66), 10 A. 146.]

JUDGMENT.

[645] STRAIGHT, J.—I must accept the findings of fact. The accused within a very short period of the theft was in possession of the stolen property, and I cannot say the Magistrate was wrong or that the evidence was insufficient in point of law to justify him in convicting. A question has been raised before me on the part of the applicant that his conviction on Ss. 380 and 457 of the Penal Code for one and the same offence is illegal, and that he has been improperly sentenced to two distinct and excessive sentences. Although I am not disposed to hold at the present moment that this contention is sound to the full extent urged, yet I think that the spirit of the Criminal Procedure Code, Ss. 314 and 452, 454 and 455, taken with S. 71 of the Penal Code, as well as convenience of practice, are best consulted by a different course being pursued to that adopted in the present case. It is true that the facts disclosed are consistent both with a charge of "theft in a dwelling house" under S. 380 and to one of "lurking house-trespass and house-breaking by night with intent to commit theft" under S. 457, but the latter is the more serious and aggravated form of crime involving all the elements of the former, and if the proof is sufficient to justify a conviction, it should in my judgment be passed and the punishment inflicted **[646]** for the graver offence of the two of which the accused is found

to be guilty. It is a common practice in England in framing indictments to vary the description of the crime in several counts, *e.g.*, a man is charged with wounding with intent to murder, to do grievous bodily harm, to commit a felony, or to resist or prevent his lawful apprehension and detainer, but the conviction would only be recorded on one of the counts and of course upon that for the most serious offence proved, which would dispose of or include all those subordinate and negative the others superior to it. Equally the sentence would only be passed upon the one count, that substantially representing and containing within its four corners the real offence committed, as to the more or less aggravated character of which the amount of punishment would have to be calculated. Where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved. This I think should have been done in the present case, and I accordingly direct that the following amendment be made in the record. The applicant, Ajudhia, is convicted on S. 457 of the Penal Code of "house-breaking by night in order to commit theft," and is ordered to be rigorously imprisoned for the period of three years from the 21st March, 1879. For formal purposes I order that judgment of acquittal be entered upon the charge under S. 380 of the Indian Penal Code.

1880 JAN. 19. — CRIMINAL JURISDICTION. — 2 A. 644=5 Ind. Jur. 262.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Straight.

1880 JAN. 19. — APPELLATE CRIMINAL. — 2 A. 646=5 Ind. Jur. 263.

EMPRESS OF INDIA *v.* MULU. [19th January 1880.]

2 A. 646=5 Ind. Jur. 263.

1. *Crim. Pro. Code, 1872, S. 249—Scope.*

S. 249 is intended to provide for the contingency that may arise, when a witness, who is produced before the Court of Sessions, holds back information and evidence and tells a different story to that which he gave in the preliminary enquiry before the Magistrate.

2. *Evidence Act, S. 33—Sessions trial—Evidence given at preliminary enquiry, admissibility of.*

It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with, and his evidence given in the preliminary enquiry referred to.

[F., 1 A.W.N. 38.]

3. *Evidence Act, S. 30—Statement by co-accused.*

The statement by an accused, being jointly tried with others, should not be taken into consideration against such other persons, if the person making the statement entirely deprecates any guilty knowledge and seeks to clear himself at the expense of his co-prisoners.

[R., L.B.R. (1893—1900), 70, 71.]

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APPELLATE CRIMINAL.

2 A. 646 = 5 Ind. Jur. 263.

JUDGMENT.

[647] STRAIGHT, J.—I had at one time the intention of disposing of the case in its present condition, but upon carefully going over it I feel that to do so would be to countenance an irregularity of procedure that ought not to be passed over. I refer to the reading of the deposition of Ganga Prasad (1) in the Sessions Court to prove the loss and identity of the articles found in the possession of the accused. It was absolutely inadmissible under S. 249 of the Criminal Procedure Code, and there is no evidence upon the record, nor do I believe was there any taken, to permit the application of S. 33 of the Evidence Act. As to S. 249, that has no applicability to a case like the present, and is intended to provide for the contingency, [648] that may arise, when a witness, who is *produced* before the Court of Session holds back information and evidence and tells a different story to that which he gave in the preliminary inquiry before the Magistrate. With regard to S. 33 of the Evidence Act it is true that it makes a statement "given by a witness in a judicial proceeding relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states," in the following emergencies: (i) When the witness is dead: (ii) When he cannot be found: (iii) When he is incapable of giving evidence: (iv) When he is kept out of the way by the adverse party: (v) When his presence cannot be obtained without an amount of delay or expense which under the circumstances the Court considers unreasonable. But in my opinion it was intended that the provisions of the section as to emergency (v) were only to be sparingly applied, and certainly not in a case like the present, where the witness was alive and his evidence reasonably procurable. Assuming, however, that there were reasons why the Court of Session thought fit to dispense with Ganga Prasad's personal attendance, and circumstances were disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reasons and to prove such circumstances should have been formally and regularly taken and recorded. It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with, and there is an entire absence, as far as I can see in this case, of anything to establish those grounds for applying S. 33 of the Evidence Act. The reading of the evidence of Ganga Prasad as given by him in the Magistrate's Court was therefore irregular and improper. I further remark in his judgment that the Sessions Judge has allowed his decision to be influenced by the statement of Deodat, and that under S. 30 of the Evidence Act he has "taken it into consideration" against the two other accused. In this respect I think he was also in error. The account of the transaction given by Deodat is in no sense a confession, on the contrary he deprecates altogether any guilty knowledge, and seeks to clear himself at the expense of his co-prisoners. The case of *Queen* v. *Belat Ali* (2) deals very fully [649] with this point, and I have also myself had at some little length to discuss it in the case of *Empress* v. *Ganraj* (3). Therefore the statement of Deodat should have had no weight against Mulu or Khilla (4).

Much as I regret to have to do so I must send this case back for further inquiry before the Sessions Judge without the assessors, such inquiry to be conducted in the presence of the three accused who are to be afforded every opportunity for cross-examination, and the further proof is to be

(1) the owner of the property. (2) 10 B.L.R, 453. (3) 2 A. 444.

(4) Mulu, Deodat and Khilla, the persons committed for trial before the Court of Sessions charged with dishonestly receiving stolen property in the commission of *dakaiti*.

directed to establish the loss of the several articles and their identity by Ganga Prasad. In addition to this I desire fuller evidence of what was said by Mulu and Khilla, each individually, as to the property found in the well both before and at the time of its being found. whether both or which of them went down the well, and what the date was on which Mulu gave any intimation that he could restore some of the property. When this evidence has been taken it must be returned certified to the Court, which will then proceed to dispose of the appeal.

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JAN. 19.
APPELLATE CRIMINAL.
2 A. 646 = 5 Ind. Jur. 263.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Oldfield and Mr. Justice Straight.

1880
JAN. 26.
APPELLATE CIVIL.
2 A. 649.

BACHCHU (*Plaintiff*) *v.* MADAD ALI (*Defendant*).

[26th January 1880.]

2 A. 649.

1. *C.P.C., 1877, S. 210—Decree payable within a fixed time.*

There is no authority, in the C.P.C., for a Court to make an order directing the amount of a decree to be paid within a fixed period.

2. *Suit on hypothecation bond—Applicability of S. 210, C.P.C., 1877.*

It would seem that the provisions of S. 210 of the C.P.C., 1877, are not applicable in a suit for the recovery of a bond-debt by the sale of the hypothecated property.

[F., 7 B. 332 (335).]

JUDGMENT.

[650] OLDFIELD, J.—The defendant borrowed from the plaintiff the sum of Rs. 125 at one per cent. interest per mensem, pledging as security an annuity of Rs. 106-2-0, called "*nankar*" allowance, which the defendant received from the firm of Sadaranji and Jairamji, and the plaintiff has brought this suit to recover the money lent with interest, by enforcement of the lien on the annuity pledged in the bond and against the defendant personally. The Court of first instance decreed the claim, with costs and interest at eight annas per cent. per mensem, but in the decree allowed the defendant a period of two years for payment of the amount decreed. The lower appellate Court affirmed the decree. The plaintiff in second appeal has objected to that part of the decree allowing the defendant the option to pay within two years, and there is no doubt the objection is valid.

The effect of the order of the Court is that the decree-holder is debarred from taking out execution of his decree or having it satisfied till the expiry of two years from date of the decree, and there is **[651]** no authority in the Civil Procedure Code for a Court to make such an order. Under S. 210 in all decrees for the payment of money the Court may for sufficient reason order that the amount shall be paid by instalments, but this section is inapplicable, for the decretal order is not for payment by instalments, and it is doubtful whether the section will apply to a decree of the nature of the decree made in this suit, which is for something more than the payment of money. Moreover, it cannot be held that any sufficient reason is shown in this case for allowing defendant time for payment. We decree the appeal with costs, and modify the decrees of the lower Courts, by cancelling that portion which allows two years within which the amount decreed is to be satisfied.

1880
JAN. 26.

FULL BENCH.

4 A. 248.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

DEO KISHEN AND ANOTHER (*Defendants*) *v.* MAHESHAR SAHAI AND OTHERS (*Plaintiffs*). [26th January 1880.]

4 A. 248.

C.P.C., 1877, S. 561—"The date fixed for the hearing"—Time for filing objections.

In S. 561, C.P.C., the words "the date fixed for the hearing" refer to the date fixed for the hearing under S. 552 of the Code and that alone, and not to any other date to which the hearing may be adjourned. And the objections which a respondent may urge with reference to a decree under appeal, must be filed not less than seven days before such date fixed for the hearing.

[Not F., 11 B. 698 (699).**]**

REFERENCE TO THE FULL BENCH.

"Whether the law requires that the notice of objections referred to in S. 561 of the Civil Procedure Code shall be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties, or seven days before the date on which the first hearing of the case actually comes on?"

JUDGMENT.

[248] The day fixed for the hearing of an appeal is that fixed under S. 552 of Act X of 1877 and that alone. The hearing of the appeal may be adjourned to another day, but the latter is not, in the language of the law, the day fixed for the hearing of the appeal, which is only the day originally fixed for that purpose. In Ss. 555, **[249]** 556 and 557 the day originally fixed for the hearing is plainly and carefully distinguished from any other day to which the hearing may be adjourned. S. 561 requires a respondent to file any objection he may wish to take to a decree which is the subject of an appeal not less than seven days before the day fixed for the hearing of the appeal. The words "the day fixed for the hearing" in S. 561 correspond with the words "the day so fixed" in Ss. 555, 556 and 557, and refer to the day fixed for the hearing under S. 552 of the Code.

No doubt a day to which the hearing has been adjourned is also a day fixed for the hearing: but in the law, as has been pointed out, "the day to which the hearing has been adjourned" is distinguished from "the day fixed for hearing," and cannot be included in the latter expression.

Some appeals may be heard on the day fixed for the hearing. In others the hearing may be once or twice or more frequently adjourned. That some respondents should only have one opportunity of filing objections, and that others should have two or three or more numerous opportunities of so doing, and that the number of these opportunities should depend upon the accidents which prevent a Court from hearing an appeal on the day originally fixed for the hearing or on the days to which the hearing may have been adjourned, is a proposition which does not recommend itself to approval. A fixed and not a variable time within which objections may be filed is what the law may reasonably be understood to have established.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

GANGA PRASAD (*Plaintiff*) *v.* GAJADHAR PRASAD AND OTHERS (*Defendants*). [29th January 1880.]

2 A. 651.

1880
JAN. 29.
APPELLATE CIVIL.
2 A. 651.

1. *Mesne profits—S. 211, C.P.C., 1877.*

In a suit for mesne profits, where the defendants themselves occupied and cultivated the lands in suit, the most reasonable and fitting mode of assessing such profits would be to ascertain and determine what would be a fair rent for the lands, if they had been let to an ordinary tenant and had not been cultivated by the defendants themselves.

2. *Procedure on hearing of appeal—C.P.C., 1877, S. 561.*

Where both the parties appeal from the decree of the Court of first instance, and both their appeals are dismissed, and one of them only appeals to the High Court, the other cannot, in such appeal, take objections, to the decree of the lower appellate Court dismissing his appeal.

[D., 8 B. 368 (370).]

Suit for possession of 37 bighas of land and Rs. 883-13-0 the mesne profits of the same for 1283 and 1284 Fasli, under an agreement for the partition of the plaintiff's share and that of the defendants in a certain mahal, under which partition the land in suit had fallen to the share of the plaintiff. The first Court held that, under the terms of the agreement of partition any land held as sir by the one party was to be surrendered if it fell under the partition to the share of the other party, and gave the plaintiff a decree for the possession of the land claimed; but it dismissed the claim to the mesne profits, observing as follows :—"The Court finds that the evidence as to the produce claimed is not satisfactory: the witnesses are not unanimous in their statements, and are not trustworthy and are also at enmity with the defendants."

On the plaintiff's appeal the lower appellate Court observed as follows :—"The appellant (plaintiff) claims for profits which he would have made had he not been kept out of the land the subject of suit: the lower Court has found that the evidence as to the produce of the land is not satisfactory, and this Court must agree with the lower Court: appellant has assumed the produce of 37 bighas 5 biswas to be eight maunds per bigha, and the value of the *bhusa* to be Rs. 90, and after deducting one maund per bigha for costs of seed, Rs. 93 for costs of cultivation, claims the balance: this account is most unsatisfactory: the Court cannot accept that wheat and barley only were sown, nor can it accept an account which makes the outturn the same of each field: on an area of 37 bighas the crops sown would vary according to the crop and the soil, and the value of the crop according to its amount and kind: the appellant urges that if he is not to obtain a decree for the profits under his estimate he is at all events entitled to the rent recorded against the land: the Court finds that this has been deposited in the Collector's treasury, and remains but to be claimed and taken by appellant: the Court is far from thinking that the rent deposited is a fair equivalent for the use of the land, but it rested with appellant to show what was a fair profit to have been derived from the land, and the Court cannot accept the appellant's account as a fair one, he having failed to show that it is such."

1880

JAN. 29.

APPELLATE CIVIL.

2 A. 651.

The defendants' appeal to the lower appellate Court was dismissed. The plaintiff preferred an appeal to the High Court. The respondents contended that they had acquired a right of occupancy in the land in suit and could not be dispossessed.

ORDER OF REMAND.

[653] Appellant appears to have claimed a larger share of profits than he was entitled to, or at least to have asked for the same outturn from each field, which the Judge rightly regards as an unsatisfactory account of the profits. The defendants furnished no accounts. Mesne profits (*Explanation*, S. 211 of Act X of 1877) mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom. Applying this rule to the particular circumstances of the case in which both parties are shareholders in the estate, and defendants themselves occupied and cultivated the lands in suit, the most reasonable and fitting mode of assessing the amount to which the plaintiff is en-[654]titled would be to ascertain and determine what would be a fair rent for the land, if it had been let to an ordinary tenant and had not been cultivated by the respondents themselves. The rent recorded in the rent-roll is probably that paid by sir-lands, and if so the plaintiff seems to be entitled to the rent which the respondents could have obtained from a tenant, if they had not kept the lands in their own hands. We remand the case to the Judge to enable him to ascertain and determine what the rent should be. On receipt of his finding one week might be allowed for objections, and at the end thereof the appeal as regards appellant will be disposed of.

With regard to the objections put in by the respondents, they cannot be admitted. These objections are in fact an appeal from the decree passed against respondents in this case, on the appeal brought by themselves against the original decree of the first Court. Under S. 561 of Act X of 1877 a respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal. But in the case now before us the appellant lost his appeal, and there was no objection which respondents could have taken by way of appeal to this Court against the decree of the lower appellate Court. They might have appealed from the decree on their own separate case of appeal, but in the particular case before us the decree of the lower appellate Court was one dismissing the appeal of the present appellant. We may add that if the objections by way of appeal in their own case could be received, they would fail as they impugn the finding of the Court in that case on a matter of fact, and there are no legal grounds for a second appeal.

FULL BENCH.

1880

JAN. 31.

FULL BENCH.

2 A. 654 = 5 Ind. Jur. 264.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

REFERENCE BY BOARD OF REVENUE, N.W.P., UNDER ACT I OF 1879.

[31st January 1880.]

2 A. 654 = 5 Ind. Jur. 264.

Agreement with a penal clause—Bond for amount of penalty—Act I of 1879 (Stamp), S. 7 and Sch. I, No. 5 (c).

By the Full Bench, STUART, C.J., *dissenting* :—

An agreement with a penal clause, by which the obligor undertakes, in the event of his failing to fulfil the conditions of the agreement, to pay a certain amount as penalty to the obligee, is chargeable, under S. 7 of the Stamp Act, with the stamp duty leviable on a bond for the amount of such penalty.

Per STUART, C.J.—For the purposes of the Stamp Act, the penal clause in the agreement cannot be considered separately, as constituting a bond, but simply as one of the several subsidiary clauses making up the whole agreement, and the document is only chargeable as an agreement. (Sch. I, No. 5 (*c*)).

[Diss., 8 C. 284 (286) ; **Doubted**, 9 A. 585 (589) **(F.B.).]**

REFERENCE UNDER S. 46 OF ACT I OF 1879.

The terms of an instrument were as follows :—

[655] " Articles of agreement made this—— day of———in the year of our Lord one thousand eight hundred and seventy-nine, between the Collector of Allahabad on behalf of Government of the one part, and Nilcomal Mittra and Charu Chandra Mittra, both of Allahabad, carrying on business under the name and firm of Nilcomal Mittra and Son, and so hereinafter designated, of the other part. Whereas the aforesaid Nilcomal Mittra and Son hereto of the second part, being desirous of obtaining for themselves the monopoly of the right of manufacture and vend of rum and native or country spirits in and for the city and cantonments of Allahabad, and for the manufacture and sale of country spirits according to the farming system in pargana Chail and the Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all of the Allahabad district, for the period of three years certain, commencing from the first day of October, 1879, have applied to the Collector aforesaid for the same, and whereas the said Collector of Allahabad has been authorised by and with the sanction of the Board of Revenue for the North-Western Provinces to grant the same: It is hereby agreed between the said parties hereto as follows :—

" (i) That in consideration of the payment of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and Rs. 1,200 per annum for license fees on rum, and Rs. 3,000 per annum on account of license fees on native spirits, for the city and cantonments of Allahabad, agreed to be paid by the said Nilcomal Mittra and Son unto the Collector of Allahabad aforesaid in the manner hereinafter specified, the said Nilcomal Mittra and Son shall have the **[656]** exclusive right of manufacturing rum, *i.e.*, spirits manufactured according to the English method, and shall have the exclusive right of sale of the rum so manufactured by them and of country spirits manufactured by them after the native method in and for the city and cantonments of Allahabad, the abkari jurisdiction of which extends to a radius of four miles round the official cantonment limits. It is also understood that no shops other than those of the said Nilcomal Mittra and Son

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for sale of country spirits shall exist or be opened, and that no country spirits other than their manufacture shall be permitted to be imported for sale or use within the said area. Also in consideration of Rs. 15,000 agreed to be paid annually in the manner hereinafter specified by the said Nilcomal Mittra and Son to the said Collector of Allahabad on account of the farm of pargana Chail, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said pargana Chail. Also in consideration of Rs. 15,740 agreed to be paid annually in the manner hereinafter to be specified by the said Nilcomal Mittra and Son to the said Collector of Allahabad on account of the farm of the aforesaid Trans-Jumna parganas, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all such farms or monopolies to extend and subsist for a period of three years certain, commencing from the first day of October, 1879. (ii) That the said Nilcomal Mittra and Son of the second part shall not open or cause to be opened any shops for the purposes of the above farms other than those now open and existing, without the previous consent of the said Collector of Allahabad of the first part in writing had and obtained. (iii) That as yearly license fees for the sale of rum and country spirits within the abkari limits of the city and cantonments of Allahabad, as above described, the aforesaid Nilcomal Mittra and Son of the second part shall pay or cause to be paid unto the Collector of Allahabad the sum of Rs. 1,200 and Rs. 3,000, respectively, in all Rs. 4,200. (iv) That besides the aforesaid license fees of Rs. 1,200 and Rs. 3,000 the said Nilcomal Mittra and Son shall pay to the Collector of Allahabad aforesaid a still-head duty on all the rum and country spirits issued to them from the distillery at **[657]** Karailabagh at the rate of Rs. 4 per imperial gallon of rum, and Re. 1 per imperial gallon of country spirits. Provided always that for every year during the aforesaid three years no less quantity than 5,000 gallons of rum shall be drawn out by the said Nilcomal Mittra and Son, so as to yield to Government a minimum sum of Rs. 20,000 per annum on account of still-head duty on rum : and it is hereby distinctly understood by and between the parties to these presents that for no cause, such as bad seasons, dearness of material, labour, or provisions, shall the aforesaid Nilcomal Mittra and Son be excused from paying to the said Collector of Allahabad the said minimum sum of Rs. 20,000 per annum as still-head duty on rum. (v) That besides the license fees and still-head duty aforesaid the said Nilcomal Mittra and Son shall pay to the said Collector of Allabahad, during the said period of three years, the sum of Rs. 1,250 for each month, before the 15th day of the month, on account of the farm of Chail, and Rs. 1,311-10-8 for each month, before the 15th day of the month, for the farm of the Trans-Jumna parganas aforesaid, for the exclusive right of manufacture and vend of country spirits after the farming system in the aforesaid parganas Chail, Khairagarh, Bara, and Arail in the district of Allahabad aforesaid. (vi) That in the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000."

OPINION OF THE BOARD OF REVENUE.

The opinion of the Board as regards the stamp-duty chargeable on this instrument was as follows :

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"The Board considers that the instrument, although it is in the form of a lease is not a 'lease' as defined in S. 3, Cl. (12), of the Stamp Act. It cannot be said to lease immoveable property; nor is it an agricultural lease known as a 'patta,' nor is it a lease of 'tolls.'

"The definition of a 'bond' as given in S. 3, Cl. (4), (*a*), of the Stamp Act appears to cover the main provisions of the document. A bond is defined to be 'any instrument whereby a person obliges himself to pay money to another, on condition that the obligation **[658]** shall be void if a specified act is performed, or is not performed, as the case may be.' By the instrument in question the excise contractor binds himself to pay certain sums annually to the Collector of Allahabad on condition that the obligation shall be void if a specified act be not performed, *viz.*, if the Collector do not make over to him the monopoly of the right of vend of spirituous liquors within certain parts of the Allahabad district. The Board, however, are inclined to think that the concluding words of the definition refer to the obligor of a bond and not to the obligee, and that it is the obligor not the obligee on whom the performance or the non-performance of the 'specified act' is incumbent. If the definition be limited to this construction, it is impossible to class the instrument in question as a 'bond' with reference to its principal provisions.

"There is little doubt, however, that the penal clause in the instrument whereby the contractor binds himself to pay a penalty of Rs. 5,000 on failure to comply with the conditions of the contract is a bond for Rs. 5,000. But the Board believe that such penal clauses have been held to be auxiliary to the main provisions of the contract, and, therefore, do not relate to a 'distinct matter' in the meaning of S. 7 of the Stamp Act. If this view be correct and the instrument be held by the Court to be also a 'bond' in respect to its principal clauses, the duty will be calculated on the amount secured by the latter, and no additional duty will be leviable on account of the subsidiary bond of the penal clause. As the contractor binds himself to pay Rs. 55,940 per annum for three years, the duty will be calculated on a bond for Rs. 1,64,820, and will amount under Sch. i, No. 13, of the Act, to Rs. 825.

"If, however, the main clauses of the instrument do not constitute it a 'bond', it might possibly be held to be a 'conveyance,' as defined by S. 3, Cl. (9), being an instrument by which the right of vend is transferred on sale to the excise contractor. Otherwise it must be classed as an 'agreement not otherwise provided for by the Stamp Act' (Sch. i, No. 5 (*c*)), and as such is only liable to a duty of eight annas. In this case, however, the duty on the bond in the penal clause would exceed the duty chargeable on the instrument in respect to the principal matter treated of, and under S. 7 the higher duty of the two is leviable."

JUDGMENT.

[659] STUART, C. J.—The result of the very anxious consideration I have given to this reference is a conclusion altogether different from that arrived at by my colleagues and by the Board of Revenue. A very careful examination of the Stamp Act I of 1879 has satisfied me that there is nothing in its provisions or its schedules that applies to the penalty of Rs. 5,000 agreed to be paid in the event or events therein expressed, and the legal character of that penalty must be determined solely on legal principle. I agree with the Board that the document is not a lease as defined by the Stamp Act, but a mere agreement or memorandum of an agreement, the proper stamp-duty on which is eight annas, and the several clauses and articles which constitute this agreement constitute the primary

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obligation undertaken by the parties, the Rs. 5,000 being a mere penalty contingent on the non-performance cannot be anticipated or presumed. On the contrary the presumption, according to all recognised legal principle, is that the contract or agreement will be performed, and that the circumstances under which this penalty may be sought to be enforced will never arise. That I say is the legal presumption applicable to this part of the case, the right to recover the penalty may or may not happen and which we are not to assume will happen. That being so, this penalty of Rs. 5,000 does not come into consideration at present as matter for stamp duty. Should the contingency provided against by this penalty occur, it will then be in the power of the Collector to recover it in a proper suit and under an appropriate Court-fee. But at present we have, in my opinion, nothing to do with the penalty, what we have to do with is the true character of the instrument with which, in the manner and to the effect I have pointed out, it is incorporated.

A careful examination of the instrument, which I say is an agreement chargeable with a duty of eight annas, ought I think to lead to this conclusion. It recites that Nilcomal Mittra and Son, being desirous of obtaining from the Government the monopoly of the right of manufacture and sale of English and native spirits for **[660]** the period of three years certain commencing from the 1st day of October, 1879, had applied to the Collector for the privilege, and that the Collector, by and with the sanction of the Board of Revenue, had agreed to grant the monopoly asked for, and in consideration of which monopoly payment shall be made of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and other large payments including payments for license fees are stipulated for; and then comes, as article 6 of the instrument, the condition respecting the penalty, and which is in these terms :—"In the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof, the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000." There can be no doubt about this penalty being a *bona fide* condition of the agreement on the contingency which it contemplates happening, but that it was *that* and nothing more is to my mind very evident, for the clauses that follow include this penalty as among the considerations moving the parties.

Both the Board and my colleagues describe the covenant for a penalty of Rs. 5,000 as a "bond" for that amount within the meaning of the term as given in S. 3, Cl. (4), of the Stamp Act of 1879. That section provides that "unless there is something repugnant in the subject or context 'bond' means any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be." But this definition only applies inversely to the case before us in which, besides, there is no condition of nullity or voidance, the penalty being applied, without discrimination or specification, to the entire contract and the whole of its provisions, and which are exclusively of a pecuniary character, and the violation of which could be adequately measured in damages. It is also to be observed that the penalty in an English bond can never be enforced excepting for the purpose of covering interest and costs. In the case of the penalty now under consideration, it was probably intended to be enforced, and is no doubt capable of being enforced, to cover damages as well as interest and costs, but in either case the penalty **[661]** is not such a unit or entity as that to which a precise stamp-duty can *a priori* be applied.

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From these considerations it results that the adoption of the penalty as the measure of the stamp-duty on this agreement would involve the injustice of applying it indiscriminately and without regard to the nature and extent of the breach. On this subject I find it laid down in Broom's Commentaries on the Common Law of England (1864), p. 618:—"Where, however, parties agree that a specific sum shall be payable by way of *penalty* for breach of contract, our Courts will apply equitable principles in the assessment of damages, not indeed allowing them to exceed the sum thus stipulated, but requiring evidence to be given for the purpose of fixing their precise amount, and enabling the jury to award it accordingly." And as an illustration of the law so laid down the learned author refers to the case of *Kemble* v. *Farren* (1) which appears to be a much stronger case in favour of the principle that I would apply than the present. It was an action of assumpsit for the breach of an engagement by the defendant to perform as an actor at the plaintiff's theatre during several consecutive seasons. "This agreement," continues Mr. Broom, "contained various clauses and stipulations between the parties, *inter alia*, that the defendant should perform, and the plaintiff should pay him so much on every night that the theatre should be open for theatrical performances during the time in question, and that, if either of the parties should neglect or refuse to fulfil the said agreement or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, which sum was declared to be *liquidated and ascertained damages*, and *not a penalty* or in the nature thereof. Notwithstanding, however, this expression of the intention of the parties, the Court of Common Pleas held that the amount specified was to be regarded *as a penalty merely*, and not as liquidated damages, for they observed that, if an agreement contains clauses, some sounding in uncertain damages and others relating to certain pecuniary payments, as happened in the case *sub judice*, and the action is brought for the breach of a clause of an **[662]** uncertain nature, *it would be absurd to construe the sum specified in the agreement as liquidated damages: because, if so, a very large sum might become immediately payable in consequence of the non-payment of a very small one*, such case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of contract." The fairness of the rule so expounded is obvious, and in the present case would, if applied, prevent the injustice of the full penalty being enforced without reference to the nature and extent of the breach of contract. In the case before us the breaches might involve the violation of the whole contract, in which case the full penalty of Rs. 5,000 would be enforceable. In the present case the penalty is to be paid "in the event of *any* breach on the part of the said Nilcomal Mittra in the observation or performance of any of the conditions hereof." But the actual breach might be something comparatively small, and it would therefore be unjust to exact the whole penalty and not such a portion of it as in such a case might be applied.

But this is a state of things which cannot be anticipated at the commencement of a contract, and can therefore afford no measure for a present calculation of stamp-duty.

For these reasons it appears to me impossible to regard this penalty as a bond within the meaning of that term as defined by the Stamp Act I of 1879, but that it ought to be looked at simply as one of several clauses of the entire agreement, and which, should it ever come to be enforced on

(1) 6 Bing. 141.

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the equitable principle I have explained, would involve the levying of a court-fee according to the amount claimed in a suit to be brought for that purpose.

This is my answer to the reference by the Board of Revenue, and I regret it should be given in disagreement with the opinion of my colleagues.

OLDFIELD, J.—As I understand the terms of this instrument it is an instrument by the first five clauses of which it is agreed [663] between the parties to it, namely, Nilcomal Mittra and Son on the one side, and the Collector of Allahabad on the other side, that in consideration of Nilcomal Mittra and Son making certain annual payments to the Collector he shall receive from the Collector the exclusive right of manufacture and sale of certain spirits within certain territorial limits for a period of three years, and conditions are specified in respect of shops to be opened for the sale of the spirits and of the instalments by which the payments are to be made: and by the sixth clause Nilcomal Mittra and Son bind themselves, in the event of any breach on their part in observation or performance of any part of the conditions of the instrument, to pay to the Collector a penalty of Rs. 5,000: and by the eighth clause the Collector covenants, in consideration of the above conditions being duly observed by Nilcomal Mittra and Son, not to take away or withhold the exclusive license to manufacture or sell spirits for three years, or to do anything whereby the performance of the conditions of the agreement by Nilcomal Mittra and Son shall become practically impossible. No part of this instrument except clause six comes within the meaning of a bond as defined in the Stamp Act. I look on the main clauses as only evidence of a contract between contracting parties in respect of the lease or sale of a right of manufacture and vend of spirits, and so far the instrument is subject to stamp-duty as an agreement under Sch. i, No. 5 (*c*). I agree with the Board that the words in the definition of bond in the Act "on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be," refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent. Clause six, however, meets the requirements of the definition of "bond," the obligors therein binding themselves to pay a penalty of Rs. 5,000 on failure by them to comply with the conditions of the contract, and the instrument will be subject to duty accordingly under the provisions of S. 7 of the Act.

PEARSON, J.—I am of the same opinion.

SPANKIE, J.—I also agree.

STRAIGHT, J.—I am of the same opinion.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

1880 FEB. 2. FULL BENCH. 2 A. 682.

CHEDI LAL AND ANOTHER (*Plaintiffs*) *v.* KIRATH CHAND AND OTHERS (*Defendants.*) [2nd February 1880.]

2 A. 682.

1. *Court-fees Act, 1870, S. 17—Distinct subjects.*

A suit for possession of a house, for house-rent up to the date of suit and for future house-rent, embraces "distinct subjects" within the meaning of S. 17 of

the Court-fees Act, 1870. and the plaint and the memorandum of appeal in it are chargeable with the aggregate amount of the fees, to which separate suits for the different causes of action brought separately would be liable.

Per SPANKIE, J.—*Contra*.

[Diss., 8 C. 593 (594) (**F.B.**); **Cons.**, 16 A. 401 (407)=14 A.W.N. 124.**]**

2. *Court-fees Act, S. 28—Document improperly stamped—Power of High Court to levy deficient Court-fees.*

Where a document has been received in the lower Courts without being properly stamped, and the deficiency is detected in the High Court, that Court can, under S. 28 of the Court fees Act, direct that it should be properly stamped.

[R., 12 A. 129 (153,162) (**F.B.**), 29 A. 749 (758) (**F.B.**)=4 A.L.J. 636=A.W.N. (1907), 253.**]**

3. *Court-fees Act, Ss. 11 and 7, Cls. I and II.*

A claim for future rent is governed by S. 11 of the Act and not by Cls. I and II of S. 7. (SPANKIE, J.).

A claim for future profits is governed by S. 7, Cl. 1, and S. 11 of the Act. (OLDFIELD, J.)

[Expl., 15 B. 416 (418); **R.**, 33 C. 1232 (1235), 15 B. 416.**]**

The plaintiffs sued in virtue of a conditional sale which had been foreclosed on 19—5—1875, for (i) possession of the house, valued at Rs. 275; (ii) Rs 72 being compensation in the nature of rent for the use and occupation of the house from 19—5—1875, the date of foreclosure, to the institution of the suit, at the rate of two rupees per mensem; and (iii) similar compensation for the "future" from the institution of the suit to the date on which possession of the house should be delivered to them. They stated that their cause of action arose on 19—5—1875, the date of foreclosure. The Court-fee paid on the plaint was Rs. 26-4-0. The Court of first instance awarded the plaintiffs possession of the house and "future" compensation. The defendants paid on their memorandum of appeal from this decree a court-fee of Rs. 26. The lower appellate Court dismissed the suit. On appeal from this, the taxing officer of the High Court reported that deficient Court-fees had been paid both on the plaint and the memorandum of appeal in the lower appellate Court. That officer stated that the proper fee payable on the plaint was Rs. 44-10-0, and on the memorandum of appeal Rs. 39, computed as follows:—

	Rs.	A.	P.
(i) Claim for possession	21	0	0
(ii) Ditto for house-rent	5	10	0
(iii) Future rent at Rs. 2 per mensem under S. 7, Cl. ii, Court Fees' Act	18	0	0
Total ...	44	10	0

(i) Claim for possession	21	0	0
(ii) Future rent at Rs. 2 per mensem under S. 7, Cl. ii, Court Fees' Act	18	0	0
Total ...	39	0	0

Consequently the case came before the Full Bench together with 2 A. 676.

JUDGMENTS OF THE FULL BENCH.

[684] STUART, C. J.—This case also came before us on the report of the Office. It appears that there is no deficiency of court-fees in this

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Court, but that there is a deficiency to the extent of Rs. 18-6-0 on the part of the plaintiff in the Munsif's Court, and of Rs. 12-12-0 on the part of the defendant in the lower appellate Court.

Pandit Bishambhar Nath for the appellants objected that this Court had no jurisdiction at this stage to entertain the question relating to the deficiency of court-fees reported by the Office, but I am clearly of opinion that S. 28 of the Court Fees' Act gives us full power for that purpose.

On the merits of the question respecting the court-fees to be charged, this case falls within the principle of the decision we have given on the same legal question in First Appeal No. 15 of 1879 (1). According to the principle recognized in that case the report of the Office in this case is clearly right, and the additional court-fees to be paid by both parties is ordered accordingly.

STRAIGHT, J.—I agree in the views and conclusions of the Chief Justice.

SPANKIE, J.—The learned Pandit Bishambhar Nath appears to question the power of this Court to decide that a document found in the record of a case sent up in appeal or on reference, as for revision, to this Court should be properly stamped. With reference to fees in other Courts than the High Courts and Presidency Small Cause Courts, the pleader argues that our power of interference is limited by S. 12, Cl. ii, of the Court Fees' Act. But I would claim full power for the Court's interference, quite outside chapters II and III of the Act. S. 28 provides that no document which ought to bear a stamp under the Act shall be of any validity, until it has been properly stamped. The section deals with the case in which a document through mistake or inadvertence has been received, filed or used in any Court, without being properly stamped. Such a document may be returned at the outset by the presiding Judge of the [685] Court in which it has been so received or filed or used, or if the document has been received, filed or used in a High Court, any Judge of that Court may, if he thinks fit, order that such document may be stamped as he may direct. But the section does not say that the High Court Judge can interfere only when this document has actually been filed in his Court. If the document has been used in the High Court, and the original mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of that Court may direct that it should be properly stamped, always having regard to the fact that it must be a document chargeable under the Court Fees' Act. This construction appears to be quite reasonable and consistent with the concluding provision of the section, "and on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance." In fact, when the insufficiency of the stamp has been detected and when a proper order has been made and carried out, the original mistake or inadvertence and all subsequent consequences of such mistake or inadvertence are cured.

On the other question my opinion in the reference regarding First Appeal No. 15 of 1879, *Mul Chand*, plaintiff (1), would govern this case.

The suit does not appear to be multifarious within the term of S. 17 of the Court Fees' Act. It is one for immoveable property, and a claim for arrears of rent in respect of the property claimed is joined with it under S. 44, *Rule a*, to which S. 45 of the Procedure Code is subject. I

(1) See 2 A. 676, *infra*.

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do not think that the plaint would be chargeable as provided by S. 17 of the Court Fees' Act. The application of clause ii, S. 7 of the Court Fees' Act, seems altogether wrong ; the plaintiff asks for house-rent in future, as he would ask for the mesne profits from the date of decree to the date of possession under the decree. It is not a claim for money in the meaning of Cl. i ; the rate is known, but not the sum that would be actually due when possession was given under the decree. Probably S. 11 of the Court Fees' Act provides for this part of the claim.

[686] OLDFIELD, J.—The suit in my opinion embraces distinct subjects of the nature of those referred to in S. 17, Court Fees' Act. Here the claim for possession of the house and the claim for rent, which in this suit is by way of damages, arise out of different causes of action and might have been made subjects of different suits. So much of the claim as refers to future rent should be charged for Court-fees under Cl. i, S. 7, leviable under the provisions of S. 11 of the Act. The objection is quite untenable that this Court has no power to interfere to order that the documents shall be properly stamped, as full power to that effect is conferred by S. 28, Court Fees' Act.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Straight.

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2 A. 738.

NARAINI KUAR (*Defendant*) *v.* DURJAN KUAR AND OTHERS (*Plaintiffs*).

NARAINI KUAR (*Defendant*) *v.* PIAREY LAL AND OTHERS (*Plaintiffs*).

[2nd February 1880.]

2 A. 733.

Addition of parties—C.P.C., 1877, S. 32.

No party should be added either as plaintiff or defendant in a suit unless he has, in either of such capacities, an identity or community of interest with that party in the litigation on whose side he is to be ranged, in the questions directly arising out of and incident to the original cause of action.

Where, therefore, two persons claiming adversely to one another as heirs of the same person, deceased, filed two suits against the same defendant, and each of them was, on his application, made a defendant in the other suit, *held* that, as the priority of rights of these plaintiffs *inter se* was not in issue in either suit, and the presence of the added defendants was not necessary to effectually and completely adjudicate upon and settle all the questions involved in the suits, such addition of parties was improper. (7 W.R. 202, 8 W.R. 15, 10 W.R. 369=3 B.L.R.A.C. 28, 4 C. 355, *F.*, and *Appl.*).

[R., 8 A. 91 (94), 10 A. 223 (237) (**F.B.**), 118 P.R. 1890, 5 O.C. 94 (95), 2 L.B.R. 246 (250).]

JUDGMENT.

[739] STRAIGHT, J.—These are first appeals from two orders passed by the Subordinate Judge of Bareilly on the 4th of July, 1879. **[740]** In order to make the question of law raised on behalf of the appellant intelligible it is necessary to recapitulate the following facts.

It appears that two suits are pending in the Court of the Subordinate Judge against one Naraini Kuar. In the first of these the plaintiffs are Rani Durjan Kuar, Chandi Din, and Mashuk Mahal Sahiba Begam, and in the second Piarey Lal, Bhairon Prasad, Shib Lall, and Narbada Prasad. The litigation relates to the ancestral property of Chaudhri Basant Ram,

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deceased. The three plaintiffs in case No. 1 sue for possession of the property by right of inheritance,—Rani Durjan Kuar as widow of Basant Ram and step-mother of Chaudhri Naubat Ram, his son, also deceased; Chandi Din as grandson of Basant Ram and sister's son of Naubat Ram; and Mashuk Mahal Sahiba Begam as vendee of a portion of the property in suit from the other two plaintiffs, under a sale deed of the 17th of February, 1879. In case No. 2 the four plaintiffs, alleging themselves to be the nearest heirs of the deceased Naubat Ram, sue for proprietary possession, by cancelment of an order of the 15th August, 1879, declaring Naraini Kuar to be the owner of the property in suit and directing the entry of her name, in that character, in the *khewat*. To both suits the defendant replies, that she is entitled to the property by virtue of the adoption of her deceased husband, Raghunandan Prasad, by Naubat Ram. It is admitted that she is in possession, and that her name is entered in the revenue records. The two plaints were filed respectively, in the first case, on the 17th April, and, in the second, on the 12th May, 1879. The pleas of the defendant were put in on the 4th of July. Upon that day application was made. under S. 32 of Act X of 1877, by both sets of plaintiffs, praying that they might be added as defendants in that suit in which they were not plaintiffs, and thereupon the orders now appealed were passed.

It is objected before us on behalf of the original defendant, Naraini Kuar, that these orders are irregular and illegal; that the Subordinate Judge has misinterpreted the provisions of S. 32 of Act X; that he has improperly exercised the discretion vested in him under that section; and that it is inequitable that the defendant should be hampered and embarrassed in the conduct of her case, by being placed between a cross-fire of adverse claims, [741] those of the plaintiffs on the one hand and of the defendants on the other.

The question thus raised is one of much importance, as to the procedure and practice contemplated by S. 32. The substantial point for determination appears to be, has the Subordinate Judge, having regard to the permissive character of S. 32, properly, that is, within the terms of the section, exercised his discretion in passing the two orders appealed.

No doubt it is most desirable, when litigation has been instituted in respect of a particular subject-matter or specific contract, that the Court having cognizance of it should see that all questions directly springing out of it should be raised and dealt with once and for all, and that all persons naturally concerned in and likely to be legally affected by the determination of those questions should be joined as parties. The practice of the English Equity Courts has always been to recognise this principle in its widest aspect, and the Orders under Rule XVI of the Judicature Act afford abundant facilities for the joinder of parties. It is noticeable that their language, with slight exception, is repeated word for word in the earlier sections of the 3rd chapter of the Civil Procedure Code, though it is worthy of observation that the provisions of Orders 17 and 19, as to adding persons from whom a defendant claims contribution or indemnity, or others whom the Court or Judge thinks should be joined for the purpose of a question being determined, not only as between the plaintiff and defendant, but between them and such other person, have not been incorporated. While the propriety of preventing unnecessary and expensive repetition of litigation and multiplication of suits cannot be questioned, neither as a principle of justice to litigants nor as a convenient rule of practice can an indiscriminate joinder either of causes of action or of parties be tolerated.

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It becomes necessary to closely examine not only the terms of S. 32, but also the kindred provisions in the earlier part of chapter III, which now replace the legislation formerly contained in S. 73 of Act VIII of 1859. First as to S. 32, the Court may at any time, either upon or without application, "order that any plaintiff be made a defendant or that any defendant be made [742] a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suits, be added." But it seems to me that, in exercising the very wide discretion given by these later words, regard should be had to the terms of Ss. 28 and 29, and the test as to the joinder of defendants should be whether the relief sought is "in respect of the same matter," or the liability alleged to exist relates to "any one contract."

Now let us see how the language of these sections is applicable to the cases under consideration. So far as the two sets of plaintiffs are concerned, it is obvious that their claims are altogether adverse, and that, as between them, there is a question of priority of heirship to be decided, in which Naraini Kuar, the original defendant, has no actual interest. It is true that the property to which they both assert a title is one and the same, but I do not think that this circumstance justifies the orders of the Subordinate Judge. Apart from all questions of inconvenience or embarrassment to the principal defendant in the conduct of her defence, should she fail to establish the adoption on which the whole fabric of her case rests, I do not see how, as between the plaintiffs and the joined defendants, no matter in which case, any decision that can be passed will estop either of them from subsequent assertion of their rights against one another in a separate suit. It does not appear to me that the plaintiffs in either case could have joined the other plaintiffs in their original plaint as defendants, for they sought no relief against them, and the relief they did seek against Naraini Kuar was not in the sense of S. 28 in respect of "the same matter." The joinder of the two sets of plaintiffs, as defendants, in accordance with the order of the Subordinate Judge, can only be reasonable, if they are to be equally bound by the decree in one suit, not only as to the principal defendant, but as between themselves; and it is only in this sense that "their presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." But the question involved in each suit is not what are the rights of the two [743] sets of plaintiffs *inter se*; the issue to be decided between the defendant Naraini Kuar and each set of plaintiffs is perfectly plain and intelligible, and, as she is in possession, the burden of proof will be on those who assail her title. Necessarily all the plaintiffs are interested in the determination of the "adoption," set up by the principal defendant, but, as I have already remarked, I do not see how a finding upon this point in either suit can bind the joined defendants to the plaintiffs or the plaintiffs to the joined defendants, in respect of their mutual claims between one another to the property, or, in the event of the principal defendant establishing the adoption in one case, can obviate a second trial. No plea of *res judicata* could be sustained. Upon the argument before us Mr. Hill for the appellant called our attention to three lengthy judgments of Sir Barnes Peacock—*Joy Gobind Doss* v. *Gource Prashad Sinha* (1); *Raja Ram Tewary* v. *Luchman Pershad* (2); *Ahmed Hosain* v. *Khodeja* (3)

(1) 7 W.R. 202. (2) 8 W.R. 15. (3) 10 W.R. 368=3 B.L.R., A.C., 28.

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—which are valuable and instructive. For though these were given upon cases arising under S. 73 of Act VIII of 1859, the reasoning and principles of interpretation enunciated may appropriately be followed in construing S. 32, Act X of 1877. Under S. 73, Act VIII of 1859, the Court had power to join "all parties who may be likely to be affected by the result," an expression that might be taken to mean a great deal more than was ever intended by the legislative authorities, and which Sir Barnes Peacock in the judgments already adverted to was careful to qualify and reduce within intelligible limits. But now reading, as I think one should, Ss. 28, 29 and 32 of Act X together, the terms "questions involved in the suit" must be taken to mean questions directly arising out of and incident to the original cause of action, in which, either in character of plaintiff or defendant, the person to be joined has an identity or community of interest with that party in the litigation on whose side he is to be ranged. I do not lay this down as an irrefragable rule by which applications under S. 32 of Act X should be determined; for cases may arise similar to *Saroda Pershad Mitter* v. *Kylash Chunder Banerjee* (1) and *Kali Prasad Singh* v. *Jainarayan Roy* (2); but in the multi-[744]tude of instances it will be a useful test to apply in deciding whether the presence of parties is necessary to enable the Court "effectually and completely to adjudicate and settle the questions involved in the suit." I entirely agree with the remarks of Pontifex, J., in *Mahomed Bādsha* v. *Nicol* (3), and applying them in the present cases, it appears to me that the joinder of the two sets of plaintiffs as defendants was not necessary to enable the Court effectually and completely to settle the question arising between the plaintiffs and Naraini Kuar in the respective suits. I, therefore, think that the Subordinate Judge improperly passed the two orders of the 4th of July, and that these appeals must be allowed with costs. The defendants who have been added to the record will be struck off, their statements of defence returned to them, and the plaints restored to their original shape.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

1880
FEB. 5.
APPELLATE CIVIL.
2 A. 669=5 Ind. Jur. 268.

FARZAND ALI (*Defendant*) *v.* YUSUF ALI AND OTHERS (*Plaintiffs*). [5th February 1880.]

1. *Amendment of plaint—Material alteration—S. 53, C.P.C., 1877.*

Where a suit for the restoration, to its original condition, of a pond, which the defendants were alleged to be wrongfully filling up, was allowed to be amended so as to become a claim for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and to the use of the water by way of easement, *held*, that the alteration was a material one.

[R., U.B.R. Civil (1897-1901), 231.]

2. *C.P.C., 1877, Ss. 53, 562.*

An appellate Court cannot order or allow a plaint to be amended, and cannot remand a case under S. 562 of the C.P.C. for the purpose of such amendment.

[Diss., 6 M. 239 (244); R., 1 A.W.N. 121, 19 B. 303.]

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(1) 7 W.R. 315.
(2) 3 B.L.R., A.C., 23.
(3) 4 C. 355.

JUDGMENT.

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APPELLATE CIVIL.
2 A. 699 = 5 Ind. Jur. 268.

[670] PEARSON, J.—We regret to be obliged to interfere in a case which appears to have been unduly protracted by irregular procedure, but we cannot refuse to admit the validity in the main of the grounds of appeal.

The case after being originally tried by the Munsif appears to have been remanded to him by the Officiating Judge in appeal in contravention of the terms of S. 564, Act X of 1877. The second decision of the Court of first instance was again the subject of an appeal which terminated in a second order of remand in contravention of the section aforesaid. The Munsif's third decision was also appealed; and the Judge in disposing of the third appeal has once more remanded the case for re-trial in contravention of the same section, with a direction to cause the plaint to be amended. The present appeal is the seventh stage which the proceedings have reached.

The claim as brought was for the restoration of a pond, which it was alleged that the defendants were wrongfully filling up, to its original condition. By the proposed amendment, if we rightly understand, the claim will be for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water by way of easement. The alteration is certainly a material one.

We observe that S. 53 of Act X of 1877 provides for the amendment of a plaint at or before the hearing of a suit in the Court of first instance at the discretion of that Court, but we do **[671]** not find any provision in the law empowering an appellate Court to order or allow a plaint to be amended, or to remand a case under S. 562, for the purpose of such amendment. That section contemplates a case in which the decree of the first Court upon a preliminary point has been reversed in appeal. In the present case it does not appear that the decree of the Court of first instance proceeded upon a preliminary point and has in respect thereof been reversed.

We have therefore no alternative but to set aside the lower Court's order of remand and to direct it to dispose of the appeal afresh in reference to the claim as brought. The costs of this appeal will be costs in the cause.

CIVIL JURISDICTION.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

1880
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CIVIL JURISDICTION.
2 A. 686.

MIAN JAN (*Auction-purchaser*) *v.* MAN SINGH (*Decree-holder*).

[5th February 1880.]

Sale in execution of decree—C.P.C., 1877, Ss. 311 and 312—Review of order.

Where, owing to an order for postponement of an execution-sale not being communicated in time to the officer conducting it, such sale is effected, and is also confirmed by the Court, such Court does not act improperly or *ultra vires* in reviewing the order of confirmation and setting aside the sale as illegal. For, the order for sale having been withdrawn, the sale was made without authority.

[D., 1 C.W.N. 226 (228).]

On the day fixed for the sale of certain immoveable property in the execution of a decree, the Court made an order postponing the sale, but

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the sale had been effected before such order reached the officer conducting it. The Court, no application having been made to set aside the sale, passed an order confirming it. Subsequently, an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal.

On the appeal of the purchaser who had been a party to the proceedings taken in review, against this order, the District Judge held that an appeal would not lie to him from the order. The purchaser thereupon preferred the present application to the High Court in which he prayed for the revision of the orders of the lower Courts, alleging that the first Court had exercised a jurisdiction not vested in it by law, and the second Court had refused to exercise a jurisdiction so vested.

JUDGMENT.

[687] PEARSON, J.—The first plea in appeal is abandoned as untenable. The statement contained in the second ground of appeal is not accurate. What appears from the proceedings is that the 20th September, 1878 had been fixed for the sale of the judgment-debtor's property in execution of decree in pursuance of an order of the Subordinate Judge, who, on that same date, on the judgment-debtor's application, ordered the sale to be postponed. The sanction to the sale originally given being thus withdrawn, it follows that the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid. It is true that the sale had been effected before the order directing its postponement had reached the officer conducting the sale, but the circumstance, though it exonerates him from blame in the matter, does not make the sale good and valid. It is to be regretted that the Subordinate Judge should have confirmed the sale which he now rightly pronounces to **[688]** have been wholly illegal. It seems that he thought himself precluded from setting it aside *suo motu*, and no application had been made to him to set it aside. Shortly after he had confirmed the sale an application was made to him by the decree-holder to review his order confirming it, whereupon he set aside the sale as illegal, and so virtually reversed his former order. In reviewing his order and setting aside the sale as illegal, we cannot say that he acted *ultra vires* or that his action was otherwise illegal. This application is therefore disallowed and dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

1880
FEB. 5.
APPELLATE CIVIL.
2 A. 688.

BANNO (*Defendant*) *v.* PIR MUHAMMAD (*Plaintiff*).

[5th February 1880.]

Mortgage-bond – Registration Act XX of 1866, S. 17.

A bond, charging immoveable property for the payment of both the principal and interest, and payable by instalments, under which the first instalment payable within three years with accumulated interest exceeds Rs. 100, creates an interest in immoveable property of the value of Rs. 100 and upwards, and must, under S. 17 of Act XX of 1866, be registered. (2 A. 40, *R.*)

JUDGMENT.

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2 A. 688.

[689] STRAIGHT, J.—It seems to us that this appeal should prevail. By the bond of 17th December, 1866, the property was charged for both principal and interest. The first instalment was payable in three years from the date of the bond with the accumulated interest, and the amount then becoming due would exceed Rs. 100. It was therefore an instrument creating an interest in immoveable property of the value of Rs. 100 and upwards, and under S. 17 of Act XX of 1866 required registration. The present case is analogous to one decided by Pearson, J., and Oldfield, J., in *Rajpati Singh* v. *Ramsukhi Kuar* (1), and the view we now hold is in accordance with the current of decisions in this Court (2), to which our attention was called in the course of the hearing. The appeal is decreed with costs, the judgment of the lower appellate Court reversed and the decree of the Munsif (3) restored.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

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APPELLATE CIVIL.
2 A. 690.

GIRDHARI DAS (*Defendant*) *v.* POWLETT, POLITICAL AGENT AND SUPERINTENDENT OF THE KOTA RAJ ON THE PART OF THE GOVERNMENT OF INDIA (*Plaintiff*). [9th February 1880.]

2 A. 690.

Parties to a suit—Political Agent—Superintendent of Estate.

Where, at the request of a Raja, the Government of India provided for the due administration of his State by appointing a Political Agent or Superintendent to be in charge of the State, *held*, in a suit brought by such "Political Agent and Superintendent of the State on the part of the Government of India" for the recovery of certain moveable and immoveable properties belonging to the State, that he had no *locus standi*, as, either the Raja, if he was the proprietor of the properties, or the Government of India, if his rights and interests had passed to them, could alone have a *locus standi* to sue.

In a suit instituted in the Court of the Subordinate Judge of Agra in the name of "Major P. W. Powlett, Political Agent and Superintendent of the Kota State, on the part of the Government of India," wherein the plaintiff claimed certain moveable and immoveable property belonging to the Kota State, the first issue for trial framed by the Subordinate Judge was, "Regard being had to the administration of the Kota State, is the suit brought by the Political Agent and Superintendent entertainable or not"? The Subordinate Judge held on this issue that the suit so brought was entertainable, his reasons for so holding being as follows:—"The papers relating to the appointment of the said officer show that the arrangement regarding the management of the Kota State was made in a special manner with the sanction of His Excellency the Viceroy and Governor-General of India in Council; that a sum of money has been fixed for the personal expenses of the Rajah; and that he has nothing to do with the administration of the State, which is in every respect governed by the Agent and Superintendent, subject to the supervision of the Government of India. There is no law or ruling which would lead me to hold the suit to have been illegally brought in the name of the Agent and Superintendent, nor is there any ground for making such a presumption, inasmuch

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(1) 2 A. 40. (2) 2 A. 216; 2 A. 96; and 1 A. 274. (3) dismissing the suit.

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as it would be clearly improper to judge of the Rajah, who is an intelligent person and attained the age of majority, according to those ordinary persons to whom the law is applicable. Even in the cases of the minor chiefs whose states are managed by Agents under the supervision of the Government of India, suits are not prohibited to be brought in the names of those Agents: moreover, the powers vested in the present Agent of Kota, who in addition to the usual title of Agent bears the special title of Superintendent, and in the letter of his appointment absolute powers are granted to him, must be considered to be far superior to those vested in the other Agents. Consequently, as he can discharge all the important and intricate business of the State under the powers vested in him, and is in every respect responsible for it, there is no reason why he should not institute this suit, which is brought only for the benefit of the State, in his own name. Now, as far as I can see, I think the suit is properly brought in the name and designation used in the plaint, and considering all the procedure of the Civil Courts, there appears to be no harm at present or in future in passing a decree in that name." The Subordinate Judge eventually gave the plaintiff a decree for the immoveable property claimed.

The defendant appealed to the High Court.

JUDGMENT.

[692] STUART, C. J.—This appeal must be allowed. Indeed, no serious attempt was made at the hearing before us by the counsel **[693]** for the respondent to support the judgment, and I must express my surprise and disappointment, that so experienced an officer as the then Subordinate Judge of Agra should have been content to have given such reasons as he assigns in his judgment for holding that the suit in this instance had been properly laid. It is not pretended that the Rajah is a disqualified proprietor under the Court of Wards, or that he has been in any respect divested of his rights of property over his estate; and as for the suggestion that the position assumed by the Government of India and its Political Agent in this suit could be justified as an act of State, such a contention cannot for one moment be admitted. The claim for interference on the part of the Government of India, whether in its own name or in that of its Political Agent, is one based entirely on a correspondence showing the necessity of the management and administration of the estate being for a time taken out of the hands of the Rajah, and he himself no doubt acted wisely in applying to the Government for assistance in his troubles. But it is a very different thing to say that such management and administration gave the Government, not only the power to administer the estate for the benefit of the Rajah, but to deprive him of his right and title in it and his dominion over it, to such effect, that the Government could by itself, or by any of its officers, deal with it and with parties indebted to it as if it was the Government's own independent property. For, however large the power of the Government might be in the way of administration and management, the right to the estate itself and every part of it, the title to the estate and all that constitutes a *jus in re* in regard to it, remained in and was inherent in the Rajah himself, and such a suit as the present could only be brought in his own name, by which means, and by which means alone, could his consent as the true plaintiff be made to appear on the face of the record. In such a case the Government of India neither have themselves, nor can they delegate to others, any larger powers than those that could be given to any other administrator or manager; and the principle on which this view of the case rests is that no man who is *sui juris* can be

deprived of his property, for a single moment, or for any purpose whatever, excepting by his own deliberate consent and act, such an act, on his part as would in law have the effect of at once divesting himself of, [694] and investing his transferee with, his estate. No doubt the services agreed to be given to the Rajah on his own application were most important and likely to be very beneficial to himself and his property, but the estate has still remained his, and is his, and his alone, and his name alone can be used in all judicial proceedings connected with its administration. As for Major Powlett, he, as Political Agent and Superintendent of the estate under the orders of the Government of India, has simply no *locus standi* whatever, nor could he be allowed to represent the Government of India, in such a suit, even if that Government had itself a better title than it has.

The appeal is allowed and the suit is dismissed with costs in both Courts.

PEARSON, J.—The property in suit is claimed as belonging to the Kota estate, and the claim is based on the proprietary right of the Rajah of Kota. If he be the proprietor of the property the subject of the claim, he should have been the plaintiff in the suit; on the other hand, if his right and interest therein has passed to the Government of India, the Government of India should be the plaintiff. The Political Agent and Superintendent of the Kota Raj does not profess to have any such proprietary right and interest in the property as to entitle him to sue as plaintiff for its recovery. The suit, as brought, must be dismissed, and the appeal decreed with costs.

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FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

1880 FEB. 9. FULL BENCH. 2 A. 694.

EMPRESS OF INDIA *v.* SRI LAL AND OTHERS. [9th February 1880.]

2 A. 694.

Penal Code, Ss. 372, 373—Offence under the sections, what constitutes.

Where the accused, by falsely representing that a girl belonging to a low caste belonged to a higher caste, induced a member of a higher caste to take her in marriage and to pay money for her to the accused, in the full belief that the representations were true, *held* that the accused had not committed offences under Ss. 372, 373, I.P.C.

[D., 22 A.W.N. 133.]

ORDER OF REFERENCE.

[695] STRAIGHT, J.—These are appeals against a series of convictions by the Officiating Sessions Judge of Gorakhpur. The appellants were charged under Ss. 372 and 373 of the Penal Code. The evidence establishes that they, by falsely representing certain girls of the Baniah, Dome and other castes to be members of Kayasth, Rajput, and Ahir families induced a number of Kayasths, Rajputs, and one Ahir to take these girls to wife and to pay money for them to the appellants in full belief that the representation was true. The question I have to refer for the decision of the Full Bench is whether under such circumstances the convictions on Ss. 372, 373, Penal Code, can properly stand.

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FULL BENCH.

2 A. 694.

JUDGMENT.

STUART, C. J.—On the facts as stated to us in this reference and as explained at the hearing, it is quite clear that the convictions under Ss. 372 and 373 cannot stand. The offence apparently committed by accused was cheating. There can be no doubt of the immorality of the purpose and motive on the part of the accused, but I hesitate to say that their conduct was unlawful in any absolute sense. On discovery the girls, who by fraud had succeeded in becoming wives, and who had in the meantime communicated loathsome disease to the unfortunate men who had married them, **[696]** were turned out of their so-called husbands' houses, and it would appear from what was stated at the hearing that their course of life thereafter was that of prostitution, so that what began in fraud to the husbands has ended in the permanent degradation of the wives themselves. Again, the girls appear to have been parties to the fraud committed on their husbands, having been duly instructed beforehand by the accused as to the part they were to play and the deceit they were to practise on the unhappy men, and they acted the part so well that the ceremony of marriage was gone through without any suspicion being entertained that anything was wrong. That this state of things could not be reached by any law, Civil or Criminal, I hesitate to affirm. The appellants in the present case might have been tried for cheating under S. 415 of the Penal Code, and I am inclined to think that a very strong argument might be maintained in support of the opinion that these girls, wives though they be, were guilty of abetment and conspiracy, within the scope and meaning of S. 107. The convictions, however, under Ss. 372 and 373 were altogether mistaken, and should be set aside.

PEARSON, J.—If, as I understand the referring order to mean, the evidence establishes no more than this, that the appellants, " by falsely representing certain girls of the Baniah, Dome and other low castes to be members of Kayasth, Rajput, and Ahir families, induced a number of Kayasths, Rajputs, and one Ahir to take these girls to wife and to pay money for them to the appellants in full belief that the representation was true," then I am clearly of opinion that they cannot be convicted of the offence defined in S. 372, Indian Penal Code. For conviction of that offence it must be proved that the accused intended that the minor should be employed or used for the purpose of prostitution or for some unlawful and immoral purpose. and knew it to be likely that the minor would be so employed or used. Not only are we given to understand that evidence of such intent or knowledge is wanting; but it would seem that under the circumstances such intent or knowledge cannot certainly be presumed. The girls were disposed of for the purpose of being married, and, although the marriages might have been objectionable under Hindu law on the ground **[697]** of the inequality in respect of social status of the respective parties to them, it does not appear that they would have been wholly invalid. The offence of which the appellants were apparently guilty was cheating as defined in S. 415, Indian Penal Code.

SPANKIE, J.—I concur in the opinion of Mr. Justice Pearson.

OLDFIELD, J.—If the accused intended *bona fide* that the girls should be taken in marriage, although, by reason of difference of caste, no legal marriage might take place under Hindu law (and on this point it is unnecessary to give an opinion), yet the accused will not be guilty of an offence under Ss. 372 and 373, Indian Penal Code, for it cannot be said that they acted with intent that the girls should be employed or used for purpose of prostitution or for any unlawful and immoral purpose, or that

they knew it to be likely that they would be employed or used for such purpose. The reference does not require us to go further in our reply or to say what offence under the Penal Code the accused may have committed.

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FULL BENCH.

2 A. 694.

STRAIGHT, J.—Upon the question I have submitted to the Full Bench in this reference, I am of opinion that the convictions under Ss. 372 and 373 cannot be sustained. The main object and real intent of the accused was to get money and the representations made were merely the means to that end. I do not think it can be said that the prohibited act was done with the intent that the minor should be used for an "unlawful and immoral purpose." All the false statements were directed to convincing the proposed purchasers of the girls of their caste qualifications for *marriage*, and the Sessions Judge specifically found that the buyers were deceived. This is clear from the fact that in each case the ceremony of marriage was gone through with all the accustomed formalities attending such proceedings, and it is equally plain that the accused, never contemplating that discovery of their frauds would take place, intended that the girls should live as the wives of their purchasers. It was contended by the Junior Government Pleader that, as in point of fact no proper or recognizable marriage could take place between persons of these different castes, the accused must be assumed to have intended the **[698]** natural consequences of their acts, namely, that the ultimate position of the girls would be that of mere mistresses. Even if this be so, which I very much doubt, it cannot be said, that that is an "unlawful and immoral purpose." It may be immoral, but it is impossible to say it is unlawful. The mischief aimed at by these sections was traffic in female minors for purposes of "prostitution," that is, in its perfectly well-understood sense, "or for any unlawful and immoral purpose" of a like description. But here a form of marriage, no matter what its precise character was, was gone through, and though the men who took part in it have been punished by being put out of caste for disregarding the rules and regulations of their community, it does not appear to me that the girls should, for the purposes of the law, be regarded as any the less the wives of those excommunicated persons.

Entertaining the views I do, I am of opinion that the convictions under Ss. 372 and 373, Penal Code, must be set aside.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

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APPELLATE CIVIL.

2 A. 698.

JANKI DAS (*Defendant*) *v.* BADRI NATH (*Plaintiff*).
[11th February 1880.]

2 A. 698.

1. *Suit for money charged upon immoveable property—Jurisdiction.*

In a suit for money charged upon immoveable property by enforcement of the charge, the question of jurisdiction must be determined with reference to the amount of the bond, and not the value of the property hypothecated.

[F., 15 C. 104 (106).]

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2. *First and second mortgages—Sales in execution of decrees enforcing mortgages—Priority between auction-purchasers.*

Of two auction-purchasers, purchasing the same property, sold simultaneously in execution of two mortgage-decrees, the one, who purchases in execution of the decree enforcing the earlier mortgage, has a prior right to possession over the other.

One Chotay Lal executed a bond on 14—11—1864 in favour of Munni Bibi promising to pay her Rs. 500 with interest at two per cent. per mensem within two years, and hypothecating his proprietary interests in a certain house, situate at Allahabad, as collateral security for such payment. He executed another on 24—6—1867 in favour of Janki Das, the defendant in this suit, promising to pay him Rs. 1,800 with interest at one per cent. per mensem within seven years, and hypothecating a moiety of the same house as collateral security for such payment. In a suit by Munni Bibi on her bond, in the Court of the Munsif of Allahabad, for Rs. 720, she obtained a decree of the 9th March, 1872, giving her a lien on the hypothecated property for that amount. In a subsequent suit by Janki Das on his bond in the Court of the Subordinate Judge of Allahabad, he obtained a decree on the 1st August, 1874, giving him a lien on the hypothecated property for the amount of the decree. Munni Bibi executed her decree on the 10th December, 1877; a moiety of the house, being the interest of Chotay Lal therein, was sold under the order of the Munsif. Badri Nath the plaintiff in this suit purchased it. On the same day the same property was sold in the execution of Janki Das' decree under the order of the Subordinate Judge. Janki Das purchased it and obtained possession of the property. Badri Nath was resisted by Janki Das in his endeavour to obtain possession of the property. In the suit by Badri Nath against Janki Das to establish his right to the possession of a moiety of the house, the defendant stated as follows:—"Chotay Lal, the judgment-debtor and original owner of the house in dispute, was indebted to several creditors: to defraud those creditors of their just dues and to secure his house from attachment, he executed, without consideration or any money paid, under false language and with dishonest intent, a bond in favour of Munni Bibi, his sister: this bond after execution and registration he kept in his own possession: as soon as the creditors came down upon him he borrowed from Ram Prasad, brother of the defendant, Rs. 1,000, through Munni Bibi, and executed a bond for the same: this bond bears date 24th June, 1867: a short time before the date for paying this bond fell due, he got Munni Bibi to bring a case against him founded upon the bond in her favour and caused a decree to be passed against him on the 9th March, 1872: Munni Bibi, her mother, and the judgment-debtor himself have told many persons that the bond in favour of Munni Bibi was written only to keep the property from attachment, and that no consideration ever passed for the same: as the bond upon which the decree was passed under which plaintiff eventually became a purchaser was one without consideration and collusive, it follows that rights resting upon the auction under such circumstances can bear no comparison with defendant's claim, which is a just one and free from all taint of collusion: further the plaintiff by another act of collusion caused the house to fetch at auction a much lower sum than it was really worth."

After the framing of the following issues "(i) Which of the two decrees confers a prior right upon the purchaser, and (ii) Was the decree passed by the Munsif of Allahabad on the 9th March, 1872, one within the jurisdiction of that Court," the Subordinate Judge dismissed the plaintiff's

claim, his reasons for so doing being :—"In this case the rival applicants for possession of the same half of a house situate in the city of Allahabad are Badri Nath and Janki Das. They both base their claims upon a purchase at open auction held by two different Civil Courts on one and the same day. There is no evidence tendered to show whether there was any priority of time in the sale. It is, however, undisputed that Janki Das was the first to obtain possession and that he has been in possession ever since. Being a possessor with a title it is incumbent upon the plaintiff to show that he has a better title under which to demand the re-conveyance of the property from defendant to himself. The position in which defendant stands is briefly this. There has been a public avowal of a sale between the Civil Court as agent for the judgment-debtor and the defendant as vendee. The transfer was at once complete. It was perfected by possession, and the defendant can now only be compelled to re-convey to a prior vendee. If the plaintiff could show such priority he ought to have done so. Instead of this he has confined himself to showing that the decree under which he purchased proceeds from a bond of an earlier date than the bond which led to the execution and sale under which defendant purchased. There might have been some object in this had he been striving to establish a charge upon the property in dispute. The bond was not in his favour, but in favour of Munni Bibi, and even to her it gave only a lien upon the house hypothecated therein. The document, which stands upon the file as Exhibit A, shows that the mortgage in favour of the lady was a simple mortgage in which the borrower bound himself personally for the repayment of the loan with interest, and pledged his land as a collateral security for such repayment. Under such a mortgage, as Mr. Macpherson (1) shows, the mortgagee, having obtained a decree, proceeds in execution to sell the land and out of the proceeds of the sale to satisfy his claim.

"Munni Bibi's right was nothing more than a right to certain money with interest. She never had possession of the land, nor could she ever obtain possession unless she proceeded at the sale to become the vendee. Nor was her position altered by the decree which was correctly given in the first instance against the person of the mortgagor. We come lastly to the sale, and here for the first time we have a starting of possession in favour of plaintiff against the vendor. It has, however, been already shown that, for all that has ever been shown to the Court, the plaintiff's and defendant's starting points were one and the same; anyhow, the defendant being in possession, plaintiff must show his priority. The burden being upon him and not having been discharged, the Court finds the first issue against him.

"As regards the second issue, it is unnecessary here to enter into the grounds upon which the Court holds it has cognizance. The plaintiff maintains the Court has cognizance and the Court agrees with him on the point. Having, however, found against him on the first issue there is no need to pursue this issue further." The lower appellate Court held that the plaintiff was entitled to the possession of the property in suit, having purchased it at a sale effected to discharge a prior lien. The defendant preferred an appeal to the High Court.

JUDGMENT.

[702] SPANKIE, J.—In dealing with the pleas in appeal it is necessary to see what was the defence set up. It was briefly as follows; that

(1) Macpherson on Mortgages, 2nd Ed., p. 13.

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Chotay Lal, the judgment-debtor and original owner of the house in dispute, was indebted to several creditors, and, to defraud them and secure his house from attachment, he dishonestly executed a bond hypothecating the house to Munni Bibi, his sister, without any consideration, the transaction being altogether fraudulent. He retained possession of the bond, but, when pressed by his creditors, he borrowed from Ram Prasad, the brother of defendant, Rs. 1,000, through Munni Bibi, and executed a bond for that sum. The bond is dated 24th June, 1867. Before the bond fell due the judgment-debtor caused Munni Bibi to bring a suit against him founded upon the bond which he had given her, and on the 9th March, 1872, a decree was given against him.

Now the plaintiff's case is that the bond under which the decree was executed and sale in his favour was had is dated 14th November, 1864. Both plaintiff and defendant are auction-purchasers upon the same day in execution of decrees. The decrees are of two different Courts. The plaintiff purchased in execution of the decree of the Munsif upon the bond, dated 14th November, 1864, and the defendant purchased in execution of the decree of the [703] Subordinate Judge upon the bond executed on the 24th June, 1867. In both bonds there was an hypothecation of the house as security for the payment of the debt.

The Subordinate Judge on the 28th November, 1878, laid down the following issue, "Which of the two decrees confers a prior right upon the purchaser." On the 18th December he added this issue, "Was the decree passed by the Munsif of Allahabad on the 9th March, 1872, one within the jurisdiction of that Court." The second issue was added because in the first instance the property was valued at Rs. 1,200 by the Munsif, and the plaint was returned by him on the ground that the claim was beyond his jurisdiction. The Subordinate Judge found that there was no evidence to show that there was any priority in the time in favour of one auction-purchaser over the other. But Janki Das, defendant, obtained possession first, under his sale, and, therefore, as Janki Das was a purchaser with title, the plaintiff was bound to show a better title, if he desired to secure the property for himself. In coming to a conclusion upon this point the Subordinate Judge appears to have made a mistake in assuming that in the decree of the 9th March, 1872, there had been no decree against the property hypothecated as security in the bond dated the 14th November, 1864. He seems to hold that the plaintiff failed to prove any priority of lien, and, as defendant had obtained possession in execution as auction-purchaser, his possession could not be disturbed. The Subordinate Judge did not think it necessary to express his reason for holding that the Munsif of Allahabad had jurisdiction in the suit in which he made the decree of the 9th March, 1872, at the same time he held that there had been jurisdiction, The first Court then dismissed the suit on the ground that plaintiff had established no title as against defendant. In appeal the Judge reversed the decision of the Subordinate Judge, and decreed the claim in favour of plaintiff. The lower appellate Court held that the decrees were not money decrees, but both had been made in suits to recover money by enforcing the security hypothecated in the bonds upon which the claims were based, and that priority would be found according to the dates of the respective bonds. The plaintiff as auction-purchaser in execution of a decree against person and property hypo-[704]thecated in a bond dated 14th November, 1864, would thus have a prior title as against an auction-purchaser in execution similarly situated in execution of a decree under a bond, dated 14th June, 1867, the sale to satisfy a prior incumbrance being preferred to that satisfying a subsequent incumbrance.

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The first plea for determination is the fifth in the memorandum of appeal, that of jurisdiction. There can be no doubt (assuming that we could go behind the decree of the 9th March, 1872) that the Munsif had jurisdiction. The claim was for money and to enforce the security, the property hypothecated being within the jurisdiction of the Court. The cases cited by defendant appellant's counsel do not apply. The Calcutta Court (*Petition of S. J. Leslie* (1)) has ruled that a suit brought upon a mortgage praying for a decree for the amount due under it, and also that in default of payment the land might be sold, was a suit for land within the meaning of S. 15, Act VIII of 1859, and was rightly brought in the Court of the district within which the land is situate. The question there was one of territorial jurisdiction ; no such difficulty arises in this case. So again the Full Bench decision of the Presidency Court in *Surwar Hosscin Khan* v. *Shahzada Gholam Mahomed* (2) does not affect this case, for in that suit the question was one of limitation which does not arise here. Admitting that the suit is one to enforce a charge upon immoveable property, and is therefore one for the recovery of an interest in immoveable property, still the claim is to enforce that charge only to the extent of the debt due, and no further. The property could have been preserved from attachment and sale by payment of the debt due, which with interest was within the pecuniary jurisdiction of the Munsif's Court. The plea, therefore, that the suit upon which the decree on the bond dated 14th November, 1864, was given, and in execution of which the plaintiff became the auction-purchaser, is barred, because the value of the property exceeded Rs. 1,000, fails.

As to the other pleas, the judgment of the lower appellate Court decreeing the claim in favour of plaintiff-respondent appears to be sound, and in accordance with the practice of the Courts. **[705]** The precedents cited by the appellant, *Dayal Jairaj* v. *Jivraj Ratansi* (3), do not seem to apply. There is no question here of notice or no notice of a prior incumbrance. The circumstances of this case, such as they are, must be looked at. Here there was in execution a sale of the same property twice over under two different decrees of two different Courts, and the question is whether the auction-purchaser, who has bought the property sold in execution of a decree charging it for the satisfaction of the debt due under a bond of much earlier date, is not to be preferred to the auction-purchaser in execution of a decree to satisfy a more recently executed bond, and on this point there was really no defence. It has already been noticed at the commencement of this judgment what was the defence to the suit. It was contended that the bond on which plaintiff relied was executed fraudulently, and that the bond upon which defendant relied was free from all taint of fraud and therefore was to be preferred to that of plaintiff. It did not appear to be denied that, if the plaintiff could show a better title, he was entitled to a decree. The first Court under a mis-apprehension as to the nature of the decree holds that the plaintiff had not established a better title than defendant had, and therefore the Subordinate Judge dismissed the claim. The Judge, correcting the error of the Subordinate Judge as to the nature of the decree, finds that the lien in the plaintiff's case was of a date prior to that of the lien in the defendant's case, and, as there appears to be nothing contrary to law in this finding, our interference is not required.

The purchaser at an auction-sale in execution of a decree against a judgment-debtor is bound to satisfy all charges on the estate purchased

(1) 9 B.L.R. 171. (2) B.L.R., F. B. R., 879. (3) 1 B. 237.

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by him which existed at the time of the mortgage, to satisfy which the property was sold. I have not found any cases exactly analogous to the present which is somewhat peculiar, the sales being simultaneous, under different decrees, and in two different Courts. But the principle above noticed may be applied to the case, and as both parties purchased the property at auction in execution of the decrees charging it, the plaintiff's title appears to be superior to that of **[706]** the defendant, inasmuch as he purchased in execution of a decree upon a bond of prior date to that which was the foundation of the claim that led to a decree in execution of which defendant purchased. The earlier possession of defendant under the auction-sale was simply an accident arising out of the simultaneous sales in two different Courts. I notice a case in the Presidency Court, *Ajoodhya Pershad* v. *Moracha Kooer* (1), where the claims of both the parties were on bonds specially registered under Ss. 52, 53, Act XX of 1866, so that neither decree could have legally imposed any lien on the property. The estate was sold by auction on two occasions in satisfaction of two distinct bonds, and the person who had proceeded on the later-dated of the two bonds, but who represented the earlier auction-purchaser, had actually taken possession of the estate. It was held that, though in a properly brought suit between the parties to declare the property liable for the amount of the first mortgage, the party in possession would have to pay to secure his possession, yet he could not be ousted by the opposite party. This case differs from the present one in so much that the decrees in the precedent cited must be regarded as money-decrees, whereas in the present case both decrees charged the property. Moreover in that case the sales were not simultaneous, but one occurred on 25th January, 1869, and the other on the 9th March, 1869. Here it appears to me that I ought to consider what would have been the effect, if by accident or otherwise there had been two simultaneous sales in execution of two decrees charging property by order of the same Court. In such a case effect would doubtless have been given to the auction-purchase under the decree upon the older lien, and, under the circumstances of the case, it appears to me that the plaintiff is entitled to claim possession of the property, and that the sale in favour of defendant should be considered of no effect as against that in favour of plaintiff, and his possession should be regarded as not having been acquired under any good title. Here again I should say once more that the claim was not resisted by the defendant on the ground of his title being superior to that of the plaintiff under the sale, but mainly, if not altogether, on the **[707]** ground that the decree under which the plaintiff purchased was a decree obtained in a fraudulent transaction and therefore should have no force. On this point, if it be allowed that we could go behind a decree which has not been set aside, it is sufficient to say that the Judge has found that the defendant declined to give any evidence in support of the plea of fraud. As he asserted the fraud he was bound to prove it, as he did not even attempt to do so, there is an end of the plea. I would dismiss the appeal and affirm the judgment with costs.

(1) 25 W.R. 254.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Straight.

SAWAI RAM (*Plaintiff*) *v.* GIR PRASAD SINGH (*Defendant*).

[11th February 1880].

2 A. 707.

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2 A. 707.

Wrongful dispossession of land—Compensation—Jurisdiction of Civil Court—Act XVIII of 1873 (N.W.P. Rent Act), S. 95, Cls. (m) and (n).

When the lessee of an estate is an occupancy tenant of a portion of it, and, in execution of a decree obtained by the Zamindar, is ousted from the estate including the occupancy-holding, a claim for mesne profits (brought by him after the reversal of such decree) against the Zamindar in respect of the occupancy holding, is cognizable by the Civil Courts, and such a remedy could not be sought by means of applications under cls. (*m*) and (*n*), S. 95 of the Rent Act, there being no wrongful dispossession within the meaning of that Act.

[R., 19 A. 456 (457) = 17 A.W.N. 101.]

In an estate held by Sawai Ram as a sub-proprietor he held certain lands (51 bighas, 10 biswas) with a right of occupancy. Gir Prasad Singh, the Zamindar, obtained a decree on the 29th July, 1876, against Sawai Ram for the possession of the estate. On the 31st August, 1876, in execution of this decree, Sawai Ram was ejected from the entire estate including the 51 bighas 10 biswas of land held by him with a right of occupancy. On the 7th December, 1877, on appeal by Sawai Ram, this decree was set aside and Gir Prasad Singh's suit was dismissed by the District Court, which decided that Sawai Ram held the estate, not as a lessee, but as a sub-proprietor under a permanent tenure. The District Court's decree was affirmed by the High Court on the 16th May, 1878. Sawai Ram, on the 4th July, 1878, recovered possession of the entire estate. In November, 1878, he instituted the present suit against Gir Prasad Singh in the Court of the Subordinate Judge of Aligarh, in which he claimed, *inter alia*, (i) the value of the crops standing on the 51 bighas 10 biswas of land at the time the defendant obtained possession of such land in the execution of the decree dated the 29th July, 1876, alleging that Gir Prasad Singh had appropriated such crops; and (ii) the rents of 48 bighas of land, being a part of the 51 bighas, 10 biswas, before mentioned, which Sawai Ram alleged had been let by Gir Prasad Singh to tenants. The Subordinate Judge decreed in favour of Sawai Ram. The District Judge on appeal dismissed the suit in respect of these claims, the reasons for so doing being :—

"It is to be observed that the plaintiff in this suit has always had two different rights in this village; first, his rights as lessee of the zamindars, secondly, his rights as an occupancy-tenant of fifty-one bighas, ten biswas, of land. With these latter rights the Civil Court has no concern, nor has any order been passed by, or any claim been made in, any Civil Court throughout these proceedings which could affect the plaintiff's possession as an occupancy-tenant of the fifty-one bighas, ten biswas, of land. The Civil Court's orders have always had reference to the zamindari rights held by the lessee. It follows, then, that any interference with the plaintiff's rights as an occupancy-tenant, of which the defendant may have been guilty, was made by the defendant as zamindar in possession, and had no warrant of the Civil Court to support them. It is clear also that the defendant was in possession as zamindar from August, 1876. It appears to me that, when in August, 1876, the defendant turned the plaintiff out of his occupancy-tenancy and seized the standing

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crops on the lands comprised therein, the plaintiff might and should have made applications under S. 95, clauses (*m*) and (*n*), of Act XVIII of 1873. Those applications should have been made within six months of the cause of action (S. 96, *c*), and as those applications 'might have been made,' no other Court (S. 95) can take cognizance of the matter to which they would have referred. It is nothing to the purpose to say that the plaintiff was awaiting the end of the litigation in the Civil Courts. The action of the defendant in seizing the crops and turning plaintiff out of his cultivation was always wrongful. It has not become so only under the Civil Court's final decree, though that decree may throw a stronger light on the wrong. I have, therefore, no hesitation in deciding that the claim on account of the standing crops is not cognizable here, and would be, in my opinion, barred by limitation, even if the Court had jurisdiction, as this seizure of the standing crops was never ordered by the Court and was outside the litigation between the parties.

"Turning now to the claim of the plaintiff to the rent of the '*khud-kasht*' land, no doubt the defendant had the right to collect the rents of that land from the plaintiff (if the defendant had not ousted plaintiff), as long as he (defendant) was in possession as zamindar, and now that defendant's possession as zamindar has been restored as lessee, the plaintiff is entitled to receive from defendant what defendant was entitled to collect and could accordingly have collected. The lower Court has found as a fact that the land in question was let by the defendant in 1285 Fasli for Rs. 175, and from this fact has deduced that the rent for the rabi of 1284 Fasli should have been Rs. 72-14-0. These, however, are rents which the defendant collected from tenants at will, with whom, so far as the Civil Court is concerned, he had no right to deal in connection with plaintiff's '*khud-khast*' land. These sums in fact represent the damage resulting to plaintiff, not only from his ejectment from his lease, but also from his "*khud-kasht*" lands. As already remarked by this Court, the Court below has no concern with the latter ejectment and resulting damage.

"The question is how much the defendant received from the land (*khud-kasht*) as zamindar and by virtue of the rights held to be his by the Civil Court.

"There is no evidence to show. In fact, as regards 1284 Fasli, if the plaintiff is to be believed, defendant received nothing but the crops standing on the land, a matter I have already disposed of."

The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[710] SPANKIE, J.—The facts of the case are very clearly set forth by the first Court in the elaborate judgment in favour of the plaintiff. In appeal the Judge modified the first Court's judgment, finding that, when plaintiff has been dispossessed from the lands comprising his occupancy-right as tenant, he should have made an application under clauses (*m*) and (*n*), S. 95, Act XVIII of 1873, and, as this application might have been made, the Civil Court had no jurisdiction to hear this part of the claim, which, indeed, if the Civil Court could have entertained it, was barred by limitation.

It is contended by the plaintiff that the Civil Court had full jurisdiction: the plaintiff in bringing this suit had adopted the only course open to him, his ejectment having been carried out in execution of a decree of Court, and this decree having been subsequently set aside: the Judge too had erred in holding that the claim was barred by limitation, and in dismissing the claim on account of the "*khud-kasht*" lands.

We are of opinion that the applications referred to in letters (*m*) and (*n*), for compensation for wrongful dispossession, or for [711] recovery of possession of land of which a tenant has been wrongfully dispossessed, do not apply to the present case, in which there was no wrongful dispossession within the meaning of the Rent Act, and that the claim of the plaintiff was not one for which a remedy was available under S. 95 of that Act, and, therefore, the Civil Court had jurisdiction. Holding this view, it follows that the limitation of S. 96 of the Rent Act does not apply. So, we think that the Judge was wrong in dismissing the claim for the rent of the "*khud-kasht*" land which defendant let to tenants. The effect of the decree against the present plaintiff, when executed, put him out of possession of the entire estate which he held as lessee, and defendant took possession of all the lands. Therefore plaintiff is clearly entitled to a refund of all rents to which the lessee alone had a claim, if he had chosen, as defendant did, to let a portion of his sir.

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2 A. 707.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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APPELLATE CIVIL.
2 A. 744.

PARSHADI LAL (*Defendant*) *v.* RAM DIAL (*Plaintiff*).

[13th February 1880.]

Suit for pre-emption—Deposit of purchase-money—Appellate Court, powers of—C.P.C., 1877, S. 214.

An appellate Court disposing of an appeal in a suit for pre-emption, can of its own motion fix by its decree, a time for the deposit of purchase-money, even though the time fixed by the lower Court may have expired without any deposit having been made; and such action of the Court does not *contravene* the provisions of S. 214 of the C.P.C. (H.C.R., N.W.P., 1868, p. 254, *F.*)

[Appr., 13 A. 376 (379) **(F.B.)**; **R.**, 13 A. 189 (190) **(F.B.)**, 11 O.C. 144; **D.**, 137 P.R. 1894.**]**

In a suit to enforce a right of pre-emption, the Munsif directed that the sum which he had ascertained to be the purchase-money should be deposited within a month from the date of the decree. The plaintiff appealed to the Subordinate Judge contending that such sum was not the purchase-money. While the appeal was pending, the time fixed by the decree of the Munsif expired without any deposit having been made. The Subordinate Judge dismissed the appeal, fixing by his decree, of his own motion a further time for the deposit. The defendant appealed to the High Court.

JUDGMENT.

[745] PEARSON, J.—The grounds of appeal are overruled by the Full Bench decision in *Sheo Prasad Lal* v. *Thakur Rai* (1), and it does not appear to us that the appellate Court's action and order contravened the provisions of S. 214, Act X of 1877. The appeal is dismissed with costs.

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(1) H.C.R., N.W.P., 1868, p. 254.

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APPEL-LATE CIVIL.

2 A. 711.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Straight.

RAM LAKHAN RAI (*Plaintiff*) *v.* BANDAN RAI AND OTHERS (*Defendants*). [16th February 1880.]

2 A. 711.

Sale of immoveable property—First and second-purchasers—Right to purchase-money under first sale—Second-purchaser not representative of vendor.

Where the same immoveable property has been sold to two persons, and the first sale is found not void by reason of the non-payment of the sale-consideration, and the second sale is found to be invalid, as having been made by a person who had no rights and interests remaining in the property, the second purchaser in possession cannot be held to be a representative of the vendor so as to be entitled to receive the sale-consideration found to be still owing to the vendor, and to retain possession of the property in suit until it is paid.

[Rel. on, 6 N.L.R. 98 (101)=7 Ind. Cas. 541 (543) ; **D.,** 18 M. 61 (63).**]**

JUDGMENT.

[712] PEARSON, J.—The plaintiff sued to recover possession of an eight gandas share in mauza Chandipur under a sale-deed executed in his favour by Ram Bakhsh, defendant, on the 7th August, 1874, on the averment that after his purchase he had been put in possession of the property, but had been ousted from it by the other defendants, to whom Ram Bakhsh had ostensibly conveyed the same property by a sale-deed dated 11th December, 1877. The defendant Ram Bakhsh admitted the receipt of the sale-consideration, Rs. 600, from the plaintiff and the truth and justice of his claim. The other defendants contended that the sale-deed of the 7th August, 1874, had been invalidated by the non-payment of the sale-consideration therein mentioned, and that consequently Ram Bakhsh was competent to sell the property, the subject thereof, to them, and that they were lawfully in possession of it under the sale-deed executed in their favour. The Court of first instance allowing these contentions dismissed the suit with costs. The lower appellate Court concurred with the Munsif in finding that the plaintiff had neither paid the sale-price, nor been put in possession of the property, nor been ejected from it by the second vendees, but nevertheless held that the vendor was not free or competent to avoid the first sale. The Subordinate Judge was of opinion that Ram Bakhsh had only a right to sue for the sale-consideration, or to refuse possession of the property to the plaintiff until receipt of that consideration. The Subordinate Judge further ruled that the plaintiff was not entitled to obtain possession of the property without payment of Rs. 600, the sale-consideration, which was payable to the defendants, the second vendees, as representatives of the vendor, whatever rights and interests he had in the disputed property against the plaintiff having passed to them, and that they were accordingly entitled to receive the sale-consideration, or until its receipt to retain possession of the property in question.

The respondents have not taken any objections to the lower appellate Court's decision, and we are bound therefore to accept the ruling that the first sale is not void by reason of the non-payment of the sale-consideration, and that the second sale is invalid as **[713]** having been made by a person who had no rights and interests remaining in the property. This being so, we cannot assent to the view that the second vendees are representatives of the vendor and entitled to receive

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2 A. 711.

the sale-consideration, found to be still owing to him, and retain possession of the property in suit until the receipt of that consideration. What he sold to them was not the right to receive that consideration, but the property in suit. They were doubtless at liberty to resist the plaintiff's claim on the ground that the sale made to him had been invalidated by his failure to pay the sale-price; but they have not challenged the ruling that it was not so invalidated, and they must submit to the conclusion that the sale made to themselves is invalid, and that they are not entitled to retain possession of the property thereunder.

If then they are not entitled to retain possession of the property until receipt of Rs. 600 from the plaintiff, the question remains whether that sum should be paid to the vendor. To him, if it be due at all, it is due from the plaintiff, but he admitted its receipt in the Court of first instance, and has not claimed it here. From him, and not from the plaintiff, the second vendees are entitled to recover the price which they paid to him for the property, which the lower appellate Court has ruled that he was not free and competent to sell to them.

For the above reasons we must decree the appeal with costs, and modify the lower appellate Court's decree by reversing that portion of it which directs the plaintiff to pay Rs. 600 and to bear his own costs. Those costs must be paid by the defendants, second vendees.

APPELLATE CRIMINAL.

PRESENT:

Mr. Justice Pearson.

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APPELLATE CRIMINAL.
2 A. 713.

EMPRESS OF INDIA *v.* KISHNA AND ANOTHER. [18th February 1880.]

2 A. 713.

Penal Code, S. 201—Causing disappearance of evidence of murder.

(1) S. 201, I.P.C., refers to persons other than the actual offenders.

(2) Where a person who has committed murder removes the corpse from one field to another, he does not cause any evidence of murder which that corpse affords to disappear, but his object is merely to divert suspicion from himself.

[F., 8 A. 252=6 A.W.N. 716, 22 C. 636 (641): R., 1 L.B.R. 366, 30 P.L.R. 1904=1 P.R. 1904 (Cr.), 1 S.L.R. 73 (81) Cr.]

Kishna and Fauja, having caused the death of Jiwan in a field belonging to Bhikan, removed Jiwan's dead body from that field to his own field with the intention of screening themselves from punishment. The Sessions Judge convicted Kishna of culpable homicide not amounting to murder of Jiwan and also of an offence under S. 201, I.P.C. Kishna preferred an appeal to the High Court.

JUDGMENT.

[714] PEARSON, J.—No one is present on behalf of the appellant to support the appeal. The grounds on which the findings of the Sessions Judge are appealed against are not apparent from the petition of appeal. Those findings, however, appear to me to be obnoxious to grave objections. The appellant has been found guilty of causing the disappearance of evidence of an offence committed with the intention of screening himself and other offenders from legal punishment. Now S. 201, Indian Penal Code, has been held to refer to persons other than the actual offenders;

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2 A. 713.

and therefore the appellant in this case could not properly be punished for what he [715] may have done to screen himself from punishment. But, as a matter of fact, he did not, by removing the corpse of Jiwan from one field to another, cause any evidence of Jiwan's murder which that corpse afforded to disappear. His object may have been to divert suspicion from himself or from Bhikan ; but his act does not constitute the offence defined in S. 201, Indian Penal Code. The conviction and sentence under that section are therefore annulled.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

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APPELLATE CIVIL.
2 A. 746.

DEVA SINGH (*Plaintiff*) *v.* RAM MANOHAR AND ANOTHER (*Defendants*). [19th February 1880.]

2 A. 746.

Hindu Law—Mitakshara—Mortgage by father, of joint ancestral property—Sale of such property in execution of decree against father—Liability of son's share.

Where a Hindu family is joint, and the joint property is in the father's possession and management, the whole of it is liable under a decree obtained against the father for money borrowed by him for the use of the joint family ; the suit and the decree in such a case must be regarded as against the father as representing the joint family. (6 I.A. 233=5 C.L.R. 477, *F.*; 3 C. 198, *D.*).

[R., 1 O.C. 1 (8).]

The undivided estate of a joint Hindu family consisting of the father (Sheo Narain Singh), and his five sons, while in the possession and management of the father, was mortgaged by him with the knowledge of the sons as security for the re-payment of moneys borrowed and lent for the use and benefit of the family. Ram Manohar the lender sued Sheo Narain Singh to recover the moneys by the sale of the family estate and obtained a decree on the 6th July, 1877 against Sheo Narain Singh directing its sale, and sought to bring the family estate to sale in execution of this decree. Deva Singh one of the sons of Sheo Narain Singh instituted the present suit against Ram Manohar and Sheo Narain Singh to protect his share in such estate from sale.

The defendant Ram Manohar set up the following defence :—"That the plaintiff, notwithstanding his knowledge of the transaction, had kept quiet and admitted it ; under these circumstances his claim is improper : that the justice of the defendant's claim is not denied and its nature is not open to any objection, therefore under Hindu law and precedents the defendant's debt is chargeable on the property advertised for sale as well as against the plaintiff and other sharers, and the property cannot be exempted : that the defendant Sheo Narain Singh, having borrowed the money secured by the bond for the maintenance and the benefit of the plaintiff and all other members of the family, had executed the document in question : that the defendant Sheo Narain Singh and all other members of the family benefited by the loan : that the defendant Sheo Narain Singh, having failed to fulfil the promise, the defendant obtained a decree ; and that the defendant Sheo Narain Singh has caused his son to bring this suit, with a view to delay the recovery of the money due to this defendant."

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2 A. 746.

The suit was not defended by the defendant Sheo Narain Singh. On the date fixed for the settlement of issues (11th December, 1878) the plaintiff's vakil admitted "that the plaintiff lived as a member of a joint family in commensality, and that he derived benefit from the property in suit as one of the joint family." The second issue fixed by the Munsif was: "whether the property in suit is actually owned and possessed by plaintiff or Sheo Narain Singh, defendant, and whether it is liable to be sold in satisfaction of the decree?"

The Munsif decided this issue against the plaintiff and dismissed the suit, for the following reasons:—"The Court has deliberately taken into consideration the precedents cited by the parties. The Privy Council ruling relied on and quoted by the plaintiff's pleader, *Deendyal Lall* v. *Jugdeep Narain Singh* (1), is inapplicable to the present suit for the following reasons:—(i) In that case the debt had been contracted by the father for his own personal use, and not to meet any legal necessity, such as maintenance of his family. Now the plaintiff in this case has not only failed to prove that the defendant No. 2 had borrowed the money for his personal use, and that he spent it for his own purposes (his wife and his sons, the plaintiff andothers, not participating in the benefit), but it also appears, on the contrary, from the statement of the pleader recorded in the proceeding, dated the 11th December, 1878, that the money secured by the bond was enjoyed by the plaintiff, his mother, and brothers, when they admittedly lived and messed together. Under these circumstances all the property pledged in the bond is liable for the debt, and the plaintiff's share cannot be exempted. (ii) The precedent applies to the case of a transfer made by the ancestor of an ancestral joint property without the consent of his co-sharer who did not benefit by the transaction. In this case the defendant No. 2 borrowed money of a banker while living and messing jointly, and spent it for the benefit of his wife and sons, and when the banker demanded the money he caused this suit to be brought under colour of the Hindu law. It is impossible that the son should remain ignorant of the act of his father with whom he lived. The plaintiff ought to have brought a suit when the defendant No. 2 had acted beyond his power in borrowing the money for his own use on the security of the ancestral property. But at that time the plaintiff, his brothers, and the wife of the defendant No. 2 jointly appropriated the money quietly. A decree was eventually passed for that money and the property having been advertised for sale the present suit has been instituted. There can be no doubt that the suit has been brought in collusion with the defendant No. 2 for a dishonest purpose."

On appeal by the plaintiff the Subordinate Judge affirmed the Munsif's decision, the material portion of the Subordinate Judge's judgment being as follows:—"It appears from the proceeding, dated the 11th December, 1878, referred to by the Munsif, that the plaintiff has admitted the fact of his living with his father. It is clear that the plaintiff and his father live together, and it is also clear that the plaintiff has been living in commensality with his father, who is the judgment-debtor, and that the debt was for the plaintiff's support and benefit. It is also clear that the property continued all along in possession of the plaintiff's father, the judgment-debtor, who hypothecated all that was in his possession. Under these circumstances no part of the property can be, in consideration of the plaintiff's right of inheritance, exempted from liability for the money lent for the use of the joint family by the defendant-respondent. As the

(1) 3 C. 198.

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judgment-debtor was in possession of the property which he had hypothecated in the bond, it was not necessary to implead the plaintiff. As the plaintiff was aware of the defendant-respondent's just demand, and of the decree, and the suit, and as he took no measures at that time for his protection from the demand which has not been paid off as yet, the claim of the plaintiff does not deserve any consideration. The precedents cited by the plaintiff cannot be applicable to a case in which a debt is contracted for the support and benefit of the children, and in which the father has possession of the whole property which he has pledged. The fact of the whole property being liable for the debt is apparent from the plaint, in which the plaintiff himself says that all the property has been hypothecated. In short, with reference to the facts of the case, the Munsif's decision deserves to be upheld. According to law, a son who wants the property of his father is bound to pay his father's debt. The debt was contracted for the support of the children including the plaintiff, and it is a just debt. The debt being incurred in good faith for the support of the joint family, the liquidation thereof is incumbent on all persons. No plea against the validity of the debt is worthy of consideration. It being necessary for a son to pay his father's debt, and he having failed to do so, the property is in consequence advertised for sale by auction; the plaintiff's claim must be considered improper." The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[751] OLDFIELD, J.—It appears that the defendant Ram Manohar obtained a decree against the defendant Sheo Narain Singh, the father of plaintiff, upon a bond executed by him, and sought to execute the decree against certain joint family property pledged in the bond, and the plaintiff has brought this suit to exempt his share in the joint family property from sale on the ground that the defendant Ram Manohar only obtained a decree against his father, and it is only his father's rights that can be taken in execution under such a decree. The decree was passed against the property pledged in the bond, and the finding of the lower appellate Court on the facts is that father and son lived together as members of an undivided Hindu family, the property being in the father's possession and management, and that the debt was incurred for the plaintiff's support and benefit, and the money was lent for the use of the joint family by the defendant Ram Manohar, and the plaintiff was aware of the transaction.

It is undoubted that the whole ancestral property is liable for a debt contracted by a father under such circumstances, and there is no weight to be attached in the present case to the contention that, the decree being against the father only, it is only his interest that can be sold, for we cannot but hold that the suit and decree in this case must be regarded as against the father as representing the joint family.

In a recent case before the Judicial Committee of the Privy Council, *Bissessur Lall Sahao* v. *Luchmessur Singh* (1), decided **[752]** 15th July, 1879, where the question was whether certain family property could be held liable under decrees obtained against members of the joint family, their Lordships appear to consider that, where the family is joint, there may be a presumption that the party sued is sued as a representative of the family, and they held that, when the decrees are substantially decrees in respect of a joint family and against the representatives of the family, they may be properly executed against the joint family property. Such

(1) 6 I.A. 233; 5 C.L.R. 447.

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2 A. 746.

appears to be the case in the suit in which this appeal has been made. Much stress has been laid by the plaintiff-appellant's counsel on the case of *Deendyal Lall* v. *Jugdeep Narain Singh* (1). In that case it was held that the auction-purchaser, who was also the decree-holder, "could not acquire more than the right, title, and interest of the judgment-debtor; and if he had sought to go further, and to enforce his debt against the whole property, and the co-sharers who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it; by the proceedings which he took he could not get more than that was seized and sold in execution, *viz.*, the right, title, and interest of the father."

But our view of the case before us, which proceeds on the representative character of the judgment-debtor as representing the family, cannot be said to be in conflict with the principle laid down in the above case.

We affirm the decree of the lower appellate Court and dismiss this appeal with costs.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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FEB. 24.
APPELLATE CIVIL.
2 A. 715.

CHUHAR MAL (*Plaintiff*) *v.* MIR AND OTHERS (*Defendants*).

[24th February 1880.]

Bond—Interest—Penalty.

Where, in a bond under which the principal amount is payable without interest by instalments, and in default of such payment, with interest at Rs. 3-2-0 per cent. per mensem, sufficient immoveable property is hypothecated, and a surety is also furnished, the stipulation for interest at a high rate is of a penal nature; and reasonable interest alone could be allowed.

[Not. F., 15 A. 232 (255) (F.B.)]

JUDGMENT.

[716] STUART, C. J.—It is clear that the defendants, who are the debtors under the hypothecation-bond, have been taken advantage of by their greedy and unscrupulous lender. But, if there were nothing else in the case than the mere stipulation for a high rate of interest, it might be difficult to hold that the plaintiff was not entitled to recover on that footing, the usury laws having been repealed, and parties generally in such transactions being left to their contracts. But here there appears to be a peculiarity which takes his case out of the general category to which I have referred. As I understand, the money was lent in the first instance without interest, and, that being so, the subsequent stipulation for Rs. 3-2-0 per cent. per mensem, to be enforced on the defendant's default in paying the instalments, appears to me to be not only penal, but really in the nature of a fraud on the main contract, and interest should be reduced to what is reasonable under all the circumstances. **[717]** I agree with the lower Courts in thinking that one per cent. per mensem would be sufficient, and to this rate my colleague Mr. Justice Spankie is willing to reduce the interest. After date of decree of the first Court six per cent. per annum to be allowed. The judgments of the lower Courts will therefore stand and the present appeal is dismissed with costs.

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(1) 3 C. 198.

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APPELLATE CIVIL.

2 A. 715.

SPANKIE, J.—Plaintiff-appellant sued defendants-respondents on a bond executed by Mir and Sumair on the 14th August, 1868, for Rs. 400 payable by instalments without interest, and stipulating, in case of default, that the obligors would pay interest at Rs. 3-2-0 per cent. per mensem. The obligors hypothecated twenty-nine bighas of land in mauza Mirzapur, as security for the payment of the debt. One Narpat was also surety. Sumair and Narpat are both dead, leaving Khushal and others, defendants, their sons, in possession of their property.

Mir admitted the bond and also that he was in possession of the estate of Sumair, deceased. He contended, however, that he had only received Rs. 250 out of the Rs. 400 borrowed, as Narpat, the surety, had to take Rs. 150, and he further urged that the provision in the bond for such extortionate interest was penal. Khushal, as heir of Narpat, admitted the bond, but pleaded that the debt should be recovered from the debtors, and, if that could not be done, he was liable for the balance.

The only question now before us in second appeal relates to the interest. The first Court held the condition in the bond to be a penal provision and would not allow it. In appeal the Judge affirmed the decree of the first Court, holding that the rate of interest amounted to a penalty and was excessive.

It is contended by the plaintiff that the ruling of the Courts below as to the interest is erroneous. The property hypothecated in the bond was expressly made liable for the payment of principal and interest, and therefore the plaintiff is at liberty to recover the rate stipulated therein.

Looking at all the circumstances of the case, and the terms of the contract, which are much in favour of the obligee, as the property of the obligors, sufficient for the discharge of the debt, is hypothecated to him in the deed, and besides this another person **[718]** became surety, I am disposed to regard the very high rate of interest imposed in case of default as being of a penal character. At the same time the money was lent in the first instance without interest, and the deed hypothecates the property both for the payment of the debt and interest; the appellant therefore may have some ground for contending that the interest named in the bond is the consideration agreed to be paid by the borrower to the lender for the use of the money. Still the rate of interest imposed by the terms of the bond is so excessively high, and specially so when the security appears to be good and the risk therefore less, that it seems impossible not to regard the clause respecting interest as a penal one, in case of default, and as there was default, I would give the plaintiff-appellant reasonable compensation, and this I think would be half the rate imposed by the bond to the date of the decree of the Court of first instance, and after that I would allow interest at six per cent. per mensem. But if the learned Chief Justice considers that a less rate should be allowed, I am willing to reduce it to twelve per cent.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

SANKAR DIAL (*Decree-holder*) *v.* AMIR HAIDAR AND OTHERS (*Judgment-debtors*). [24th February 1880.]

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APPELLATE CIVIL.
2 A. 752.

2 A. 752.

Attachment in execution - Objection by judgment-debtor—Release from attachment—Decree-holder's remedy—C.P.C., 1877, Ss. 278 to 283—Suit to establish right.

Where property attached in execution of a decree is released, on the objection of the judgment-debtor to the effect that it was in his possession, not as his own property, but as superintendent of an endowment, the decree-holder's remedy is not by way of appeal against the order releasing the property, but by means of a suit under S. 283 of the C.P.C., to establish his right to proceed against such property. For, though the objection was made by the judgment-debtor, it was one to be dealt with under Ss. 278 and 279, &c., of the C.P.C. (6 B.L.R. 721, 6 B.L.R. 725, 6 W.R. 61, *F.*)

[**F.**, 7 A. 36 (37), 15 C. 437 (445), 6 C.W.N. 63 (65); **R.**, 8 A. 626 (634)=6 A.W.N. 228, 10 M. 117 (119); 16 C. 1 (7), 23 B. 237 (252), 1 O.C. Sup. 11 (12); **D.**, 7 A. 547 (549)=5 A.W.N. 132, 9 A. 605 (607), 16 C. 603 (607).]

JUDGMENT.

[753] OLDFIELD, J.—The decree-holder, appellant before us, sought to attach certain property in execution of his decree, and the judgment-debtors objected that they held the property, not as their own property, but as superintendents of an endowment to which the property belonged, and they objected to the attachment. The Court of first instance released the property from attachment on the objections taken. The decree-holder appealed to the Judge, who dismissed the appeal on the ground that, with reference to the value of the subject-matter, it lay to the High Court. The decree-holder has now appealed to this Court. A preliminary objection appears to us to be valid, to the effect that there is no appeal, and that the decree-holder's proper remedy is by regular suit.

The objections taken to the attachment were of the nature of those to be dealt with under S. 278 and following sections, Civil Procedure Code, and the remedy for the party dissatisfied is under S. 283 by regular suit. The case is not altered by the circumstance that the objectors were the judgment-debtors. It has been held frequently that the provisions of S. 278 and following sections apply equally to the objections by parties to the suit as by strangers, when their objections are of the nature of those with which those sections deal—*Haris Chandra Gupto* v. *Srimati Shashi Mala* **[754]** *Gupti* (1); *In the matter of the petition of J. B. Rainey* (2); *Chunder Kant Surmah* v. *Bungshee Deh Surmah* (3). We dismiss the appeal with costs.

(1) 6 B.L.R. 721.
(2) 6 B.L.R. 725.
(3) 6 W.R. 61.

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APPEL-LATE CIVIL.

2 A. 754.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

BALDEO PRASAD AND ANOTHER (*Plaintiffs*) *v.* GRISH CHANDAR BHOSE (*Defendant*). [24th February 1880.]

2 A. 754.

Suit on lost cheque—Cause of action—Parties to suit—C.P.C., 1877, S. 61.

(*a*) When a cheque is lost by a payee or indorsee, the refusal of the drawer or the indorser to renew the cheque or refund its amount to the payee or indorsee, gives the latter a cause of action against the former.

(*b*) Where the indorsee sues the indorser for renewal of a lost cheque, the drawer also must be impleaded, as the cheque cannot be renewed without his co-operation.

JUDGMENT.

[754] OLDFIELD, J.—The case of the plaintiffs is that a cheque, No. 3821 of 18th October, 1877, drawn by Captain C. Ellis, Emigration Agent, on the Bank of Bengal, for Rs. 300, was endorsed over to their agent, Parsotam Das, by the defendant, for valuable consideration. Parsotam Das sent the cheque to the plaintiffs' firm at **[755]** Ghazipur, and they forwarded it by post to their firm at Arrah, but it was lost in transit. The defendant refused to give a duplicate of the cheque; and the plaintiffs now sue to compel him to give a duplicate or to refund the money, and to pay damages, Rs. 48, equivalent to interest on the amount of the bill lost by plaintiffs owing to defendant's refusal, and future interest from date of institution of the suit. The defendant replies that he did not indorse the cheque over to plaintiffs; that it was drawn payable to Babu Hari Mohan Banarji, who indorsed it. The Judge has rejected the plaint on the ground that it does not disclose a cause of action. This is, however, erroneous.

Under S. 61, Code of Civil Procedure, a suit may be maintained on a lost negotiable instrument, and, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff to the satisfaction of the Court against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint; and in Byles on Bills of Exchange, 12th Ed., chapter XXVIII, p. 378, we find that the relief administered by Courts of equity will be afforded, "not only on bills, but on notes; not only against the drawer, but against the indorser, or the acceptor; not only may a new bill be required, but payment; but the Court will not call on a party to renew or pay a lost bill without providing him with a satisfactory indemnity."

The defendant Babu Grish Chandar Bhose, assuming him to be the indorser of the cheque, cannot give the new cheque asked for without the co-operation of the alleged drawer, Captain Ellis; and the plaintiff should amend his plaint by joining Captain Ellis as a defendant in the suit, and praying that the relief sought may be given against both defendants.

The Judge will return the plaint to the plaintiff to be amended accordingly, and his order rejecting it is set aside, and the cost of this appeal will be costs in the cause.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

SHEO PRASAD AND ANOTHER (*Plaintiffs*) *v.* UDAI SINGH (*Defendant*).

[25th February 1880.]

2 A. 713.

Sale of immoveable property—Suit for possession—Specific performance—Limitation Act, 1877, Sch. II, Arts. 113, 136 and 144.

Where land, the subject of a sale, was not in the possession of the vendor at the time of sale, but had been adjudged to him under a decree, against which an appeal was pending, a suit by the vendee "for possession agreed to be given" (there being no such agreement in the sale-deed), is not a suit for specific performance, to which Art. 113, Sch. II, of the Limitation Act, 1877, is applicable, but one for possession under the title conveyed by the sale, which is governed by Arts. 136 and 144 of the second schedule.

[R., 13 B. 424 (428), 15 B. 261 (264), 10 C. 218 (224), 5 Ind. Cas. 273 (275).]

JUDGMENT.

[719] PEARSON, J.—This purports to be a suit to obtain possession of landed property sold by the defendant to the plaintiffs on the 27th October, 1865. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree of the late Sudder Dewany Adawlat, North-Western Provinces, dated 9th August, 1864, against which an appeal was pending before the Privy Council. But he obtained possession of the larger portion of the property on the 24th February, 1870, and of the remainder on the 23rd August, 1872, and the cause of action in this suit is that he has not put the plaintiffs in possession of it.

The lower Court has held the suit to be one for the specific performance of a contract to which article 113, schedule II, Act XV of 1877, is applicable, and has dismissed the suit as barred by efflux of time, it having been instituted on the 5th October, 1877, or more than three years after the dates above mentioned.

On examining the deed of sale, we find that it does not contain any express promise or undertaking on the vendor's part to put the vendees in possession. It recites that he has sold to them and received the sale-consideration, and goes on to declare that they, regarding themselves as the absolute proprietors thereof, shall **[720]** remain in possession of it from the date on which he may obtain possession of it in execution of the decree aforesaid.

Such being the terms of the deed, the plaintiffs are not in a position to sue that the defendant may be compelled to put them in possession in fulfilment of a specific engagement to do so, nor is such the prayer of their plaint. As we have already observed, they sue to obtain possession in virtue of the right and title conveyed to them by the sale-deed.

In the 3rd paragraph of the plaint they say that the possession was agreed to be delivered "on the receipt of possession by the vendor," but, inasmuch as there was not really any such express agreement, we must understand what they say to mean no more than that he was bound by an implied agreement to put them in possession.

Taking this view of the nature of the suit, we are unable to concur in the ruling that Art. 113. Sch. II, Act XV of 1877, is applicable to it, and we rule that either Art. 136 or Art. 144 is applicable, and that, whichever of them be applicable, the suit is within time. * * * * * * * * *

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CIVIL JURISDICTION.

CIVIL JURISDICTION.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

BADR-UN-NISA (*Plaintiff*) *v.* MUHAMMAD JAN AND ANOTHER (*Defendants*). [27th February 1880.]

2 A. 671.

2 A. 671. 1. *Suit for money paid by mistake—Contract Act, S. 72—Act XI of 1865, S. 6.*

A suit for the recovery of money over-paid to a creditor by mistake is a suit for damages, within the meaning of S. 6 of Act XI of 1865, falling under S. 72 of the Contract Act, and is cognizable by a Small Cause Court.

2. *C.P.C., 1877, S. 53—Amendment of plaint.*

It would seem that a plaint once returned for amendment, under S. 53 of the C.P.C., and amended, accordingly, cannot be again returned for amendment.

Badr-un-nisa, the plaintiff, who on the 11th September, 1876, executed a bond in favour of the defendant Muhammad Jan promising to pay him Rs. 200 with interest at two per cent. per mensem within three years, instituted the present suit on the 3rd October, 1879, in the Court of Small Causes at Allahabad against the defendant Muhammad Jan and the defendant Abdul Ghani. stating in her plaint:—" (i) That she had paid the defendant Muhammad Jan, on the 20th June, 1878, at Allahabad, at his request, Rs. 299, on account of the bond dated the 11th September, 1876: (ii) that the sum due on account of the said bond was only Rs. 292-9-0: (iii) that the defendant Muhammad Jan had taken Rs. 6-7-0 more than was due from her: and (iv) that on the 1st April, 1877, she paid to the defendant Abdul Ghani Rs. 9 on account of the said bond as directed by the defendant Muhammad Jan, and for which he did not allow any deduction." She therefore prayed that " (i) Rs. 6-7-0 which the defendant Muhammad Jan had received in excess on the 20th June, 1878, together with interest at two per cent. per mensem from the 21st June, 1878, to the 1st October, 1879, might be awarded to her: (ii) that Rs. 9 paid to the defendant Abdul Ghani at the request of the defendant Muhammad Jan together with Rs. 3-3-0, interest from the 1st April, 1877, to 1st October, 1879, might be awarded to her: (iii) that Rs. 20-8-0, principal and interest, might be awarded in all." On the return of the plaint for amendment in respect of the relief sought, the plaintiff amended it by asking that a decree might be passed in her favour for Rs. 15-7-0, principal, and Rs. 5-1-0, interest at twenty-four per cent. per annum, in all Rs. 20-8-0

REFERENCE BY THE JUDGE OF THE SMALL CAUSE COURT.

" She (plaintiff) now sues for the refund of Rs. 15-7-0 excess paid by mistake and Rs. 5 interest upon that excess: and has framed her plaint as a plaint for money due upon a contract: I held that there is no contract whatever in the case, that the relation of the parties (plaintiff and defendant No. 1) is that of one having paid money to the other through mistake. Such a relation subsists, as pointed out by Sir Barnes Peacock in the Full Bench ruling in *Rambux Chittangeo* v. *Modhoosoodun Paul Chowdhry* (1), upon a *quasi* contract; and a *quasi* contract is no contract at all. The Indian Contract Act provides for these cases in S. 70, and by so doing seems to

(1) 7 W. R. 377.

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CIVIL JURISDICTION.

2 A. 671.

suggest that it recognises to the full the principle that they do not arise from any contract (see the heading of chapter V within which S. 70 falls). I further held that the words which grant jurisdiction to this Court, 'money due on bond or other contract,' cannot be enlarged to include money due on relations resembling those created by contract.

"The pleader for the plaintiff urges on the other hand that the obligation in this case rests upon an implied contract and that the claim is therefore cognizable.

"At the same time he contends that, if overruled in this point, he may be allowed to amend his plaint into one for damages or compensation, in which case, following the ruling of the Hon'ble Court in *Agra Savings Bank* v. *Sri Ram Mitter* (1), his suit would be cognizable by this Court.

"Defendant, however, objects that such amendment would alter the plaint into one of another and inconsistent character, and it seems to me his contention is right.

"In the original plaint he would be suing upon a contract, in the amended plaint upon the breach of a contract. The distinction between a contract and breach of a contract as causes of action seems to me to fall under the words 'another and inconsistent.'

"On this point I am, however, doubtful, and I have therefore determined upon referring both points for decision."

The questions referred by the Judge for the decision of the High Court were as follows: "(i) Are cases falling under S. 70, Act IX of 1872, cognizable by a Court of Small Causes? (ii) Can a plaintiff amend a plaint for money due upon an implied contract into a plaint for damages arising out of breach of an implied contract?"

JUDGMENT.

[673] STRAIGHT, J.—This is a reference under S. 617 of Act X of 1877 by the Judge of the Small Cause Court, Allahabad, in respect of certain questions of law that have arisen in a case before **[674]** him, in which one Badr-un-nisa is the plaintiff and Muhammad Jan and Abdul Ghani are the defendants. It appears that the plaintiff was the obligor of a bond for Rs. 200 of which defendant No. 1 was the obligee. On the 1st April, 1877, at the request of defendant No. 1, she paid to defendant No. 2 the sum of Rs. 9, on the understanding that it was to be credited to her in the amount due from her on the bond. On the 20th June, 1878, the plaintiff, upon his demand, paid to defendant No. 1, Rs. 299 in satisfaction of her debt to him. It now appears that she has paid over and above what was actually due from her Rs. 15-7-0 and it is this amount she seeks to recover.

The questions properly arising on the Judge's reference appear to be,—(i) Does the plaintiff's claim fall within the terms of S. 72 of the Contract Act? (ii) If it does, can the plaint as filed be altered from its present shape to meet the case, without contravening the directions of the proviso of S. 53, Act X of 1877? (iii) If not, does the plaint upon its face sufficiently disclose what the suit is for, so as to enable the Judge to treat it as one for damages without doing the defendant injustice or taking him by surprise?

It appears to me that the circumstance of the Rs. 9 having been paid to defendant No. 2 in no way affects the nature of the plaintiff's claim. She ought to have been credited in account with that sum by defendant No. 1, but she was not, and consequently, when she satisfied

(1) 1 A. 388.

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2 A. 671.

his demand of Rs. 299 on the 20th June, 1878, and paid Rs. 15-7-0 too much, her cause of action arose. The suit falls directly within S. 72 of the Contract Act, and, the plaintiff having paid this money by mistake and the defendant having refused to repay it when requested to do so, the plaintiff is entitled to recover it from him.

As to the second point the plaint as originally framed no doubt treated the plaintiff's claim as based upon a *quasi* contract. According to English precedents, suits for the recovery of money paid by mistake are founded upon the fiction of an implied contract and promise to pay. But the provisions of the Contract Act, chapter V, have superseded this fiction of implied contract and promise, and **[675]** the re-payment of money by a person to whom it has been paid by mistake is by S. 72 declared to be a duty on the part of such person, the refusal to perform which, when requested, is proper ground of an action for damages. The suit of the plaintiff in the present case therefore is for damages against defendant No. 1 and defendant No. 2 can in no way be a party. The plaint was originally filed on the 3rd October, 1879, and was returned for amendment within twenty-four hours on the 19th October. It was amended within the time limited by the Court and re-filed in its present shape.

I have considerable doubt as to whether it is competent now for further amendment of the plaint to be made, if it be necessary. According to the terms of S. 53, Act X of 1877, it was returned for amendment "at the first hearing," and was amended within the "time fixed by the Court." I am disposed to think that it is now too late for any further alterations in its shape to be made, but as the view I entertain upon the third point obviates the necessity for any amendment, it is unnecessary to express any determinate opinion as to this. It appears to me that the plaint in its present shape, although it may be inartistically framed, indicates sufficiently what the suit is for. It shows clearly on its face that a sum of Rs. 15-7-0 is demanded by the plaintiff of the defendant, and as the application of the Contract Act determines the cause of action and the precise nature of the relief to be asked under a state of facts such as exists in the present case, I think, without infringing the provisions of Ss. 50 and 53 of Act X, the Judge may take cognizance of the plaint as one for damages and dispose of the case under S. 6, Act XI of 1865.

As I have already remarked, defendant No. 2 must be struck off, and he will of course be entitled to his costs.

SPANKIE, J.—I concur.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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FULL BENCH.

2 A. 720.

RAM PRASAD (*Defendant*) *v.* SUKH DAI (*Plaintiff*).

[28th February 1880.]

2 A. 720.

Declaratory suit—Consequential relief—Suit to establish right to attached property—C.P.C., 1877, S. 283—Court-fees Act, 1870, S. 7, cl. 4 (c) and Sch. II, Art. 17, III.

A suit, under S. 283 of the C.P.C., by a plaintiff in possession of immoveable property, attached in execution of a decree, for a declaration of his right thereto

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and "for protection of such property from sale" is one claiming consequential relief; the plaint or memorandum of appeal in such a suit must, therefore, be stamped under S. 7, Cl. 4 (*c*) and not under Sch. II, Art. 17, III of the Court-fees Act.

[Overruled, 16 A. 308 (312) (F.B.); F., 12 A. 129 (163) (F.B.); R., 16 B. 608 (616, 617), 31 C. 511 (515), 31 B. 73 (77)=8 Bom. L.R. 885; D., 20 B. 736 (741).]

ORDER OF REFERENCE.

STUART, C.J. and SPANKIE, J.—"Finding that the rulings of this Court—S.A. No. 168 of 1879, decided the 13th May, 1880 (1): S.A. No. 296 of 1879, decided the 29th July, 1879 (1): S.A. No. 334 of 1879, decided the 22nd August, 1879 (1): S.A. No. 384 of 1879, decided the 1st August, 1879 (1)—are contradictory as regards the principle on which court-fees are payable in suits under S. 283 of the Code of Civil Procedure, and that some of them are opposed to rulings of other High Courts—*Jai Narayan Giri* v. *Grish Chandra Myti* (2): *Thakur Din Tiwary* v. *Nawab Syed Ali Husain* (3): *Eadur-un-nissa Bibi* v. *Karim-un-nissa Khatun* (4): *Bank of Hindustan* v. *Premchand Raichand* (5)—we refer for the consideration of a Full Bench the question whether court-fees are payable in such suits under Cl. iv (*c*), S. 7, or under Cl. iii, Art. 17, Sch. ii, Act VII of 1870."

JUDGMENT.

[722] STUART, C. J.—Since this case was before Spankie, J., and myself I have had an opportunity of perusing the plaint, and it cannot be doubted that by it, not only a declaration of right, but that consequential relief is also prayed for. And I may observe that in my opinion the plaintiff was quite entitled to frame her suit in this form and was in no way bound to await the eventualities of a mere declaration of right: and she appears to me to have wisely considered that her object would be most effectually attained by a plaint in the form which she adopted. The plaint shows how Sukh Dai the plaintiff acquired the house, which is the subject of the suit, and that her claim as owner had been interfered with by the action of the purchaser of a decree against the house, or rather one-third of it, and that she had applied to have the sale postponed, but that the Munsif had rejected her application. The plaintiff therefore prays for the following relief:—"That her right be established in respect of the said house, or one-third of the said house, valuing Rs. 1,333-5-4, by virtue of the deed of gift dated the 26th March, 1873, and for her possession and enjoyment thereof being protected from sale be established." There cannot be a doubt that consequential and substantial relief is here asked for, and that the court-fee payable is that provided by Cl. iv (*c*), S. 7 of the Court Fees' Act, and that Cl. iii, Art. 17, Sch. ii of the same Act has no application.

This is my clear opinion irrespective of any rulings on the subject by this or by any other of the High Courts. But I have looked into all those printed for us in this case, and they all appear to me to have been correctly decided and to be in strict consistence with the opinion I have formed and stated in the present case, not even excepting the ruling by Pearson, J., and Turner, J., in *Chunia* v. *Ram Dial* (6), for in that case all that was prayed for was a mere declaration of right. The decision of the Privy Council of the 6th March, 1874, *Thakur Din Tiwary* v. *Nawab Syed Ali Husain* (3), as also the rulings by the Calcutta and Bombay High Courts are as satisfactory as they are to my mind conclusive.

(1) Unreported. (2) 22 W.R. 438. (3) 21 W.R. 340. (4) 19 W.R. 18.
(5) 5 Bom. H.C.R., O.C.J., 83. (6) 1 A. 360.

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PEARSON, J.—In the suit out of which this appeal has arisen it would seem that the plaint asked, not only for a declaration of [723] the plaintiff's right to the property in question, but also for its protection or exemption from sale in execution of the defendant's decree. The latter prayer was, in my opinion, superfluous; for, if the plaintiff succeeded in obtaining a decree declaratory of his right, he could on the strength thereof apply to the Court executing the decree to release the property from attachment and to refuse to proceed to the sale thereof. As, however, he was so ill-advised in framing his suit as to pray for consequential relief which he did not need to obtain by means of the decree passed in the suit, it is impossible to hold that his suit is not one of the nature described under letter c, Cl. iv, S. 7 of the Court Fees' Act. I confine my remarks to the particular case under reference, and refrain from noticing or commenting on the decisions to which our attention has been drawn. The distinction between suits under letter c, Cl. iv, S. 7, and suits under Cl. iii, Art. 17, Sch. ii of the Act is plain; the former are suits for a declaratory decree where consequential relief is prayed; the latter are suits of the like kind where no consequential relief is prayed. There is no scope for argument in the matter.

SPANKIE, J.—I concur.

OLDFIELD, J.—I am of opinion that in this case, looking to the relief sought, there is a claim for consequential relief, and the court-fees should be levied under letter c, Cl. iv, S. 7 of the Court Fees' Act.

STRAIGHT, J.—Plaintiff rightly estimated the nature of the relief she was seeking in her suit, by paying a court-fee of Rs. 60-12-0 in the first Court. It was not a mere declaration of her right at which she aimed, but she sought consequential relief as well. The defendant-appellant has therefore inadequately stamped his petition of appeal and he will have to make up the deficiency.

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PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

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2 A. 756.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) *v.* SHEO SINGH RAI AND ANOTHER (*Plaintiffs*). [1st March 1880.]

Master's liability for fraud of servant—Contributory negligence.

(*a*) In a suit against Government for breach of contract, whether express or implied, the plea, that the Government is not liable for the fraud or dishonesty of its servants outside the scope of their employment, is not sustainable, when such fraud or dishonesty is carried out and effectuated after the liability of Government to the plaintiff has been once undertaken and acknowledged, though the fraud may have had its inception before such acknowledgment.

(*b*) Nor can the plea of contributory negligence be successfully urged, when such negligence is induced by its own servants on the occasion of the plaintiff seeking their service within the scope of their duties.

JUDGMENT.

[756] STRAIGHT, J.—The plaintiffs in this suit claim from the Collector of Meerut, as representing the Secretary of State for India, restitu-[757] tion of two Government Promissory notes of the loan of 1854-55, made over to the Meerut Treasury on their behalf by their duly authorised agent

on the 12th August, 1872. They further ask alternatively for other notes of equal value or for the equivalent cash with interest at four per cent. from date of last payment. The lower Court decreed the claim and the defendant now appeals.

The facts of the case, which are not disputed, appear to be as follows:—The plaintiffs are Commissariat agents carrying on business in the city of Delhi, under the style or firm of Sheo Singh Rai, Nihal Singh. On the 12th August, 1872, they sent by the hand of their gomashta, Sumair Chand, nine Government Promissory notes of the value in all of Rs. 48,000 to the Meerut Treasury office, in order that they should be forwarded thence to Calcutta for cancellation and consolidation into one note. At that time the regular Treasury Officer, Mr. Billings, was absent on leave, and one Babu Kali Charan, Deputy Collector, was holding charge in his stead. Employed in the office in the capacity of chief clerk was a certain Muhammad Husain, and it was his special duty, when securities were left there for transmission to Calcutta, to see that they were carefully packed and despatched, as speedily as possible, and to prepare the necessary forwarding letter that had to accompany them. Muhammad Husain had been for many years in the Government service, and the most perfect confidence was reposed in him by his superior officers, and those who were acquainted with him or had to come in contact with him in business matters had entire faith in his integrity and honesty. It was to this man that Sumair Chand delivered the nine Promissory notes on the 12th August, 1872. The following is his account of what then occurred: "Muhammad Husain then made a mark on the notes and then I signed for Nihal Singh: Muhammad Husain himself wrote something, or he caused some other person to write something, on the notes, and then he had the interest paid to me: on the same day he again asked me to sign the notes at another place, which he said was required to get the notes consolidated: these too I signed for Nihal Singh: then he asked me to remain outside and that he would do all that was required: after some time I was called in, and Muhammad Husain gave me a receipt in **[758]** English." The receipt here referred to was for the nine Promissory notes, and bears the signature of "Kali Charan, Treasury Officer." In ordinary course it should take from ten to fifteen days to transmit the notes to the Public Debt Office at Calcutta for cancellation and to get back the consolidated note. Subsequent to the 12th August, 1872, Sumair Chand called on two or three occasions at the Meerut Treasury to know whether his note had arrived, but on each occasion his inquiries were answered by Muhammad Husain to the effect that it had not been received from Calcutta. Somewhere about the beginning of March, 1873, Muhammad Husain absconded, and on the 31st of that month a consolidated note, which had been received from Calcutta, for Rs. 31,200, was handed to the plaintiffs, but as it should have been Rs. 48,000, as shown by the receipt of the 12th August, 1872, suspicion was necessarily at once awakened and inquiry was instituted, with the following result. Two of the nine notes made over by Sumair Chand to Muhammad Husain. numbered 017849 for Rs. 12,000, and 020102 for Rs. 5,000, had never been forwarded to Calcutta at all, but had been misappropriated by him, he taking advantage of the blank indorsement of the name of Nihal Singh by Sumair Chand to make the latter one payable to himself, by writing above that signature the words "Sold to Muhammad Husain": while, on the other, under a pretended authority from Nihal Singh, he put "Pay to the Agra Bank or order." On the note for Rs. 12,000 the Bank made Muhammad Husain an advance in August, 1872,

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of Rs. 8,000, and on that of Rs. 5,000 in December of Rs. 2,300, retaining them as security. With regard to the remaining seven Promissory notes, they remained in the Treasury at Meerut until the 19th February, 1873, upon which day they were sent to Calcutta for cancelment and consolidation, accompanied by a forwarding letter signed by Mr. Billings, who had returned from leave and resumed charge. At that time Muhammad Husain had made the necessary formal indorsement on these seven notes, above the name of Nihal Singh, which amounted to an acknowledgment on the part of that person, that he had "received a new note in exchange." When the misappropriation of these two notes was discovered, they were, as has already been stated, in the hands of the Agra Bank; and this fact coming to the [759] knowledge of Mr. Billings, he, in his capacity of a Magistrate of the first class, issued a most illegal and improper search-warrant upon the strength of which the Bank premises were entered, and the two notes were carried away by force to the Treasury for restoration to the plaintiffs. The natural consequence of this most unwarrantable proceeding was that the authorities of the Bank instituted a suit against Mr. Billings for restitution of the two notes and damages for their illegal seizure, and in the course of the litigation, the Secretary of State for India, and the present plaintiffs were brought upon the record as defendants. Ultimately this Court, upon appeal by the Bank, on the 29th May, 1876, reversed the decision of the Subordinate Judge dismissing the claim of the Bank, and passed a decree in its favour, the result of which was that the two notes were restored. These two notes are the subject of the present suit, and it may be remarked that, since their return to the Bank, they have been negotiated away, and are now in the hands of third parties, whose names do not appear.

The plaintiffs came into Court with their present claim on the 17th August, 1878, and the relief asked in the plaint is that "the Government may be directed to make restitution of the two notes, or to deliver other notes of equal value or their value in cash, amounting to Rs. 17,000, with interest at four per cent. from date of last payment, *viz.*, the 1st July, 1872, to date of suit, amounting in all to Rs. 21,165." This the Subordinate Judge has decreed, and the defendant now appeals against that decision on two grounds: (i) That the plaintiffs, in the person of their agent, were guilty of contributory negligence: (ii) That a master is not liable in damages for loss or injury sustained through the fraudulent or dishonest act of his servant without the scope of his employment.

Both these points were urged at great length on the hearing of this appeal by the Senior Government Pleader, and many English and American authorities were cited, under both heads of argument. But upon a close and careful consideration of all the facts in the case, it appears to me that the contention for the appellant proceeded on a complete misconception of the real nature of the suit, for which I may add the Subordinate Judge is primarily responsible. In my judgment he was in error in dealing with the [760] question between the parties as governed by the law relating to bailments. The nine Promissory notes were not made over to the Meerut Treasury for any temporary purpose, upon the accomplishment of which they were to be returned or otherwise disposed of according to the directions of the bailor. On the contrary, they were unconditionally surrendered, when they were handed over by Sumair Chand for cancelment, and the effect of their delivery to the Treasury at Meerut is the same as if they had been taken by the plaintiffs to the Public Debt Office at Calcutta and handed over there. In those

individual notes, as individual notes, they retained no interest. Properly the plaintiffs might for their own protection have refused to give them up except upon receipt of the consolidated note, and I think they would have been justified in doing so; but the Government has, for its own convenience and security, established a rule that persons wishing to have old securities cancelled and consolidated are required, not only to deliver up their old securities, but to give a receipt in advance for the new one, their only document of title being the written acknowledgment of the Treasury Officer, that their securities have been received. As a matter of fact they have no option, and in order to obtain what they want, they must perforce conform to the requisitions. In my opinion the receipt given in the present case by Babu Kali Charan, the acting Treasury Officer, must be regarded as an undertaking on the part of the authorities to deliver one consolidated note for Rs. 48,000 in due course. Consequently, I do not think that there was any bailment of the two notes in the defendant for the plaintiffs, but that there was a contract entered into, the effect of which was that the plaintiffs were entitled to demand, and the defendant was bound to give a consolidated note of the value of Rs. 48,000. The present suit is, therefore, in reality one for damages on account of the defendant's refusal to discharge his obligation, and the measure of those damages must be the amount by which the note for Rs. 31,200 falls short of Rs. 48,000, with interest. Regarding the case in this light, it is difficult to see in what way the two pleas in appeal are in any way an answer to the plaintiffs' claim. The authority of Babu Kali Charan to bind the Government is unquestioned, and if he chose to contract [761] it into a responsibility without proper care and caution, that is a matter which in no way affects the position of the plaintiffs. It is perfectly obvious, that Kali Charan was guilty of the greatest negligence in not verifying the nine notes, and seeing they were properly indorsed before he gave his receipt. Moreover, he was grossly careless, both in failing to lock them up in the safe, of which he had the key, and in forgetting their receipt and in not requiring Muhammad Husain to prepare the forwarding letter for his signature, and to pack them for transmission thither. The evidence of Mr. Billings seems to me to establish the negligence of the Treasury in the most conclusive way, and had a bailment been established, or were this rightly an action of tort for the loss of the two notes, I think an overwhelming case would have been made out against the defendant. I am well aware that heads of departments and offices in a superior position in the public service are, from pressure of business, necessarily compelled to rely largely on the good faith and honesty of their subordinates, and I should never be disposed to draw the line too tightly in forming an opinion as to what, under this or that state of circumstances, they ought or ought not to have done. But reasonable and intelligent confidence is one thing, blind and careless trust is another; and while the one may fairly be accepted in explanation or excuse, the other should never be allowed in extenuation or relief from responsibility. The clerk in a bank handles unlimited sovereigns and bank notes during the hours of business, but no employer exercising the most ordinary precaution or prudence would fail to have his cash and securities locked up at the close of each day and so kept until banking hours recommenced. To do otherwise would afford unreasonable temptations, of which were the clerk to take advantage, the employer should not have the benefit to escape from the liability to third parties for any loss or damage they might thereby sustain.

In the present case the Government had the misfortune to be badly

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served. It had, as its representative in authority, a person who was negligent and slipshod in the discharge of his duties of control and supervision over a subordinate, who took advantage of these deficiencies to perpetrate a series of misappropriations and forgeries. Upon all the facts the inference is irresistible, that, but [762] for this laxity of administration in the Meerut Treasury on the part of Babu Kali Charan, the two notes could never have been stolen, nor the forgeries committed in respect of them, and such being the case it is impossible to avoid remarking, that it is a matter for regret the plaintiffs' claim should ever have been contested, much less that a countercharge of contributory negligence should have been made against them. Were it necessary to dispose of this allegation, I should have unhesitatingly come to the conclusion, that no sufficient case to establish it had been made out. A person like Sumair Chand going into a Government office can hardly be expected to anticipate that he will be made the victim of fraud and misrepresentation by the officials employed there. On many previous occasions Sumair Chand had drawn interest on Promissory notes for his masters at the Meerut Treasury through Muhammad Husain, and had also made over notes to him for consolidation and always without misadventure. It is not by what we know now, but from the state of things that existed at the time of the delivery of the notes, that the conduct of Sumair Chand, must be judged, and looking at it from this point of view, I do not find any such evidence of co-operative negligence as would disentitle the plaintiffs, either as bailors or parties damnified, from recovering damages.

But, as I have in an earlier part of this judgment pointed out, this suit is properly one for breach of contract, by reason of the failure of the defendant to discharge his obligation to give a consolidation note to the extent of Rs. 48,000, and, in my judgment, the pleas in appeal to this Court, and in answer to the plaintiffs' claim in the Court below, are irrelevant and afford no answer to the case set up. The property of the plaintiffs in the nine notes was determined, when they were handed over and the receipt was given, and thereupon an implied undertaking on the part of the defendant to deliver an equivalent security after the lapse of a reasonable interval of time was to be assumed. It is clear that, to all intents and purposes, the notes had been reduced into the possession of Government, and that all right to or control over them had been parted with by the plaintiffs. Whether they were properly taken care of or not was indifferent to them, for, at any time on the presenta-[763]tion of their official receipt, they were entitled to demand a consolidation note for Rs. 48,000. Such being the view I entertain of the case, I am of opinion that this appeal should be dismissed with costs. But the decree must be amended from the shape in which the relief has been given by the lower Court, so as to declare the plaintiffs entitled to damages, such damages to be the amount of the two promissory notes for Rs. 12,000 and Rs. 5,000, with interest from 1st July, 1872, to date of payment.

PEARSON, J.—I concur generally and substantially in the view taken of the case by my honorable and learned colleague, and in dismissing the appeal with costs, and in amending the decree of the lower Court in the manner proposed by him.

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PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

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NARSINGH DAS (*Decree-holder*) *v.* NARAIN DAS (*Judgment-debtor*).

[5th March 1880.]

2 A. 763=5 Ind. Jur. 269.

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Execution of decree—Limitation—Act XV of 1877, Sch. II, Art. 179 (2).

The words "appeal" and "Appellate Court" in Art. 179 (2) of the Limitation Act, 1877, include appeals to the Privy Council. So the period of Limitation for an application to execute a decree of the High Court, from which an appeal has been preferred to the Privy Council, begins from the date of the order of the Privy Council.

[R., 7 C. 620 (624).]

JUDGMENT.

[764] OLDFIELD, J.—I hold that the decree which is now being executed is the decree of the High Court (1), and the law of limitation which will govern the case is Art. 179 (2), Act XV of 1877,—"(Where there has been an appeal), the date of the final decree or order of the Appellate Court." In the case before us there was an appeal to Her Majesty in Council who affirmed the decree of this Court, the date of the order on that appeal being 12th August, 1876, and the present application (2) is within time from that date.

I see no reason to doubt that the words "appeal" and "Appellate Court" in Art. 179 (2) are intended to include appeals to Her Majesty in Council, since we find that these appeals are made the subject of legislation in the Act, which in Art. 177 provides the limitation for the admission of such appeals, and in Art. 180 provides the limitation for enforcing orders of Her Majesty in Council made in course of such appeals. Were it otherwise and were appeals referred to in Art. 179 (2) restricted to appeals preferred to the **[765]** Appellate Courts in India, a party who had appealed to Her Majesty in Council from a decree of a Court in India would be in a worse position, in respect of the limitation for the execution of his decree, than a party who had appealed to an Appellate Court in India.

I would decree the appeal with costs and set aside the order of the Judge and remand the case for disposal on the merits.

STRAIGHT, J.—I am of opinion that the decree which is now proposed to be executed is the decree of the High Court of the 18th August, 1871, and that the law of limitation which must govern the matter is contained in Art. 179, Act XV of 1877, paragraph 2, column 3. In the present case there was an appeal to Her Majesty in Council, and the decree of this Court was ultimately affirmed by order of the 12th August, 1876. During the pendency of that appeal, time did not run and the period of limitation only began on the passing of the final order. The present application by the decree-holder, appellant before us, was made on the 15th July, 1879, and is therefore within time. I see no reason to doubt that the words "appeal" and "Appellate Court" are now intended to include appeals to Her Majesty in Council, for we find those appeals made the subject of legislation in Act XV, which by Art. 177 provides a period of

(1) dated 18th August, 1871.

(2) made on the 15th July, 1879.

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limitation within which they may be admitted. Moreover, Art. 180 establishes a limitation for enforcing orders of Her Majesty in Council, a provision the presence of which may be accounted for by certain observations contained in the judgment of the Privy Council in the case of *Kristo Kinker Ghose Roy* v. *Burroda Kant Singh Roy* (1), quoted by Mr. Conlan in arguing this matter before us for the respondent. The question that arose there related to Act XIV of 1859 and neither in that Statute nor in Act IX of 1871 were there analogous articles to Art. 177 or to the last sentence of Art. 180. So far as that decision is concerned, it does not appear to me to be otherwise in any way relevant to the present case.

I agree that the appeal should be decreed with costs, and that the Judge should dispose of the application of the decree-holder on its merits.

CRIMINAL JURISDICTION.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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EMPRESS OF INDIA *v.* O'BRIEN. [6th March 1880.]

Penal Code, Ss. 299, 304, 304-A, 322, 325—Voluntarily causing hurt resulting in death.

Where the accused struck the deceased on the ribs with a stick and inflicted a hurt which not only endangered his life, but actually caused his death, and which he must have known was likely to break a rib, if not worse injury, *held*, that the offence committed was grievous hurt, but not the offence mentioned in S. 304-A. *Held*, also, that the offence did not amount to culpable homicide, as the act was not done with any of the intentions mentioned in S. 299, I.P.C.

[R., 1 A.W.N. 112, 3 A. 776 (778) = 1 A.W.N. 132, 1 A.W.N. 103.]

ORDER OF THE HIGH COURT.

[766] STUART, C. J.—The circumstance that the accused, O'Brien, was at the time of the offence of which he was convicted under the influence of drink cannot in the least degree mitigate his guilt. The facts material to the case appear to be these:—On the evening of the 2nd September, 1879, the accused O'Brien and a companion named Sharling were dining at the house of a friend in Agra within the Rajputana State Railway lines, and about mid-night they sallied forth walking towards the Fort. O'Brien perceived a ghari which they wished to hire, but the driver, a man named Wazir, a witness in the case, refused to give it unless the fare was prepaid. O'Brien and Sharling then walked on to a place where an ekka was standing, and presuming that it belonged to a man who was sleeping on a charpoy close by roused him and told him to let them have the ekka. This man was Nathu the deceased. Nathu explained that the ekka did not belong to him and remarked at the same time that he was ill. Hereupon O'Brien got irritated and committed the assault on the person of Nathu which caused his death. He pulled the charpoy about, causing the deceased to fall out of it, kicked him, and struck him on the side or on the ribs with a stick, and of the injuries the deceased thus received he died very soon after. The Civil Surgeon in his post **[767]** mortem examination states that the deceased's spleen had been ruptured in four places in its outer surface, one of which ruptures was very deep, extending to the inner surface of that organ. It would thus appear that the assault by the accused on Nathu was of a very serious

(1) 17 W. R., at p. 297.

nature, rendering a fatal result inevitable. The Magistrate committed O'Brien under Ss. 323 and 325 of the Indian Penal Code, but the Judge amended the charge by substituting S. 304-A, Indian Penal Code, for Ss. 323 and 325. The case was clearly not one of culpable homicide, and S. 304-A provides that "whoever causes the death of any person by doing any rash or negligent act, not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both," and a plausible argument might be maintained to show that the assault by O'Brien on the deceased was within the meaning of that section. But I think it safer to convict O'Brien under S. 325, because I consider that S. 304-A has in view utter indifference as to the possibly or probably fatal consequences of his act, on the part of an offender under it, and S. 325 in my opinion more fairly and accurately satisfies the requirements of the evidence. I would, therefore, set aside the conviction under S. 304-A and convict O'Brien under S. 325 of the Indian Penal Code. As to the sentence, I consider that passed by the Judge inappropriate and inadequate, and such sentence I would therefore set aside, and in lieu thereof I would sentence the accused G. W. O'Brien to one year's rigorous imprisonment and to pay a fine of Rs. 100, or in default of payment of such fine to suffer a further period of three months' rigorous imprisonment. Of course so much of the fine of Rs. 300 awarded by the Judge as has been paid and exceeds the fine now imposed will be returned to the accused.

SPANKIE, J.—The facts found are not disputed. We had issued notice to the accused to show cause why his sentence should not be revised but he has not appeared. He has been convicted of having assaulted without any provocation an old man sleeping outside his house, and having beaten him with a stick on the sides. The blow ruptured the man's spleen and caused his almost immediate death. The Magistrate who conducted the preliminary inquiry committed the accused under Ss. 323 and 325 of the Indian Penal [768] Code. But the Sessions Judge altered the charge into one of S. 304-A of the Code and sentenced the accused to pay a fine of Rs. 300, or in default to suffer rigorous imprisonment for six months. The attention of the Court was drawn to the case, and the record was sent for.

S. 304-A appears to be wholly inapplicable to the facts as found by the Sessions Judge. The circumstance that the medical evidence established death by rupture of the spleen did not reduce the accused's act to one of culpable rashness or culpable negligence. It has been laid down (1) that "culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection."

There is no reason to doubt that the act was not done with the intention of causing death, or of causing such bodily injury as the accused knew was likely to cause the death of the old man, nor was the act done

(1) in 7 M.H.C.R. 119.

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with the intention of causing bodily injury to the man, nor was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death, nor did the accused, when striking the man, know that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The offence, therefore, of culpable homicide was not committed. But I think that there can be no doubt that the accused committed the offence of voluntarily causing grievous hurt. He struck deceased on the ribs with a stick and inflicted a hurt which not only endangered his life but actually caused his death, and which he must have known was likely to break a rib if it did no worse injury. The fact that he was intoxicated at the time cannot alter the nature of the act [769] committed by the accused. S. 86 of the Penal Code applies strictly to this case.

I would set aside the conviction under S. 304-A and convict accused under S. 325 of the Penal Code. Considering the unprovoked character of the attack and the circumstances attending it, it appears to me one which is not sufficiently punished by a fine. I would sentence the accused G. W. O'Brien to one year's rigorous imprisonment, and to a fine of Rs. 100, or a further period of three months' rigorous imprisonment. So much of the fine, if paid, that exceeds the fine proposed, should be returned to the accused.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice. Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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2 A. 723.

EMPRESS OF INDIA v. RAM KUAR. [8th March 1880.]

Penal Code, S. 370—Slavery.

S. 370 is only directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, service, or conduct in any respect. *Per* SPANKIE, J.

Where the accused obtained possession of a married girl of 11 years of age by false pretences and disposed of her to a third person for value, with a view to marriage, and the girl was received also with the same intention, *held* by the Full Bench that the accused was not guilty of an offence under S. 370, I.P.C. (H.C.R., N.W.P., 1871, p. 401, *F.*)

[R., 7 M. 277 (279)=1 Weir 356.]

Ram Kuar having obtained possession of Deoki, a married girl, aged about 11 years, and living with her uncle, took her, against her will, to the house of one Udai Ram, a *Jat* by caste, and disposed of her to Udai Ram's brother, with a view to marriage, for Rs. 4 and a buffalo, alleging that Deoki was a *Jat*, whereas she was in fact a *Gararia*. The Sessions Judge convicted Ram Kuar of an offence under S. 370 of the Indian Penal Code.

ORDER OF REFERENCE TO THE FULL BENCH.

[724] SPANKIE, J.—Upon the facts found in this case I have come to the conclusion, as at present advised, that the conviction under S. 370 of the Penal Code ought not to be maintained. It cannot, I think, be said that there was in the transaction any buying or disposing of the girl as a slave. The section was not, in my opinion, intended to apply

to such a case as the one before me. But I have [725] found a decision of a Bench of this Court, which, there can be no doubt, supports the view taken by the Sessions Judge in this case. The decision to which I refer will be found in the volume of this Court's Reports (1) for 1871, and at p. 146—*Queen* v. *Sikundur Bukhut*.

The learned Judges in that decision remarked that it was "urged that to constitute a person a slave, not only must liberty of action be denied to him, but a right asserted to dispose of his life, his labour, and his property. It is true that a condition of absolute slavery would be so defined, but slavery is a condition which admits of degrees. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or a jailor. It appears to us that the appellant asserted a right to restrain the liberty of Musammat Paigya, and to dispose of her labour, and that she was detained in his house as a slave." In the present case the Sessions Judge seems to have had this judgment before him, and as it was the decision of a Divisional Bench (although at present I cannot agree that S. 370 meets either that or the case now before me), I am unwilling to dispose of the latter, without asking for the opinion of a Full Bench of the Court on the subject. I reserve for the present any expression of my reasons for thinking that S. 370 does not apply to the ordinary circumstances of kidnapping and disposing of young females to persons, either to be their wives or the wives of members of their families, or as mistresses, as the case may be. It is desirable that the case should be placed before the Court with as little delay as possible, as two cases in Criminal Revision are pending, which would be disposed of on my receiving the Full Court's judgment on the point submitted.

JUDGMENTS BY THE FULL BENCH.

STUART, C. J.—The conviction in this case under S. 370, Indian Penal Code, cannot for a moment stand. The offence, if any, appears to have been one of kidnapping or abduction, but there is not a single element of the legal conception of slavery to be found under the facts. The Judge, in coming to his utterly mistaken conclusion [726] that Deoki had been treated as a slave within the legal meaning of that status, was probably influenced by what I must call the extraordinary ruling by a Bench of this Court in the case of *Queen* v. *Mirza Sikundur Bukhut* (2). That was indeed really a much stronger case than the present, and yet it too was obviously a case not of slavery but of kidnapping or abduction. It is exceedingly difficult to understand what is meant by S. 370, Indian Penal Code. That section provides that "whoever imports, exports, removes, buys, sells, or disposes of any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." This appears to assume the condition of slavery as a possible fact within the cognizance of the law, but such a condition is as much ignored by the law of this country as it is by the law of England. A slave is a creature without any rights or any status whatsoever, who is or may become the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, and even of life or death, over the slave, without being responsible to any legal authority. Such is the

(1) N.W.P., H.C.R.

(2) H.C.R., N.W.P., 1871, p. 146.

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determinate and fixed condition of the slave, and it is not, as ruled in the above case, a condition capable of degrees.

But such a position for any human being under the Government of India was utterly repudiated by an Act passed in 1843, Act V of 1843, entitled, "An Act for declaring and amending the law regarding the condition of slavery within the territories of the East India Company." And the Act, which is a short one, containing only four brief sections, provides as follows:— 1. "No public Officer shall, in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, sell or cause to be sold, any person, or the right to the compulsory labour or services of any person, on the ground that such person is in a state of slavery." 2. "No rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company." 3. "No person who may have acquired property [727] by his own industry or by the exercise of any art, calling or profession, or by inheritance, assignment, gift or bequest, shall be dispossessed of such property or prevented from taking possession thereof on the ground that such person or that the person from whom the property may have been derived was a slave." 4. "Any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery." There is by this Act a thorough repudiation by the law of India not only of the condition of slavery as a possible state of things, but of any rights or interests or estate which could be asserted in respect of it, and therefore, as I have said, it is exceedingly difficult to understand what is meant to be intended by S. 370, Indian Penal Code. The actual accomplishment of placing a human being in the condition of a slave could not have been contemplated, inasmuch as the possibility of accomplishing anything unknown to the law cannot be supposed to have been meant or intended ; S. 370 therefore can only be understood as directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct, in any respect.

Here the girl Deoki appears simply to have been enticed away by the accused Ram Kuar for the purpose of a marriage, which owing to an objection on the score of caste did not take place, and she was sent back to Ram Kuar. Whether in any case the marriage could have been carried out must be more than doubtful, as she herself states she had previously been married to Nangha, a fact which in all probability was not known at the time to Ram Kuar. But, whether that be so or not, it is perfectly clear that on the facts there is not the slightest pretence for holding that any offence whatever under S. 370 was committed.

PEARSON, J.—It is apparent upon the surface of the case that Deoki was sold to Udai Ram's brother and purchased by him not as a slave but for the purpose of becoming his wife. I therefore concur with the learned Judge who made the reference to the Full Bench in the opinion that the conviction of Ram Kuar under [728] S. 370, Indian Penal Code, cannot be maintained. But I do not think that the decision of this Court in *Queen* v. *Mirza Sikundur Bukhut* (1) affords any support to the view taken by the Sessions Judge in this case.

SPANKIE, J.—I am still of the same opinion as I was when I referred the case, that S. 370 of the Penal Code does not meet it.

(1) H.C.R., N.W.P., 1871, p. 146.

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The Sessions Judge makes the following observations in his judgment: "Apparently by this section (370) the traffic in all human beings is prohibited, and when the substance of the transaction is an attempt to give a property in the person and services of a human being, that person is disposed of as a slave within the meaning of this section, whatever force the parties to the transaction may attempt to give it."

The precedent of this Court (1), to which I refer in submitting the case to the Full Bench, appears to me to support this view. The learned Judges say that a person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or jailor. This doubtless is so. But the Judges go further and say: "The offence of which the appellant has been convicted is we are informed one of which instances are not uncommon in this country. Children are purchased from their parents or strangers, and are brought up as domestic servants, having little or no personal liberty conceded to them. These children are practically slaves, and it cannot be too widely known that their condition is such as will not be tolerated by English law, and that persons who detain them in their houses are liable to punishment under the Penal Code."

I have examined the records of Government with a view to ascertain the circumstances under which the section was framed.

In the draft Penal Code published by command in 1837, in the chapter on kidnapping, except in Cl. 357, now represented by S. 367, there is no reference to slavery. The report, however, of the [729] Commissioners recognizes slavery as existing. They say that they had collected information on the subject from every part of India, and that the documents collected have satisfied them that there is at present no law whatever defining the extent of the power of a master over his slaves, that everything depends on the disposition of the particular functionary who happens to be in charge of a district, and that functionaries who are in charge of contiguous districts, or who have at different times been in charge of the same district, hold diametrically opposite opinions as to what their official duty requires. The result was that the Law Commissioners recommended to the Governor-General in Council that no act falling under the definition of an offence should be exempted from punishment because it was committed by a master against a slave.

It may be thought, they say, that by framing the law in this manner they do in fact virtually abolish slavery in British India. But their object was to deprive slavery of those evils which are its essence, and to do so would ensure the speedy and natural extinction of the whole system. "The essence of slavery," they observe, "the circumstance which make slavery the worst of all social evils, is not in our opinion this, that the master has a legal right to certain services from the slave, but this, that the master has a legal right to enforce the performance of those services without having recourse to the tribunals."

The Hon'ble Court of Directors in 1838 directed that the Government of India should lose no time in passing an enactment to the effect of the recommendation just referred to. The majority of the Commissioners framed a draft Act, but Mr. Cameron differed from them, and afterwards the Commissioners again differed amongst themselves in submitting another report on the subject in 1841. At last in 1843 Act V of that year was passed which carried out the original recommendation of the Law Commissioners. The first section forbade the public sale by any public officer

(1) H. C. R., N.W.P., 1871, p. 146.

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in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, of any person, or of the right to the compulsory labour or services of any person on the ground that such person is in a state of slavery. S. 2 **[730]** declared that no rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company. S. 3 provides that no person shall be deprived of any property whatsoever, however obtained, on the ground that such person or that the person from whom the property may have been derived was a slave. S. 4 enacted that any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery.

After this in 1846 the Indian Law Commissioners again submitted a report on the Penal Code. In clauses 426 to 438 of their report, the Commissioners refer to kidnapping and sale of children. In Cl. 435 they refer to Act V of 1843, and observe that the private sale of a free person for the purpose of being dealt with as a slave is not prohibited by this law. But as, under S. 4 of it, no person so sold could be dealt with as a slave against his will, it amounts to a virtual prohibition which may be effectual as regards adults who can avail themselves of the law, without any further provision. But with respect to children, it should be made penal to sell or purchase a child under any circumstances. I can obtain no clue to what happened after this report. This recommendation in the report of 1846 appears to have borne fruit, for Ss. 370 and 371 were prepared.

Looking at the former law, V of 1843, and specially at S. 4, I conclude that, so far as we are concerned in the case referred to, it would be necessary for the prosecution to show that the prisoner Ram Kuar asserted a right to dispose of the girl's liberty, and under pretext of her being a slave sold her as such and to continue such. The case before us does not present any such features. The section, therefore, does not apply.

The observations of the learned Judges in the latter part of the judgment in *Queen* v. *Mirza Sikundur Bukhut* (1) appear to me to go beyond the section. Ss. 365, 366, 367, 368, 372 and 373 seem to provide for the cases of kidnapping children, whilst S. **[731]** 374 declares that any one who unlawfully compels any person to labour against his will shall be punished with imprisonment of either description for a term which may extend to one year or with fine or with both. But S. 370 must be read as providing for the specific offence which it includes, *i.e.*, (i) the importation and exportation of a person as a slave; (ii) the disposal of a person as a slave (and here the presumption is that the act is against the will of the person); (iii) the acceptation, reception, or detention of any person against his will as a slave, that is, it must be shown that the act done was done against the will of the person, who cannot be accepted, received or detained as a slave. When these conditions are not seen in any case, S. 370 does not appear to me to apply.

OLDFIELD, J.—I apprehend that the sections of the Penal Code with which this reference deals were enacted for the suppression of slavery, not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another.

Slavery had the sanction of the Muhammadan and Hindu laws, and a form of slavery was prevalent in this country at the commencement of

(1) H. C. R., N.W. P., 1871, p. 146.

our rule, and Mr. Justice Spankie, whose written opinion on this reference I have had the advantage of reading, has abundantly shown that the law we are dealing with was enacted to suppress that practice

To bring the act of the accused in the case before us within the meaning of S. 370, there must be a selling or disposal of the girl as a slave, that is, a selling or disposal whereby one who claims to have a property in the person as a slave transfers that property to another.

But the facts in this case do not show anything of the kind; no such right of property in the girl appears to have been set up by the accused. The girl appears to have come under the protection of accused when in the state of destitution, and she was given over to Udai Ram in order that she might become his brother's wife, the accused receiving a gratification for her trouble. The **[732]** facts do not, therefore, appear to me to constitute an offence under S. 370.

STRAIGHT, J.—Upon the facts as disclosed in the judgment of the Sessions Judge, I am of opinion that the conviction of Ram Kuar under S. 370 of the Penal Code cannot be sustained. There is no sufficient evidence that the girl Deoki was "sold or disposed of" to the brother of Udai Ram for the purpose of her being dealt with as a slave, or, in other words, that a right of property in and over her should be asserted by her purchaser in employing her in menial and enforced services against her will and by restraining her liberty. On the contrary, the proof appears to be, that the Rs. 4 and the buffalo were given by Udai Ram's brother under the belief that Deoki was a *Jat*, and his admitted object and intention in reference to her was marriage. Moreover, the moment it was discovered she was a *Gararia*, Udai Ram started to take her back to Ram Kuar and was only prevented from doing so by his arrest. Under all the circumstances, I think that the decision of the Sessions Judge should be set aside.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Spankie.

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MAZHAR ALI KHAN AND ANOTHER (*Defendants*) *v.* SARDAR MAL (*Plaintiff*). [8th March 1880.]

2 A. 769.

Bond for money—Interest—Penalty.

Where the amount of a bond for money payable at a certain time, comprised the principal amount of the loan and advance interest thereon at 2 per cent. per mensem up to the due date, a stipulation in it that, in default of payment of the whole amount on such date, interest at 2 per cent. per mensem may be claimed from the date of the bond, was of a penal nature.

[R., 9 C. 689 (693), 11 M. 294.]

Suit on a bond executed by the defendants in favour of the plaintiff on the 8th May, 1869, the material portion of which was as follows:—"We Mazhar Ali and Fazal Ali do declare that we have borrowed Rs. 1,650 from Sardar Mal: adding Rs. 350 to this sum on account of future interest, we admit that Rs. 2,000 is payable by us to the lender: we promise to pay that amount without interest at the close of the month of Magh, Sambat 1926 (16th February, 1870): should we fail to pay the amount of principal and interest entered in the bond at the time fixed, then we will pay interest on that amount, *viz.*, Rs. 2,000, at two rupees

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per cent. per mensem from the date of the bond, in addition to the interest stipulated to be paid as above." On the defendants failing to pay the amount of the bond on the due date, the plaintiff claimed interest on the principal amount sued for at the rate of two rupees per cent. per mensem calculated from the date of the bond to the date of the institution of the suit, *viz.*, the 23rd June, 1879. The Court of first instance observed, "The Court finds that the condition as to paying interest at twenty-four per cent. (per annum) in the event of default, from the date of the execution of the bond, whether penal or not, is not unreasonable: the rate is by no means uncommon, and though no doubt the terms of the bond, in the event of default as regards the period between execution and the first date fixed for payment, may now seem hard to the defendant debtors, yet they agreed to those terms with their eyes open: nor were they obliged by circumstances to take the loan: the bond shows that they took the money with a view to speculating in indigo, and no doubt they looked for a profit which would much more than cover the rate of interest fixed in the bond: the Court sees no reason why, because or when the defendant debtors failed in their speculation, they should be allowed to evade their agreement willingly made." The defendants preferred an appeal to the High Court.

JUDGMENT.

[770] PEARSON, J.—The amount of the bond consisted of two items, *viz.*, Rs. 1,650, principal, and Rs. 350, interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and the 16th February, 1870, the date on which it was **[771]** stipulated that the whole amount of Rs. 2,000 should be paid. The provision that, in default of payment on the date stipulated, interest on the whole amount of Rs. 2,000 should be paid at the rate of two per cent. per mensem from the date of the execution of the bond was so far penal that in effect it more than doubled the rate of interest for the period above-mentioned. That penalty ought not, in our opinion, to be enforced. The rate of two per cent. per mensem is not so unusual as to be unreasonable. * * * * *

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

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On Appeal from the High Court of Judicature at Allahabad, North-Western Provinces.

HIRA LAL (*Decree-holder*) *v.* BADRI DAS AND OTHERS (*Judgment-debtors*).

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2 A. 792=3 Suth. P.C. 761=7 I.A. 167=6 C.L.R. 561=4 Saraswati's P.C.J. 157=4 Ind. Jur. 426.

Proceeding to enforce decree—Limitation—Act XIV of 1859, Ss. 14 and 20.

S. 14 of the Limitation Act, 1859, provides for the exclusion of the time during which the plaintiff, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action, *bona fide* and with due diligence, in any Court, which, from defect of jurisdiction or other cause, was unable to decide upon it. And S. 20 of the Act, which applies to applications

for execution, does not say that the applications to enforce or keep in force a decree must be in a Court having jurisdiction. It must follow, therefore, that the principle of S. 14 may be applied to S. 20, and that a proceeding, taken *bona fide* and with due diligence, before a Judge whom the party *bona fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree, within the meaning of S. 20.

[F., 5 C.W.N. 150 (152) = 28 C. 238 (241); R., 18 B. 734 (736), 7 Ind. Cas. 886 (889).]

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JUDGMENT.

[793] SIR BARNES PEACOCK.—The question in this case is whether the judgment-creditors, who on the 14th of January, 1867, obtained in the Court of the Judge at Agra a decree against the respondents, were on the 9th of April, 1874, barred by limitation from executing it. It appears that on the 3rd of December, 1868, the Judge sent the decree to the Subordinate Judge of the district to be executed by him, and that on the 3rd of April, 1869, the Subordinate Judge struck the execution-case off the file. On 9th of April, 1874, the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

[794] Between the 3rd April, 1869, when the Subordinate Judge struck the case off his file, and the 9th April, 1874, proceedings were from time to time taken by the decree-holders in the Court of the Subordinate Judge to enforce the decree, but the question is whether those proceedings were sufficient to prevent the operation of the Limitation Act XIV of 1859, S. 20.

It appears that on the 18th February, 1870, an application was made by the decree-holders to the Subordinate Judge to set off a debt of Rs. 1,300, which they owed to a debtor of the respondents, against so much of the amount due to them under the decree, and the Subordinate Judge made an order that the application should be granted, that the decree-holders should file a receipt for Rs. 1,300, and that the case should be struck off the pending file. On the 18th February, 1870, therefore, the Subordinate Judge made an order by which a portion of the debt, to the extent of Rs. 1,300, was satisfied. Subsequently on the 8th of January, 1872, an application was made to the Subordinate Judge to send a certificate of the decree to the Political Agency at Indore in order that the decree might be executed there, whereupon he made an order that the Judge should be requested to send the record of the execution of decree; but inasmuch as an interval of more than one year had elapsed since the last order it was necessary, under S. 216 of Act VIII of 1859, to serve the judgment-debtors with a notice, in order that they might, if they could, show cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post, they living out of the jurisdiction of the Court, but it was returned, as the judgment-debtors were not found. That was on the 2nd April, 1872. The Subordinate Judge held that that was not a sufficient service upon the defendants, and ordered the case to be struck off the file of pending cases. On the 3rd May, 1872, he made an order: "That a notice be sent to the judgment-debtors by post in a registered cover, fixing the 18th day of May as the date for showing cause, and that the case be brought forward on the said date." On the 30th May, 1872, the nazir of the Court made the following report: "In this case a notice in a registered cover was sent by post to the judgment-debtors. The cover has been returned [795] to-day by the post peon. The cover has a slip attached thereon, in which it is written, in Hindi, that Badri Nath, treasurer (that is one of the

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judgment-debtors), refuses to take it. Therefore, the cover in question is submitted with this petition." On the 3rd June, 1872, the case again came before the Subordinate Judge, upon which he made the following order: "The case having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment-debtor at Indore, but, the judgment-debtors not having received the cover, it was returned. The judgment-debtors not having taken the cover containing the notice, it must be considered as having been served." It is therefore ordered: "That a report be endorsed on the decree, and made over to the decree-holder's pleader, that he may sue out execution in a competent Court, and recover the amount of his decree, and that the case be struck off the pending file."

Afterwards, on the 24th December, 1873, upon a report of the muharrir that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judge's Court. Subsequently, on the 9th January, 1874, in a proceeding from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by Ss. 285 and 286, Act VIII of 1859, and copy of the application for execution of decree, be sent to the Agent at the Indore Cantonment." On the 9th April, 1874, the case was re-instituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until 3rd June, 1872, that the decree-holders had a certificate on which they had not acted, and they prayed the Court that, under S. 237, certain 4 per cent. promissory notes for Rs. 25,000 due to the judgment-debtors in the Indore Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a sum of Rs. 13,097 belonging to the judgment-debtors, and that money was sent to the Judge at Agra by means of a bill. On the 13th May, 1876, the Judge, having received the money from the Indore Agency, ordered that the Rs. 13,097-7-9 be **[796]** given over to Mir Jaffar Husain, pleader for the decree-holder, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, in which the defendants made the following objection, amongst others: "(i) That the decree-holder's decree is beyond time." Thereupon the Judge on the 18th May, 1876, made the following order: "The objections are such as may be entertained, and may possibly be determined in favour of the debtors. It appears, therefore, undesirable that the decree-holder should get the money till they have been disposed of. Let payment be stayed on the debtors giving security to pay interest at eight annas per mensem per cent., in the event of the money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree-holder, an injunction may be issued to the bank on which it is drawn, not to cash it till further orders." Then comes the decision of the 31st May, 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires*, and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorised by law, and that when the Subordinate Judge removed the case from his files he could not take it up again without a fresh transfer. He also considered that the decree-holders had not shown due diligence in the case and doubted whether any of the proceedings were *bona fide*. He, therefore, held that he was constrained to grant the prayer of the objectors, and to award them costs.

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The execution-creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the appellants had not exerted themselves *bona fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorised him to take up and dispose of the application then pending and not the subsequent applications which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the applications to and orders of the Subordinate Judge if he had had jurisdiction would have [797] been sufficient to prevent the operation of the Statute of Limitations, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. S. 14 of Act XIV of 1859 enacts: "In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bona fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bona fide* and with due diligence, before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of S. 20 of Act XIV of 1859, with regard to executions. S. 20 says: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order to keep the same in force, within three years next preceding the application for such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bona fide* and with due diligence before a Judge whom the party *bona fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of S. 20.

In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment-debtors had [798] appeared before the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if he had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within the meaning of S. 20. They ought equally to be so, though the judgment-debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Dhunput Singh Roy* v. *Mudhomotee Dabia* (1) reported in the 11th Bengal Law Reports, page 23. There, "An execution sale was stayed by consent for two months, and the execution-suit was struck off the file.

(1) 11 B. L. R., P. C., 23.

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During that period the execution-creditor applied to the Court to restore the execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the executing creditor) had attached them; but it turned out that he had attached them in another suit. *Held*,—the application being *bona fide*, that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said: "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion." They therefore came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of the 20th section of Act XIV of 1859.

On the whole, therefore, their Lordships have arrived at the conclusion, and will humbly advise Her Majesty, that the decree of the High Court was erroneous, and that it be reversed; that in lieu **[799]** thereof an order be made reversing the order of the Judge of Agra of the 31st May, 1876, and ordering that the Rs. 13,097-7-9, with such interest as they may be entitled to under the order of the 18th May, 1876, be paid to the decree-holder; and that the appellants have the costs in all the lower Courts subsequent to the petition of objection of the 18th May, 1876, and the costs of this appeal.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

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PURAN MAL AND OTHERS (*Plaintiffs*) *v.* PADMA (*Defendant*).

[11th March 1880.]

2 A. 732.

Assignment of land for service—Act XVIII of 1873 (N.W.P. Rent Act), Ss. 30, 95 (c)—Act XIX of 1873 (N.W.P. Land Revenue Act), Ss. 79, 241 (h)—Reg. XIX of 1793, S. 1—Rent-free grant.

An assignment of land, free of rent, to be held and enjoyed by the assignee so long as he should perform certain services, is not a rent-free or revenue free grant within the meaning of Reg. XIX of 1793, S. 30, Act XVIII of 1873 or S. 79, Act XIX of 1873.

A suit for the possession of such land, on the ground that the services, for the performance of which it was assigned, are no longer performed, is cognizable by a Civil Court, and is not a claim to resume a rent-free grant or to assess rent on land, in respect of which an application might be made to the Revenue Court under Ss. 30 and 95 (*c*) of Act XVIII of 1873, or Ss. 79 and 241 (*h*) of Act XIX of 1873.

[Appr., 8 A. 552 (557)=6 A.W.N. 221.]

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2 A. 732.

The plaintiffs, the Zamindars, of a certain village sued for possession of certain land in such village claiming such land on the ground that it had been granted to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of "*balahar*" or village-watchman and that the defendant had ceased to perform those duties. The defendant contended that he and his predecessors had held the land rent-free for 200 years, that he held it as a proprietor and that the suit was not cognizable by the Civil Courts.

JUDGMENT.

[733] SPANKIE, J.—I have considered the appellants' plea and have come to the conclusion that the finding of the Courts below, that the suit is not cognizable in the Civil Courts, is incorrect. The grants referred to in S. 30, Act XVIII of 1873, and in S. 79, Act XIX of 1873, are those set forth in the preamble of Regulation XIX of 1793, and in the first section thereof. That section recites **[734]** that, by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind, according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, while he continues to discharge the latter. As a necessary consequence of this law, if a zamindar made a grant of any part of his lands to be held exempt from payment of revenue, it was considered void, from being an alienation of the dues of Government without its sanction. There the grants referred to are those made by the zamindar. *Badshahi* or royal grants are excepted in the preamble. The grant referred to is a permanent alienation of revenue, or, as Acts XVIII and XIX, in Ss. 30 and 79 respectively, term it, rent. The first section of Regulation XIX of 1793 further indicates the nature of the grants as having been made under the pretext that the produce of the lands was to be applied to religious or charitable purposes. Of these grants some were applied to the purposes for which they were professed to have been made, but, in general, they were given for the personal advantage of the grantee, or with a view to the clandestine appropriation of the produce to the use of the grantor, or sold to supply his private exigencies. All such grants since the 1st December, 1790, and in future, were declared null and void by S. 10 of the Regulation.

What the plaintiff desires in this case is full possession of a plot of land which he says has hitherto been held without payment of rent by defendant, the village "*balahar*" or watchman. He was allowed to occupy the land for his support, and in point of fact whatever he derived from the land constituted his wages. But there was no permanent grant of the land to him or his predecessors. He would continue to occupy it as long as he continued to give his services as watchman. Obviously such an assignment is not a grant within the meaning of Regulation XIX of 1793, and the present claim is not one to resume such a grant or to assess the rent on the land. The Settlement Officer therefore very properly refused to entertain the claim. Nor could an application to dispossess the **[735]** defendant be made to the Collector under letter (*c*), S. 95, and S. 30, Act XVIII of 1873, for the same reason. It is not a claim to recover a rent-free grant as being one of those declared by the Regulation to be null and void, nor is it a claim to assess the rent on the land.

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The plaintiff wishes the defendant to give up the land or pay rent. The defendant repudiates the plaintiff's superior title, and claims that he has acquired a proprietary right in the plot which has been in the possession of himself and his family for two hundred years. Clearly there is a dispute between the parties which it is the special duty of the Civil Courts to determine. The plaintiff now regards the defendant, who is no longer watchman, as a trespasser; the latter asserts his full proprietary right in the plot. The Courts below are bound to determine the party to whom the right belongs and to decide the case on all its merits.

I would therefore decree the appeal, reverse the decision of the lower appellate Court, and remand the case for trial on the merits by that Court, should it find materials on the record to enable it to do so; but if it should appear that the first Court has excluded evidence of fact essential to the determination of the rights of the parties, the lower appellate Court is at liberty to reverse the decree of the first Court. Costs to abide the result of a new trial.

STRAIGHT, J.—I concur fully in the above judgment of my honorable colleague.

CRIMINAL JURISDICTION.

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CRIMINAL JURISDICTION.
A. 771.

PRESENT:

Mr. Justice Straight.

EMPRESS OF INDIA *v.* BHUP SINGH. [11th March 1880.]

2 A. 771.

Crim. Pro. Code, 1872, S. 296—Reference to High Court by Sessions Court.

A Judge should not suspend the conclusion of a trial which had already been commenced, and in which the assessors have given their opinion, for the purpose of making a reference to the High Court on a question of law that has arisen in the course of it.

REFERENCE TO THE HIGH COURT.

The Judge in referring the case observed:—"The assessors unanimously found the accused Bhup Singh guilty of the offence specified in S. 363 of the Penal Code. S. 9 of Act XI of 1872, which was in force at the time the offence was committed (committed to Sessions on the 30th September, 1879), provides that no charge as to any offence shall be inquired into in British India, unless the Political Agent, if there be such, for the territory in which the offence is said to have been committed, certifies that, in his opinion, the charge is one which ought to be inquired into in British India. The committing Magistrate appears to have overlooked the section quoted above, and I would therefore submit the case for orders to the Hon'ble Court as to whether the Political Agent should be called on, first, to certify that the charge is one which should be inquired into in British India, and, if his reply be in the affirmative, that a new trial be had, or if, as the accused has not apparently been prejudiced in his defence, and the Political Agent now certifies, as above, judgment can be given on the evidence recorded."

JUDGMENT.

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2 A. 771.

[772] STRAIGHT, J.—It appears to me that the Judge has adopted an unusual and very inconvenient course, in suspending the conclusion of the trial of Bhup Singh for the purpose of making a reference to the Court on a question of law that has arisen in the course of it. I do not think it ever was intended that S. 296 should be so used. The Sessions Judge has the whole case fully before him, and is in possession of all the materials necessary for him to give his judgment. If he decides wrongly, there is ample power in the Local Government on the one hand, or the accused on the other, to appeal to this Court and have the matter set right, and I certainly do not think that, at this stage, I am called upon to advise the Sessions Judge as to the view he should take. Upon his own responsibility and in the exercise of his discretion he must dispose of the case, and, if he feels there is substantial force in the point that has arisen in reference to the charge under S. 363, Penal Code, he must not hesitate to acquit. I would point out to him that as yet he has passed no decision upon the charge under S. 420, Penal Code, though he took the opinions of the assessors upon it. Probably in respect of this he will find that no difficulty of jurisdiction arises. The record will be returned, and he will dispose of the case.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

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APPELLATE CIVIL.
1 A.W.N. 119.

KALLU MAL *v.* KALLU. [11th March 1880.]

1 A.W.N. 119.

Bond—Obligee altering endorsement of payment—Effect.

Held, that the ruling in *Sheodin* v. *Ganeshi Lal* (N.W.P., S.D.A. Rep. 1859—73) did not apply to a case where endorsements of payments in satisfaction of the bond and not the terms of the bond itself, were found to have been altered by the obligee. In the present case the bond itself was admitted and the defendant confessed his liability for a certain amount. The lower appellate Court was, therefore, wrong in dismissing the suit *in toto*.

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APPEL-LATE CIVIL.

2 A. 735.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Straight.

MARKUNDI DIAL (*Plaintiff*) *v.* RAMBARAN RAI AND ANOTHER (*Defendants*). [15th March 1880.]

2 A. 735.

Ex-proprietary tenant—Occupancy right—Act XVIII of 1873 (N.W.P. Rent Act), Ss. 7 and 9.

The right of occupancy, which a person, who loses or parts with his proprietary rights in a mahal, acquires, by virtue of S. 7 of the N. W. P. Rent Act, in the land held by him as sir, in such mahal, at the date of such loss or parting, is a saleable interest, and can be transferred by private sale. (2 A. 451, *F.*)

[R., 7 A. 553 (559) **(F.B.).]**

JUDGMENT.

[737] SPANKIE, J.—The defendant, as lambardar, sold his share, including the "sir" and "ex-proprietary rights," to the plaintiff. The lower appellate Court holds that he could not dispose of the ex-proprietary right, as it had not accrued until the defendant had transferred his share in the estate to the plaintiff.

The wording of S. 7, Act XVIII of 1873, is to the following effect: "that every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants at will for land of similar advantages." The second paragraph goes on to say that "persons having such rights of occupancy shall be called ex-proprietary tenants and shall have all the rights of occupancy-tenants."

It is true that the general rule is that the subject of sale must belong to the vendor, and that he can sell no more than the interest which he legally possesses. But it appears to me that S. 7 of the Act recognizes from the date of its passing that a proprietor has a right of occupancy in land held by him as "sir," and reserves it to him, if he pleases, upon the terms provided by the section. The vendor was at liberty to sell his sir-land, and I do not think that S. 7 debars him from selling the interest reserved to him by the Act, namely, the right to occupy the land at a favourable rate of rent. This seems to me to be an interest created from the date of the passing of Act XVIII of 1873, and an expectancy which he might dispose of along with the sir and his proprietary share. It also seems to me that it is erroneous to refer to the right as that of an "ex-proprietary tenant." Persons who have such rights of occupancy as those described in S. 7 *shall be*, the Act says, *called* ex-proprietary tenants and shall have all the rights of occupancy-tenants. They are so called to distinguish them from the occupancy tenants described in S. 8. What S. 7 recognizes is right **[738]** of occupancy that has always perhaps been inherent in the proprietor of a share, a right to occupy a portion of the lands as his sir, either for his own cultivation, or to sublet them to others. Whether this be so or not, that he has a recognised interest in the right to occupy the land held by him as sir, in the event of his losing or parting with his proprietary rights in the mahal, would appear to be quite clear. How far the second paragraph of S. 9 of the Rent Act would invalidate

such a sale of the occupancy-right, as being contrary to law and policy, is another matter, which might have required fuller consideration. But I feel myself bound by the ruling of the Full Bench in *Umrao Begam* v. *The Land Mortgage Bank of India* (1), from which, however, I dissented. I am of opinion that the appeal should be decreed and that the case should go back to the lower appellate Court to be tried on the merits.

STRAIGHT, J.—I have had some doubt as to the proper construction to be put upon S. 7 of the Rent Act, but after very careful consideration, I agree with the view of Mr. Justice Spankie as stated in his judgment. I may add, that like him I feel bound by the decision of the Full Bench (1) referred to, though, were the matter still an open one, I should hold the prohibition of S. 9 of the Rent Act to apply strictly.

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APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

1880 MARCH 15. APPELLATE CIVIL. 2 A. 772.

MOTI BIBI (*Defendant*) *v.* BIKANU (*Plaintiff*). [15th March 1880.]

Appeal—Limitation.

Where a suit against two defendants is dismissed as against the first and decreed against the second defendant, and an application for review against the first defendant is also dismissed, and on an application for review by the second defendant in which the first defendant is unnecessarily made a party, the suit is dismissed, the plaintiff cannot, in an appeal from the decree on review dismissing his suit, implead the first defendant, as against whom the appeal from the first decree was barred by limitation.

[R., A.W.N (1908), 211.]

JUDGMENT.

[773] The plaintiff-respondent sued Tara Kishore and Moti Bibi for Rs. 800, under a bond dated 19th March, 1874, executed in favour of Tara Kishore, the plaintiff being the real creditor. Appellant Moti Bibi, defendant, denied that she had borrowed money from plaintiff under any agreement whatever, and also any execution of a bond in his favour: for a particular purpose she had borrowed money from defendant Tara Kishore, executing a bond in his favour, and preserving her property from sale: afterwards arrangements for the sale of the property which had been entered into, previous to the execution of the bond, with Tara Kishore fell through, and a sale was effected with one Ghazi, plaintiff's brother, but as a portion of the consideration was not paid, a quarrel ensued which has led to the institution of the present suit by plaintiff upon the bond of the 19th March, 1874. The Sub-**[774]**ordinate Judge on the 27th April, 1877, decreed in favour of plaintiff for the amount claimed, but dismissed the claim as against Moti Bibi, defendant. Tara Kishore, defendant, who had not appeared in the suit, applied for a review of judgment, and plaintiff also applied for the same as against Moti Bibi, defendant. The Subordinate Judge on the 16th July, 1877, refused the plaintiff's application for review as against Moti Bibi previously exonerated. But on the 25th May he had already accepted the application of Tara Kishore for review. On the 29th June, 1878, the Subordinate Judge reconsidered the case. He refers to his original judgment,

(1) 2 A. 451.

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2 A. 772.

observing that, as there had been no proof of contract between the plaintiff and Moti Bibi, he had dismissed the claim as against her: but on the evidence of Badal and Kali, agents of Tara Kishore, that they had borrowed money from plaintiff on behalf of the said Tara Kishore, he decreed the claim against that defendant: but Tara Kishore now urged that the plaintiff had not claimed the money from him, but from Moti Bibi, and that Badal and Kali were no agents of his, and had not acted upon his authority. The Subordinate Judge held that there was no proof that Badal and Kali were the agents of Tara Kishore or that he had authorised them to borrow the money or had promised to re-pay it: Tara Kishore had denied all knowledge of Moti Bibi, and plaintiff admitted that he was not personally acquainted with Tara Kishore. The lower appellate Court, therefore, dismissed the claim as against Tara Kishore.

The plaintiff then appealed to the Judge, making both defendants respondents, and, referring to the previous decision of the 27th April, 1877, it appeared that he was appealing from that decision as well as from that of the 29th June, 1878. The Judge admits that, so far as the decision of the 27th April, 1877, is concerned, the appeal is barred, but he nevertheless admitted it, as the proceedings of the Subordinate Judge, in granting one application for review and rejecting the other, were of a curious nature. It was, he considered, a case in which the parties might be misled as to the particular date on which the period allowed for appeal would begin to run against them: the appeal of plaintiff was, in his opinion, made *bona fide*: the plaintiff had all along proceeded **[775]** against Moti Bibi as the obligor, having made Tara Kishore defendant *pro formâ*: he was merely the nominal obligee, plaintiff being the real creditor: Moti Bibi did not deny that she had received the money on the execution of the bond, pleading, according to the Judge, that Tara Kishore, and not plaintiff, was the party to sue her. The lower appellate Court finds that the money was borrowed for Moti Bibi's use at the instigation of Tara Kishore, and also for his benefit, and he (the Judge) was not satisfied that Tara Kishore had not made himself liable for the money. But he decreed the claim on appeal against Moti Bibi and dismissed it as against Tara Kishore, who, however, would pay his own costs.

It is contended by Moti Bibi that the decision of the 27th April, 1877, not having been appealed within the period prescribed by law, had become final; that the application of plaintiff-respondent for review as against appellant had been rejected, and the order passed upon it was final; and that, as no sufficient reasons for the admission of the appeal after time had been assigned by respondent, the Judge had acted erroneously in admitting the appeal: moreover, the suit had been separated against each defendant and on different dates: there could not be a single appeal against the two decrees; and appellant further contends that there was no contract between herself and plaintiff, nor had she executed the deed of the 19th March, 1874.

There can be no doubt that, if the appeal heard by the Judge is one from the decision of the Subordinate Judge, dated 27th April, 1877, it is after time, and that the proper course for respondent, after that decision had been delivered and a decree had passed against him, was to have appealed the decree. The memorandum of appeal presented to the Judge refers to the decision of the 27th April, 1877, and to the intermediate miscellaneous proceedings with reference to the application of Tara Kishore for review, and that of the plaintiff for the same purpose as against Moti Bibi. But there can be no doubt that it was the decree passed by the Subordinate Judge on the 29th June, 1878, that had brought

plaintiff before the Judge as an appellant. The appeal from that [776] decree was admittedly within time. The question arises whether the Judge was at liberty in this appeal to reconsider the merits of the case as against Moti Bibi. It is true that she appeared as respondent and defended the appeal. But in doing so she only acted in obedience to the notice of the Court served upon her, and because she did so we do not think that it can be successfully contended that she should not be allowed to plead now that appeal as against her was barred by lapse of time. The decree of the 29th June, 1878, was not passed against her, but as against Tara Kishore; she was not a party to the review. If the plaintiff was desirous of appealing as against her from the decree of the 27th April, 1877, he might have done so within the time allowed by law, or if under any misapprehension he had allowed that period to run by, he should have presented his memorandum of appeal and assigned reasons for not presenting his appeal within such period. The Court, had he done so, might then, under S. 5 of Act XV of 1877, have admitted the appeal after time, if satisfied that the appellant had sufficient cause for not making his application within time. This course the plaintiff did not adopt, but waited until the decree of the 29th June, 1878, after the admission of Tara Kishore's application for review, had been made, dismissing the suit as against the said Tara Kishore. It seems to us that the appeal before the Judge was an appeal against the decree of the 29th June, 1878, under cover of which the plaintiff desired to re-open the claim as against Moti Bibi, which had been dismissed on the 27th April, 1877. We do not think that this course was legal, and we hold that the Judge has acted erroneously in assuming that the appeal was one against the decree of the 29th April, 1877, and that he was at liberty to admit it under S. 5 of the Limitation Act. It seems clear to us that the decrees of the 27th April, 1877, and of the 29th June, 1878, are separate and distinct, and that they could not be appealed in one memorandum of appeal from the decree of the 29th June, 1878. We, therefore, decree the appeal and reverse the judgment of the lower appellate Court with costs.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

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APPELLATE CIVIL.

JHUNNA (*Plaintiff*) *v.* RAMSARUP AND OTHERS (*Defendants*).

[15th March 1880.]

2 A. 777.

Hindu law—Widow—Maintenance.

For reasons of convenience and to prevent the recurrence of litigation, it is better, in decreeing maintenance to a Hindu widow, that a reasonable fixed sum should be awarded, rather than a portion of the annual income of the family property.

2 A. 777.

ORDER OF REMAND.

[777] STRAIGHT, J.—The plaintiff-appellant is the widow of one Zalim Singh, a brother of the defendants. This suit was brought to have the sum of Rs. 48 fixed as the amount of yearly maintenance the plaintiff was entitled to receive from her husband's family. The first Court passed a decree in her favour for the sum prayed. The lower appellate

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Court has modified the Munsif's order, allotting the maintenance at one-sixth of the hereditary [778] property in suit, that fraction representing the share to which Zalim would have been entitled had he been alive. The right of the plaintiff to maintenance is clear: indeed, that is positively found by both the lower Courts. We do not, however, agree with the observations of the Judge, that "the income being variable according to the seasons, it is better not to affix a given sum for maintenance, but to let that be determined as the occasion may arise." For reasons of convenience and in order to prevent the recurrence of litigation between the parties, we think it far better that a reasonable fixed sum, having regard to all the circumstances of the case, should be ascertained and decreed to the plaintiff. The Court then proceeded to make an order remanding for trial the issue whether Rs. 48 was a reasonable amount of yearly maintenance to be allowed to the plaintiff, and if not, what fixed sum would be.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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3 A. 305.

IN THE MATTER OF DAULATIA AND ANOTHER. [19th March 1880.]

Crim. Pro. Code, 1872, S. 314—Conviction for several offences—Term of imprisonment.

S. 314 limiting the Magistrate's powers of punishment for several offences to twice the amount which he is, by his ordinary jurisdiction, competent to inflict, applies to "one trial" for more offences than one.

In a case, where there is not one indictment containing different counts on the same facts, but separate and distinct cases in regard to the facts themselves, the evidence and the procedure, *held*, that the trials constituted separate trials, notwithstanding the fact, the judgments in the several cases were delivered on one and the same day, and the Magistrate's power of punishment was not limited to twice the amount, which he was, by his ordinary jurisdiction, competent to inflict.

REFERENCE TO THE HIGH COURT.

The Commissioner of Kumaun Division made the following reference to the High Court:—

"A Magistrate sentences A. to imprisonment in four cases amounting in the aggregate to seven years: he has exceeded his powers: A. appeals: I consider that A. deserves seven years as the proper punishment of his crimes, but there is no section under which I can order the Magistrate to quash his proceedings and commit the case to the Sessions; and it appears to me that, under the law, I can only reduce the punishment to the number of years within the power of the Magistrate: what ought to be done in such a case?"

ORDER OF REFERENCE TO THE FULL BENCH.

[308] SPANKIE, J.—I am of opinion that the Magistrate has exceeded his powers. I concur in the view taken of S. 314, Criminal Procedure Code, by Mr. Justice Straight in the case noted (1). I am not,

(1) *Empress* v. *Umeda*, not reported.

however, satisfied that we could do more than reduce the punishment, so as to bring the sentence within the terms of S. 314, Criminal Procedure Code. The Magistrate, I think, when the offender appears to be an habitual offender, should follow the procedure laid down in S. 315 of the Criminal Procedure Code, and in other cases, when evidence has been given which appears to justify a commitment to the Sessions, he should follow the procedure laid down in S. 196 of the Criminal Procedure Code. It is sufficient for the Magistrate, if he thinks that a case not exclusively triable, but triable by the Sessions Court and also by the Magistrate, ought to be committed to the Sessions, that he record his reasons to that effect and make the commitment, once having satisfied himself that he ought to make the commitment. The terms of the section are that the accused person shall be sent for trial before the Court of Session. In the cases before us, the Magistrate has not recorded his opinion that the offenders ought to be committed to the Sessions Court, but has dealt with them in his own Court and for offences triable by himself. I cannot say that he has acted without jurisdiction. The Commissioner of Kumaun allows that by law he can only reduce the punishment to the number of years within the powers of the Magistrate, and he asks what is to be done in such a case? I have endeavoured to show what can and ought to be done, and perhaps what I have said would be sufficient for the guidance of the Commissioner and Magistrate for the future. We, as a Court of Revision, could not enhance the sentences. If we considered that they had been *inadequate*, we might have passed a proper **[309]**sentence in each case, but we cannot say that the offences were not triable by the Magistrate. In considering the effect of the first paragraph of S. 297, we must not overlook the definitions of "trial" and "judicial proceeding" in S. 4 of the Criminal Procedure Code. If we consider that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, we may annul the trial and order a new trial before a competent Court. If we consider that a sentence passed on an accused person is one which cannot legally be passed for the offence of which the accused person has been convicted or might have been legally convicted upon the facts of the case, we may annul the sentence and pass a sentence in accordance with law. But this is not the case in the records submitted to us. The material error has not been in a "judicial proceeding," but the error has occurred in the "trial" after the charge had been drawn up, and trial includes the punishment of the offender. The sentences are wrong in law and must be set right. I would therefore, reduce the sentences so as to bring them within the provisions of the third paragraph of S. 314 of the Criminal Procedure Code. It appears that the Commissioner reports that, since he sent up the cases to this Court, he has submitted another, which has been committed to this Court. I see no reason why he should not go on with the commitment in this case which was not committed until the 1st November, 1879, and was not tried simultaneously with the other cases.

STUART, C.J.—In these cases referred to us by the Commissioner of Kumaun, we can of course, under S. 297, Criminal Procedure Code, entertain and dispose of such of them as have been tried by the Magistrate, such trial being in my opinion a judicial proceeding within the meaning of that section. The Magistrate had clearly jurisdiction to try the cases, and at "one trial," if the facts allowed of that, and in that case he could only pass the sentence or sentences which are warranted by S. 314 of the Criminal Procedure Code. That section of the Code limits his powers to a punishment which "shall not, in the aggregate, exceed twice the amount

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of punishment which he is by his ordinary jurisdiction competent to inflict," or, in other words, a punishment of four years, being the limit of [310] the Magistrate's powers within his ordinary jurisdiction. In one of the cases before us in this reference, that of Daulatia, there are four convictions and sentences, the latter amounting in the aggregate to seven years' imprisonment, and these, if S. 314 applies, we must reduce to four years' rigorous imprisonment; and in another of the cases, that of Debuli, there are three convictions against her and three sentences amounting altogether to six years' rigorous imprisonment, but these sentences we must also reduce to the limit of four years, if S. 314 applies. The sentence in the case of Bhawani was within the Magistrate's powers, and as to Jaikishen, it appears that, on appeal to the Commissioner, he was acquitted. In regard to the last case reported by the Commissioner, the only order I would make would be to instruct him to proceed with the trial before himself on the Magistrate's commitment. What I have suggested respecting the cases of Daulatia and Debuli is on the hypothesis that S. 314 applies to their cases. But I entertained at the hearing and still entertain serious doubts whether the proceedings before the Magistrate in the cases of these two accused persons formed "one trial" within the meaning of S. 314, and this question I would refer to the Full Bench of the Court. It appears that the proceedings were not continuous in the legal sense. They occupied three days, the 24th, 25th and 26th of September last, but, although judgment was given in each case on one and the same date, the charges against these two persons were separate, the evidence was separate, and the proceedings which constituted the trials were separate. So that we have not the case of one indictment containing different counts on the same facts, but separate and distinct cases in regard to the facts themselves, the evidence and procedure, a state of things which, in my opinion, is not affected by the judgments in the several cases being all delivered on a subsequent although one and the same day. A judgment by my honorable and learned colleague Mr. Justice Straight, on the meaning and application of S. 314 to trials and sentences by Magistrates was referred to, and nothing could be more correct than what he ruled (1). Indeed, what was so ruled is so obvious a reading of S. 314 as to exclude the pos-[311]sibility of the slightest criticism or objection, but it has no application to the difficulty I feel in the present case, *viz.*, whether the proceedings which were had in the cases of the two accused persons, Daulatia and Debuli, were separate trials according to the definition of "trial" in S. 4 of the Criminal Procedure Code, or constituted "one trial" within the meaning and application of S. 314? This question I would refer to the Full Bench.

JUDGMENTS OF THE FULL BENCH.

STUART, C. J.—The opinion indicated in my referring order in this case was fully confirmed in my mind at the hearing before the Full Bench. It is quite true that the Magistrate had jurisdiction to try these cases, but it is equally clear that the proceedings before him constituted distinct trials and not "one trial" within the meaning of the definition of "trial" in S. 4, Criminal Procedure Code, and within the meaning and application of S. 314, Criminal Procedure Code, the facts being different, the evidence different, and the procedure different. The Commissioner of Kumaun may therefore be informed in answer to his letter to the Registrar that we differ from him, and that the Magistrate in these cases has

(1) *Empress* v. *Umeda*, not reported.

not exceeded his powers, but that the sentences he has passed must stand.

PEARSON, J.—S. 314, Act X of 1872, provides for cases in which a person is convicted at one trial of two or more offences, punishable under the same or different sections of any law for the time being in force, and empowers the Court to sentence him for the several offences of which he has been convicted to the several penalties prescribed by such enactment or enactments which such Court is competent to inflict, such penalties when consisting of imprisonment or transportation to commence one after the expiration of the other. It declares that it shall not be necessary for the Court by reason of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict for a single offence to send the offender for trial before a higher Court. It provides that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed **[312]** twice the amount of punishment which the Court is by its ordinary jurisdiction competent to inflict.

In the case in which Daulatia was charged with having committed offences under Ss. 379 and 454, and Debuli with having committed offences under Ss. 380 and 454, Indian Penal Code, on the premises of Bachuli, on or about the 1st and 2nd August, 1879, and they were sentenced on the 30th September, 1879, the first to two years' rigorous imprisonment under S. 379 and two years' rigorous imprisonment under S. 454, and the second to one year's rigorous imprisonment under S. 380, and two years' rigorous imprisonment under S. 454, Indian Penal Code, the joinder of charges appears to have been regular under S. 453, and the punishment to be within the limits prescribed by S. 314, Act X of 1872.

The same persons were separately tried for offences under S. 379, Indian Penal Code, committed on or about the 7th May, 1879, in respect of property belonging to Tulasia, and were sentenced on the 30th September, 1879, each to two years' rigorous imprisonment to commence at the expiration of the term which they were already undergoing. They were also separately tried for offences committed under Ss. 379 and 414, Indian Penal Code, respectively, on or about the 15th July, 1879, in respect of property belonging to Chamru, and were sentenced each on the 30th September, 1879, to one year's rigorous imprisonment to commence on the expiry of the last term for which they had been already sentenced. The sentences in the two cases last mentioned appear to be legal under the provisions of S. 317, Act X of 1872. I agree with the learned Chief Justice in the opinion that the provisions of S. 314 of that Act do not apply to those two cases. The circumstances that they were decided on the same date, and that the first mentioned case was also decided on the same date, cannot have the effect of amalgamating the three cases so as to make them one. The proceedings in each of the three cases were perfectly distinct and each was disposed of by a separate judgment.

STRAIGHT, J.—This is a reference to the Full Bench of a submission for orders from the Commissioner of Kumaun by the **[313]** Hon'ble the Chief Justice and Mr. Justice Spankie. The following are the circumstances in respect of which the question of procedure to be considered arises. Two persons, Daulatia and Debuli, were tried and convicted by Mr. C. J. Garstin, Magistrate of the first class, of the following offences:—(i) On 7th of May, 1879, stealing grain, the property of Tulasia, under S. 379 of the Penal Code. For this they were severally sentenced to rigorous imprisonment for two years. (ii) On 15th of July, 1879, Debuli with stealing a bracelet from a boy named Chamru, S. 379 of the Penal Code, and Daulatia with assisting in concealing and disposing of such

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bracelet, S. 414; severally sentenced to one year's rigorous imprisonment. (iii) On the 1st August, 1879, Daulatia and Debuli, stealing grain, the property of Bachuli; Daulatia under S. 379 sentenced to two years' rigorous imprisonment, and Debuli to one year. In the same trial they were both further charged, convicted, and sentenced to two years' rigorous imprisonment for breaking into the house of Bachuli on the 2nd of August, 1879, with intent to commit an offence. To put it shortly, the convictions and sentences stand thus:—

Daulatia	...	(1) S. 379—two years. (2) S. 414—one year. (3) S. 379—two years. (4) S. 454—two years.
Total	...	Seven years.
Debuli	...	(1) S. 379—two years. (2) S. 379—one year. (3) S. 380—one year. (4) S. 454—two years.
Total	...	Six years.

The point arising for our consideration is whether the Magistrate has exceeded his powers, or, in other words, was the maximum amount of punishment he could inflict limited to four years' rigorous imprisonment. By S. 20 of the Criminal Procedure Code a [314] Magistrate of the first class may pass a sentence of imprisonment not exceeding the term of two years, and he has jurisdiction to try, amongst others, offences against Ss. 379, 380, 414, and 454 of the Penal Code. A person convicted upon S. 379 or 414 is liable to rigorous imprisonment for a term not exceeding three years, while the punishment under S. 380 may extend to seven years and under S. 454 to ten years. Upon any single conviction for any one of these offences a Magistrate of the first class may punish up to two years and beyond that he may not go. And while it appears that his jurisdiction to try any number of cases against any one person is unlimited, the sentences he can pass are to this extent circumscribed. No doubt under S. 196 of the Criminal Procedure Code he may send an accused person for trial by the Sessions Court, if "the evidence satisfies him" that it is one which ought to be tried in that Court; and by S. 315 he may adopt a similar course if the accused person has been previously convicted of an offence relating to coin or Government stamps or against property and is charged with a like offence, the punishment provided for which is three years or upwards, and if he considers such person to be an habitual offender. But it does not appear to me that these sections should in any way affect the consideration of the present point, namely, whether Daulatia and Debuli were convicted "at one trial of two or more offences, punishable under the same or different sections of any law for the time being in force." It is necessary very carefully to examine these commencing words of S. 314, nor must it be forgotten that in the analogous provision of S. 46, Act XXV of 1861, they were not at "one trial" but at "one time." Now the proviso to S. 314, limiting the amount of punishment to be inflicted by a Magistrate, is only applicable, where a person is convicted at one trial of two or more

offences, punishable under the same or different sections of any law. When we look to the interpretation clause we find "trial" defined to mean "proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender." Next it is important to see what restrictions there are as to the joinder of offences. According to S. 452 there must be a separate charge for every distinct offence and a separate trial, except, when under the terms of S. 453, a person is accused of more offences [315] than one, of the same kind, within one year of each other, when he may be charged and tried at the same time for any number of them not exceeding three. These directions as to procedure appear to me perfectly clear, and it would therefore seem that there can only be one trial of two or more offences punishable under the same or different sections of any law, where those offences are of the same kind and fall within the terms of S. 453. In the present case the Magistrate seems to have properly joined the two charges of the 1st and 2nd of August in the third trial. They both involved a stealing from the same person and were apparently sufficiently "ejusdem generis" to permit the application of S. 453. The Magistrate had the alternative of trying them separately, but for purposes of expedition and convenience it was obviously proper to take them together, and I cannot help here expressing a hope that the effect of the judgment of this Court will not be to lead Magistrates to separately try charges which ought to be joined and disposed of in one trial in order to enable them to accumulate punishment. Upon examination of the printed record in the present reference, it appears to me that there were three separate trials in the strictest sense of the term, and that upon each of the first two convictions the Magistrate was authorized to punish up to two years' rigorous imprisonment, and, as to the third for the joint offences, to inflict a sentence not exceeding twice the amount he by S. 20 had power to inflict. I am aware that the consequence of holding this view will be that the Magistrates will be in a position to multiply terms of imprisonment, if there only be a sufficient number of charges before them, and I feel very strongly the force of my honorable colleague Mr. Justice Spankie's observations as to the wisdom of allowing so much latitude to the inferior criminal tribunals. I confess I should have preferred to be able to come to a conclusion directly opposite to that at which I have arrived. But whatever views I may entertain as to the policy of vesting in Magistrates such extensive powers to punish, it does not appear to me that the sections of the Criminal Procedure Code to which I have adverted are open to any construction other than that I have placed upon them. Accordingly, I am of opinion that Mr. Garstin's orders of 30th September, 1879, are valid and good and cannot be impeached. Each trial was separate from charge to [316] sentence, and though the judgments were given and the punishments inflicted all on the same day, they are so distinguished and kept apart that each record is complete in itself.

I desire to add that the case of *Empress* v. *Umeda* (1) mentioned by the Chief Justice and Mr. Justice Spankie had not all these characteristics, and the judgment I then gave was based upon the, as I thought, irregular mode in which the Magistrate had decided the charges and inflicted the punishment "*en bloc*," and so to speak in the same breath. In this way it differs from the present case, but in such other respects as it is identical it must be taken that I have reconsidered and altered the view I then entertained.

SPANKIE, J.—Some three cases were referred. I have had the

(1) Unreported.

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opportunity of reconsidering the opinion I at first entertained regarding the point at issue. I have also had the benefit of reading my honorable and learned colleague Mr. Justice Straight's opinion and I agree with him. As to the last case submitted to us, I think, as before, that the Magistrate has not exceeded his powers and was at liberty to make the commitment to the Sessions Court.

OLDFIELD, J.—I have arrived at the same conclusion as my honorable colleague Mr. Justice Straight that S. 314, Criminal Procedure Code, will not apply to the trials before us, so as to limit the aggregate punishment which the Magistrate could inflict, nor are the convictions and sentences otherwise illegal.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

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APPELLATE CIVIL.

2 A. 778.

GOBIND SINGH (*Defendant*) *v.* KALLU AND OTHERS (*Plaintiffs*).

[22nd March 1880.]

2 A. 778.

Suit for redemption of mortgage—Valuation for purposes of jurisdiction.

In a suit for redemption of mortgage, the jurisdiction of the Court must be decided with reference to the subject matter in dispute, that is, the mortgage and the mortgagee's rights under it, in other words, the amount expressed to be secured by the instrument of mortgage, and not the value of the property mortgaged. The defence set up has nothing to do with such a question. (S. A. No. 1039 of 1877, *Diss.*).

[**F.**, 3 A. 822 (824)=1 A.W.N. 85, 7 A.W.N. 262, 10 A. 524 (528), 13 B. 489 (491); **R.**, 11 B. 591 (594), 14 C.P.L.R. 154 (155), 8 Ind. Cas. 973 (975).]

JUDGMENT.

[779] STRAIGHT, J.—This is a first appeal from a decision of the Subordinate Judge of Aligarh of the 30th June, 1879. The plaintiffs-respondents sued for possession of mauza Chiti, pargana Chandos, by redemption of a mortgage for Rs. 2,000 executed, as far back as 1835, by Jai Kishan and others, of whom they are the representatives, to Hardeo Singh, whose rights have come to the defendants by purchase. The plaintiffs alleged that the principal sum and interest secured by the instrument had been discharged out of the profits, and they prayed that the property might be restored to them. The Subordinate Judge dismissed the claim of all the plaintiffs, with the exception of three, Kallu, Gobardhan, and Parsa, in whose favour he gave a decree in part. Gobind Singh alone of all the defendants now appeals to this Court.

Upon the case being called on for hearing before us, it was urged as a preliminary objection by Pandit Ajudhia Nath on behalf of the respondents, that the appeal had been wrongly preferred to the High Court, as, the subject-matter in dispute being the mortgage, and the value of the mortgagee's rights under it, which were below Rs. 5,000, it properly lay to the District Judge. The following decisions of this Court were referred to in support of this contention,—Second Appeal No. 521 of 1869; Second Appeal No. 511 of 1878; and Second Appeal from Order No. 51 of 1879 (1).

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(1) Unreported.

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On the other side the appellant urged that, as by the statement of defence filed, a question of proprietary title to property of the value of Rs. 15,000 was raised, the appeal was cognizable by this Court. In support of this view our attention was called to a decision of Turner, J., and Spankie, J., in Second Appeal No. 1039 of 1877 (1). which, if accurate, is undoubtedly applicable to the present case.

[780] The question thus raised is one of some importance, and, having regard to the precedents already enumerated, we thought it right to take time to consider judgment. The point turns upon the construction of the words "subject-matter in dispute" of S. 22, Act VI of 1871.

In the present case the plaintiffs' suit was essentially one for redemption of mortgage, the court-fee payable on which would have to be calculated according to the "principal money expressed to be secured by the instrument of mortgage,"—Art. ix, S. 7 of Court Fees' Act. It is true that the defendants by their pleas opened up a wider field for inquiry, involving the consideration of their proprietary title to the property. But we do not think that the character or nature of the subject-matter of the plaintiffs' claim was thereby altered; it continues in its original shape so far as he is concerned, nor is the complexion of it entirely changed because the defendants put forward certain grounds of defence which, if well-founded, must defeat his right to redeem. We therefore think that the subject-matter in dispute was the mortgage and the mortgagee's right under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the Judge. We regret that the decision should be directly at variance with the judgment of Turner and Spankie, JJ., already mentioned, but the point appears to us so clear, that we feel constrained to differ from the view enunciated by those two learned Judges.

The memorandum of appeal will be returned to the appellant for presentation in the proper Court, and the appellant will pay the respondents' costs in this Court.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

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HIRA LAL (*Defendant*) *v.* KARIM-UN-NISA (*Plaintiff*).

[23rd March 1880.]

Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—C.P.C., 1859, Ss. 256, 257, 258—C.P.C., 1877, Ss. 312 and 315—Warranty of title.

(*a*) Where a sale in execution of a decree is set aside, not on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, but at the instance of a third party who has succeeded in establishing his title to it, and there is no question of fraud on the part of the decree-holder, the auction-purchaser cannot sue the decree-holder for recovery of purchase-money. (2 B.L.R.A.C. 83=10 W.R. 365, 4 B.L.R. (**F.B.**) 11=12 W.R. (**F.B.**) 8, *F.*; 1 A. 568, H.C.R., N.W.P., 1871, p. 67, H.C.R., N.W.P., 1867, p. 50, *D.*).

(*b*) The provisions of S. 315, C.P.C., 1877, having no retrospective effect, cannot apply to a sale which has taken place before the Act came into operation.

(1) Unreported.

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In the case of such a sale therefore, the auction-purchaser cannot apply under that section for the refund of purchase-money. (2 A. 229, *Diss.*).

(*c*) Under S. 315, C.P.C., the proper remedy for the auction-purchaser is by an application in the execution department and not by separate suit. (*Per* STRAIGHT, J.).

(*d*) No warranty of title is ordinarily given by the judgment-creditor in judicial sales held under the C.P.C.

JUDGMENT.

2 A. 780. [781] OLDFIELD, J.—Hira Lal, defendant, the appellant before us, caused five bighas, fifteen biswas of land to be attached in execution of his decree against Khadim Husain and Isri Husain, as property belonging to the judgment-debtors. One Wilayat Husain objected to the attachment and sale on the ground that the property did not belong to the judgment-debtors, but was endowed property; his objections were disallowed, and the property was sold by auction, [782] and purchased by the plaintiff for Rs. 505 on the 20th July, 1875, and the money paid over to the defendant, and the sale was confirmed on the 11th September, 1875. Wilayat Husain, however, brought a suit to set aside the sale, on the ground that the judgment-debtors had no right and title in the property, which was an endowment, and he obtained a decree on the 18th August, 1876, and the sale was set aside. The plaintiff has now brought this suit to recover from the decree-holder the purchase-money with interest, and the Courts below have decreed the purchase-money with interest at six per cent. It is contended in second appeal that no suit will lie for refund of purchase-money, that plaintiff's proper remedy was to proceed in the execution department under the provisions of S. 315, Act X of 1877, and that interest should not be allowed.

In my opinion, the first plea is valid. The sale took place under the provisions of Act VIII of 1859, and, although S. 258 directs that, whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, this provision applies only to cases in which the sale has been set aside for irregularities or the like under Ss. 257 and 258 of the Act, and not when a third party succeeds in establishing his title to the property. This view of the law has been held in a course of decisions of the Calcutta Court—*Rajib Lochun* v. *Bimalamoni Dasi* (1) and *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar* (2), and I am not aware of any by this Court opposed to it. The case of *Makundi Lal* v. *Kounsila* (3) proceeded on the ground that the decree-holder had fraudulently executed a decree against a person not bound by the decree, and had caused the sale of his property, and is not in point, nor are the two cases referred to by the Munsif. In *Neelkunth Sahee* v. *Asmun Matho* (4) there was no power to bring the judgment-debtor's property to sale under the decree; and in *Doolhin Hur Nath Koonweree* v. *Baijoo Oojha* (5) the decree-holder had caused property to be sold which though belonging to the judgment-debtor was not saleable in execution of a decree.

[783] The terms of S. 315, Act X of 1877, are different to those of S. 258, and by S. 315, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to

(1) 2 B. L. R., A. C., 83=10 W. R. 365.
(2) 4 B. L. R., F. B., 11=12 W. R., F.B., 8.
(3) 1 A. 568.
(4) H. C. R., N. W. P., 1871, p. 67.
(5) H. C. R., N. W.P., 1867, p. 50.

receive back his purchase-money from any person to whom the purchase-money has been paid. But it is unnecessary to determine whether plaintiff could succeed under this section, as its provisions cannot have retrospective effect, and it will not apply to a sale which has taken place before the Act came into operation; and I am unable to take the view on this point of the learned Judges who decided the case of *Mulo*, petitioner, decided the 7th May, 1879 (1), which was brought to our notice at the hearing.

The liability of a decree-holder must be decided according to the conditions of the sale in force when he caused the property to be sold, and any warranty of title in the judgment-debtor is not ordinarily given by the judgment-creditor in judicial sales held under the Civil Procedure Code; nor can it be held that the decree-holder undertook to warrant the title of the judgment-debtor in the property sold in the case before us. The rule of law in respect of sales in execution of decrees has been declared by the Privy Council in *Dorab Ali* v. *Abdul Aziz* (2). Their Lordships observe: "Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-debtor;" and again: "The Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor."

The sale in the case before us not having been set aside in favour of the judgment-debtor on the ground of want of juris-[784]diction or other illegality or irregularity affecting the sale, and there being no question of fraud or misrepresentation on the part of the decree-holder, I am of opinion that the plaintiff cannot succeed in this suit, and it should be dismissed, and the appeal decreed, with all costs, and the decrees of the lower Courts reversed.

STRAIGHT, J.—I am of the same opinion as my honorable colleague. It does not appear to me that the provisions of S. 315 of Act X of 1877 are applicable to a sale which took place in July, 1875, and the relief now afforded to auction-purchasers is not open to the plaintiff. Were there not a Full Bench decision of the Calcutta Court in *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar* (3) as to the construction to be placed upon S. 258 of Act VIII of 1859, I should have had no difficulty in holding that the setting aside of sale contemplated therein is governed by Ss. 256 and 257, which gave the Court summary powers to set aside sales on the ground of material irregularity in "publishing or conducting them." In the present case no allegation of that kind is made, but the plaintiff bases her claim to a refund of the purchase-money paid by her, because the consideration for that payment has totally failed. It is not alleged that any fraud or misrepresentation was used at the time of the auction-sale, which took place through the Court, and it is clear that no warranty of title or guarantee of undisturbed possession can be implied to a purchaser.

The following rule of law laid down by Lord St. Leonards on Vendors and Purchasers, 14th edition, p. 1, is relevant:—"If at the time of the contract the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults and cannot claim any compensation for them." And in the same

(1) 2 A. 299.
(2) 3 C. 803=5 I.A. 116.
(3) 4 B. L. R., F. B., 11=12 W. R., F. B., 8.

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APPELLATE CIVIL.

2 A. 780.

work the following passage occurs:—"If the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity (1)." In the present case, so far from there being any evidence of *mala fides* on the part of the judgment-creditor, the sale did not take place until Wilayat Husain's objections had been [785] heard and disposed of. There was, therefore, the strongest reason for his believing that the judgment-debtor had a saleable right, title, and interest in the property brought to sale.

Had the provisions of S. 315, Act X of 1877, been applicable, I think that the objection taken in the first ground of appeal by the appellant would have been fatal to the plaintiff's claim, and that instead of instituting a regular suit the proper course for an auction purchaser to pursue, under circumstances such as those which have arisen in the present case, is to apply under S. 312 in the execution department. This appeal must, therefore, be decreed with costs.

CIVIL JURISDICTION.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

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2 A. 785.

DURGA PRASAD (*Decree-holder*) *v.* RAM CHARAN AND ANOTHER (*Judgment-debtors*). [24th March 1880.]

Execution of decree—Sale of immoveable property—Order setting aside sale—Appeal—C.P.C., 1877, Ss. 312, 588 (m)—Act XII of 1879, Ss. 90 (16) and 102—General Clauses Act (I of 1868), S. 6.

Under S. 6 of the General Clauses Act (I of 1868), the repeal of any Act cannot affect any proceeding commenced before the repealing Act came into operation. Therefore an appeal allowed by S. 588 (*m*) of the C.P.C., 1877, but disallowed by the repealing Act (XII of 1879) would not be affected by such repeal, if it had been commenced before the repeal. (Appeal from Order No. 138 of 1879, and Revision Case No. 38-B of 1879, *observed on.*)

On the 25th June, 1879, the Subordinate Judge of Farukhabad made an order setting aside the sale of immoveable property in the execution of a decree, from which an appeal was preferred to the District Judge, under Act X of 1877, on the 25th July, 1879, before Act XII of 1879 came into operation. On the 6th December, 1879, the District Judge returned the memorandum of appeal to be presented to the High Court, Act XII of 1879 having in the meanwhile come into force. The decree-holder's appeal was admitted by the High Court. However, the decree-holder subsequently made an application to the High Court for the revision of the District Judge's order, on the ground that his appeal—preferred to him before Act XII of 1879 came into operation—was cognizable by him.

JUDGMENT.

[786] The Subordinate Judge's order, dated the 25th June, 1879, was appealable to the Judge under S. 588 (*m*), Act X of 1877, and was made the subject of an appeal to him on the 25th July, 1879, before Act XII of 1879 was passed. An order setting aside a sale under the second clause of S. 312, Act X of 1877, is not appealable under S. 588, Act X of 1877, as

(1) at p. 549.

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amended by S. 90 (16), Act XII of 1879. This being so, S. 102 of the latter Act, which provides for the disposal of "every appeal now pending which would have lain if the Act had been in force on the date of its institution," does not apply in this case, for the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution; but, as the appeal lay to the Judge under the law in force on that date, he was competent and bound to dispose of it under the provisions of S. 6, Act I of 1868, which declare that the repeal of any Act shall not affect any proceeding commenced before the repealing Act shall have come into operation. [787] As the Judge failed to exercise a jurisdiction vested in him by law in the matter of the appeal, we set aside the order and direct the memorandum of appeal to be transmitted to him for disposal on the merits according to law.

In the course of considering this matter we have had occasion to examine two decisions, passed by us on the 11th of February last, in Appeal from Order No. 138 of 1879 (1) and Revision Case No. 38-B of 1879 (1).

We think it right to take this opportunity to say, as regards the first of these, that it was determined under an erroneous conception of S. 102 of Act XII of 1879. It was incorrect to say that that section was "inapplicable" to that appeal. The order thereby appealed was one "*confirming a sale*," and it was appealable both under S. 588 of Act X of 1877 and the amendment of that section contained in Act XII of 1879. Moreover, that appeal was pending, when the last-mentioned Act came into force, and should, therefore, have been heard and determined as provided by the amendment to S. 589, namely, by this Court. Accordingly our order sending it back to the Judge for disposal was incorrect.

In Revision Case No. 38-B, we were in error in using the expression "had the provisions of Act XII of 1879 been applicable, the appeal from the Munsif's order *setting aside the sale* would lie, not to the Judge but the High Court;" for S. 588, as amended, enacts, by omission, that appeals from orders setting aside sales can no longer be had. We have thought it right to correct this inaccuracy of expression, though our order in the case was perfectly regular.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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GANPATJI AND ANOTHER (*Plaintiffs*) *v.* SAADAT ALI AND OTHERS (*Defendants*). [31st March 1880.]

Conveyance of immoveable property—Construction—Descriptive words.

Where the language of a conveyance is comprehensive enough to include not only an estate or taluka sold, but also the lands appertaining to it by means of alluvion, and the intention to convey such appurtenant lands is otherwise apparent, the mere mention, in the conveyance, of the jama of the estate or taluk alone, and the omission of that of the alluvial lands, cannot be held to exclude the latter from the operation of the conveyance. In such a case, the entry of the jama is merely descriptive. The same principle applies to a sale contract, a plaint, and to a decree.

(1) Unreported.

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JUDGMENT.

[788] OLDFIELD, J.—The case of the plaintiffs is that taluka Birpur with all the villages appertaining to it and all existent and contingent rights connected with it had been hypothecated to Nawab Jafar Ali Mirza, for money lent to Husaini Khanam and Bakya Bibi, the proprietors, and the Nawab instituted a suit and obtained a decree against them, and in execution caused the taluka with [789] all rights and interests to be sold, and himself purchased it on 20th November, 1872. After the purchase, the auction-purchaser agreed to sell the property to Jiwan Lal now represented by Ganpatji, who admitted the plaintiff Hari Das to an interest in the transfer, and after a suit instituted against the auction-purchaser they obtained a decree compelling the auction-purchaser to execute a sale-deed in their favour in accordance with the agreement. The plaintiffs have been obstructed by the heir of the judgment-debtors, the former owners of taluka Birpur, and by lessees put in by him, in obtaining possession of some alluvial land comprising 110 bighas, 12 biswas, 13 dhurs, which accreted to some of the villages comprising the taluka in 1860 and 1861, and was formed into a mahal and assessed with a revenue of Rs. 88 in 1863 and settled with the proprietors of taluka Birpur, and which the plaintiffs allege was sold at the auction-sale on 20th November, 1872, and passed by that sale to their vendor and to which they are in consequence entitled.

The defendants, one of whom is the heir of the former owners of the taluka, and the other two are lessees on his part, aver that this alluvial land was not hypothecated to Nawab Jafar Ali Mirza, nor included in the property sold at auction; that the property hypothecated and sold was the original mahal of taluka Birpur, excluding this land which was formed into a separate mahal recorded under the name of *Gang-barar*; and they further aver that the plaintiffs' vendor, the auction-purchaser, never considered himself the purchaser of this land nor agreed to sell this land, and it was improperly included in the sale-deed which the plaintiffs obtained by a decree of Court; and they further plead that the suit is not maintainable which reference to S. 241, Act XIX of 1873, and is barred by limitation.

The Subordinate Judge rightly held that there was no bar to the institution of this suit on the ground taken; and he proceeded to find that the land in dispute was not included in the hypothecation made by the owners of Birpur to plaintiffs' vendor, nor in the auction-sale, nor in the subsequent contract of sale by the plaintiffs' vendor to plaintiffs; and he bases this finding mainly on the following grounds: That the alluvial land formed a separate mahal [790] bearing a separate number in the *tauzi* from that of Birpur, with separate revenue assessed, *viz.*, Rs. 6,800-4-7 on mahal Birpur, and Rs. 88 on mahal *Gang-barar*, and had no connection with taluka Birpur; that all that was entered in the mortgage-deed as subject of mortgage was taluka Birpur proper, assessed with revenue of Rs. 6,800, and that the sale notification and application for sale made no separate reference to this mahal, and that it was not expressly included in the plaint (dated 19th March, 1874,) in the suit instituted by plaintiffs against the auction-purchaser, nor in the decree of 21st July, 1874, nor in the sale-contract by plaintiffs' vendor; and the Subordinate Judge argues that, being a separate mahal and not expressly included in the above documents, it cannot be held to have formed part of the property mortgaged and sold.

We are unable to take the same view as the Subordinate Judge. Taluka Birpur is shown to comprise a number of villages forming a

mahal, and in 1860 the land in dispute was thrown up and accreted in front of five of these villages, Birpur, Barmara, Ami, Soharpur, and Narainpur, and in 1863 it was formed into a mahal and assessed with the proprietors of the taluka Birpur, and entered as "*Arazi gang-barar*, mauzas Birpur, Barmara, Ami, Soharpur, and Narainpur appertaining to taluka Birpur." Thus, although formed into a separate mahal for fiscal purposes, the land would appear to have been attached to the mauzas to which it was an accretion, and at all events it is clear the new mahal after its formation appertained to taluka Birpur. The Subordinate Judge is therefore wrong in considering it had no connection with the taluka; on the contrary it appertained to it as a dependent mahal. By the terms of the mortgage-deed the owners of the taluka "agree mutually to mortgage the said taluka Birpur, and accordingly after mortgaging and hypothecating the whole of the mauzas, original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, inhabited, waste, and saline tracts, stone and wooden presses, *kacha* and *pucca* wells, reservoirs, and tanks, small tanks, and ponds, sir, *baghs*, scattered trees, trees bearing fruits and barren trees, [791] *chauni* houses and dwelling-houses, &c., and all and every portion of our proprietary, possessory, and demandable rights without excepting any right or interest obtained or obtainable.

Now it seems to us, considering the fact that the alluvial mahal appertained to the taluka, that the above terms are comprehensiye enough to include it in the property mortgaged; and if the sum entered as the *jama* was that of the taluka exclusive of the *jama* of the alluvial mahal, there was no intention by that entry to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. But the material point is not what was mortgaged but what was sold at auction. Unfortunately no sale-certificate is forthcoming, and it is alleged, and not disputed, that although the sale was confirmed no sale-certificate was obtained by the auction-purchaser, probably owing to the dispute between him and the plaintiffs. But we have in evidence the application for sale and the sale-notification, and in the former the decree-holder applies for the sale of "mahal taluka Birpur, together with original and attached mahal and all zemindari rights belonging thereto," and the sale-notification directs the sale of the "mahal Birpur, together with original and attached mahal and all the zemindari rights appertaining thereto." The attached mahal alluded to can be no other than this alluvial land, and we are at a loss to understand the Subordinate Judge's remark that the sale-notification and application for sale made no separate reference to this mahal.

We can come to no other conclusion than that this alluvial tract, formed into a separate mahal, remained attached to the taluka, and was included in the property sold at auction.

Nor do we agree with the Subordinate Judge that it was excluded from the sale to the plaintiffs, the enforcement of which they obtained under a decree of Court. The Subordinate Judge rests his finding on this point on the fact which he asserts that this land was not included in the sale-contract to plaintiffs, nor in their plaint in their suit to enforce that contract, nor in the decree which they obtained. But the whole force of the Subordinate Judge's opinion rests on an argument formed upon the amount of the *jama* which is entered in those documents as the *jama* of taluka [792] Birpur, and which is said not to include the *jama* of the alluvial mahal. But the entry of *jama* is merely descriptive, while the essential part of the document is the entry in respect of the subject

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of sale, and this is the "entire taluka Birpur," a term sufficiently comprehensive to include the alluvial mahal appertaining to the taluka, and we may observe that the draft sale-deed, dated 21st January, 1874, expressly includes alluvial lands, and what is more to the purpose the sale-deed executed by order of the Court which gave the plaintiffs their decree expressly includes the disputed lands as conveyed to them by the auction-purchaser.

We reverse the decree of the lower Court and decree the claim with all costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

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DURGA PRASAD (*Plaintiff*) *v.* BALDEO AND OTHERS (*Defendants*).

[31st March 1880.]

Agreement without consideration—Contract Act, 1872, S. 2 (d).

Where the plaintiff had voluntarily expended money for establishing a market to please the District authorities, and not at the request of the defendants (shopkeepers) or for their benefit, an agreement by the defendants to pay the plaintiff, in consideration of such expenditure, a certain commission on articles sold through their agency in such market, is one that does not come within the terms of S. 2 (*d*) of the Contract Act, and is void for want of consideration.

The plaintiff stated in his plaint as follows :—"The plaintiff established two grain-markets at Etawah, one called Hume Ganj, the other Ram Ganj, expending thousands of rupees in building shops and purchasing land, at the instance of the district authorities : the defendants rented shops in these markets, and set up as commission agents, receiving a commission of Re. 1-8-0 per cent. from the traders : in consideration of the plaintiff having expended thousands of rupees, the defendants fixed eight annas of such percentage as the plaintiff's '*haq*' which they used to pay him : in 1875, by mutual consent, six annas was fixed as the plaintiff's '*haq*,' and the defendants executed an agreement on the 22nd June, 1875, according to which that amount was paid to the plaintiff : when the plaintiff desired to have that agreement registered, some of the defendants refused to register it, others denied having executed it ; the plaintiff consequently was obliged to sue for the establishment of his right ; accordingly the present suit has been brought on the agreement by which the defendants agreed to pay six annas out of the Re. 1-8-0 they receive as commission from the traders to the plaintiff who is known as '*chaudhri*' of the market."

Out of the 118 defendants nineteen confessed judgment ; twenty-eight put in no appearance ; and seventy-one defended the suit, on the ground amongst others, that the agreement was void for want of consideration.

The first Court disallowed such defence, its decision on the issue arising from such defence being as follows :—

"Now it is proper for the Court to decide the defendant's plea (involved in the second issue of law), *viz.*—Is this document invalid with reference to S. 19, Act IX of 1872, or not ? The Court thinks it is not, because in S. 2 (*d*), Act IX of 1872, consideration is defined as anything done or promised to be done or abstinence from doing that thing. In that

case it should be admitted that the plaintiff, besides spending money from his own pocket in the establishment of 'Hume Ganj,' exercised great diligence and took great pains in having it tenanted, and this market gave the defendants an opportunity to get 'fees' (*arath*) by following their profession. In recompense of that trouble and diligence, if a portion of the fees was fixed for the plaintiff under the agreement in question as alleged by him, the consideration for that portion of the fees is that very diligence of the plaintiff."

The first Court decreed against all the defendants excepting four of those who had defended the suit. Twenty-five of the defendants who had defended the suit appealed. The lower appellate Court holding that the agreement was void for want of consideration, that the genuine character of the agreement was so doubtful that the agreement could not be supported, set aside the decree of the Court of first instance, and dismissed the suit, the material portion of its judgment being:—"It is contended that Durga Prasad, the respondent, neither had done, was doing, or promised to do anything for the appellants; that the fees they derived from the '*biparis*' were not due to any exertions on his part; that if he built shops so did the appellants; that the efforts he may have made 11 or 12 years previously to establish the market-place were made to please the Collector and not at their desire; and that it was never agreed that they should receive certain fees in consideration of paying him certain dues. On behalf of the respondent it is argued that there was consideration within the meaning of S. 25 (2), Act IX of 1872, and that the dues secured by the agreement were in compensation for something already voluntarily done by the respondent for the appellants, namely, the establishment of the market place. I am unable to see clearly what it is that the respondent has done for the appellants. The market place was evidently established with great difficulty and in the force of much opposition mainly through the exertions of Durga Prasad, but this was to please the Collector not the appellants. The respondent was a person of standing and influence, and in consideration of his assistance the local authorities wished to recognize him as *chaudhri*, but their action in appointing him as such was disallowed by the Local Government on a petition being filed by several persons, among whom were some of the defendants. It is evident that the respondent was not by any means acceptable to the persons immediately concerned. It might be considered that the appellants would not agree to pay the respondent fees unless they had gained something through him, and that the fact of their executing such an agreement afforded a presumption that he had done something for them. But, as will be noticed under plea 9, the agreement was extremely informal and vague, and there is much reason to doubt whether in fact it was executed by most of the defendants or not. It does not, for instance, recite any service done by the respondent or advantage accruing to the appellants through him. All the appellants are made to say in it is that they will not take more than Re. 1-8-0, out of which they will pay the respondent six annas. There was evidently no 'consideration,' as defined in S. 2 (*d*), and as evidently the circumstances do not bring the matter under Cl. 2, S. 25 of Act IX of 1872. I think it desirable, notwithstanding that this finding is a sufficient reason for reversing the decree, to enter into that part of the 9th plea also which raises the question whether the deed was really executed by the appellants or not, and whether the confessing defendants are in collusion with the plaintiff or not. On behalf of appellants several peculiarities are pointed out, which tend to show that the document was not executed with

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the propriety and deliberation suitable where such considerable interests were concerned and usual on such occasions. It was executed on an eight-anna stamp and a penalty subsequently enforced of twenty times the proper stamp. To this a long slip of country paper was pasted upon which the signatures which could not be got on to the stamp were written; there were no marginal witnesses, and the agreement was not drawn up in the usual form. The stamp was purchased in the respondent's name, not, as is usual in such cases, by the executants. Several of the names are those of shopkeepers, not brokers, though the former take no fees. From all this the inference deduced on behalf of the appellants is that the document was not fairly and openly executed, and cannot be fully trusted, and the inference is not unreasonable. It is evident that the Municipal Committee did not feel sure of the genuineness and validity of the document as they wished to be, for they recommended the respondent to get it registered. When he produced it for registration, some of the alleged executants admitted their signatures but declined to register; others said they had signed a blank paper; and four denied having executed the document at all. Registration was refused and the order maintained on appeal. As to one of those who denied their signature, it was found by the Sessions Court, to which the respondent was committed for trial on the charge of forgery, that his signature had in fact been forged, and the document was impounded though the respondent was acquitted on the ground of ignorance and good faith. The evidence as to the signature consists of the statements of the writer of the document, of Muhammad Nazir, Tahsildar and Sub-Registrar, and of several of the confessing defendants, and is extremely weak, as might be expected from witnesses relating what they could recollect after a lapse of three years. No confidence can be placed under such circumstances in the genuineness of any of the signatures which are denied. It may be, and apparently is, the case that certain fees were paid to Durga Prasad, but there was a dispute about them for years. It is obvious that the respondent was strongly supported by the authorities, and it is not improbable that some of the appellants may have given a reluctant assent to the terms specified in the agreement and that others subscribed to them willingly. But I am of opinion that the contract it embodies is void for want of consideration, and that the whole document is not such as can be accepted as proving the alleged agreement, and that the other evidence is also insufficient to prove it." The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[227] OLDFIELD, J.—The object of the suit is to establish an agreement in writing, dated the 22nd June, 1875, alleged to have been executed by the defendants, whereby they agreed to pay certain commission to the plaintiff on the price of articles brought for sale in a market called Hume Ganj in Etawah. The allegation of the plaintiff is that he established the Ganj at his own expense by request of the Collector at that time, built shops, which were occupied by some of the defendants, who received commission at Re. 1-8-0 per cent. on articles brought for sale, and who used to pay eight annas per cent. to the plaintiff, and that the agreement now sought to be established has been executed to give effect to the understanding existing between the parties on the subject. Out of the defendants, nineteen confessed judgment, twenty-eight put in no appearance, and seventy-one defended the suit. The Court of first instance decreed the claim against all but five; twenty-five persons among the defendants appealed to the Judge, and these are

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the respondents in appeal before us. The grounds of appeal were substantially that a suit of the nature of the present suit to establish a right to fees as *chaudhri* of a bazar is not maintainable; that the absence of registration of the document is fatal to the maintaining of the suit; that the suit should be dismissed, since the document had been held to be a forgery by a Criminal Court; and that there was no consideration for the agreement under S. 25, Act IX of 1872, and it cannot be a binding agreement on the appellants under the circumstances under which it was drawn up. The Judge rejected all the objections in respect of the maintenance of the suit, but he found that there had been no consideration for the agreement, as the term is defined in S. 2 (*d*), Act IX of 1872, and that it was not such an agreement as might be valid with reference to the provisions of Cl. (2), S. 25 of that Act; and he further held that the document had not been executed with proper formality and the deliberation suitable when such considerable interests were concerned, nor with the fairness or openness required to allow of its being fully trusted; and he reversed the decree of the first Court and dismissed the claim against the defendants.

[228] The plaintiff has presented a second appeal in this Court, making the defendants respondents who had appealed to the Judge. The objections are to the effect that the Judge's finding in respect of the invalidity of the agreement for want of consideration, and for want of proof of its proper execution, is wrong, and that he should not have dismissed the suit against those defendants who had not appealed to him.

The Judge's finding on the question of consideration is one which is not open to question in second appeal. To render the agreement valid as a contract, it must be shown that there was consideration as defined in the Contract Act, or if not, that the agreement comes within the exceptions provided for in S. 25. Now the deed is silent as to the character of the consideration for the promise, and the only ground for making the promise is the expense incurred by the plaintiff in establishing the Ganj; but it is clear that anything done in that way was not "at the desire" of the defendants, so as to constitute a consideration, and the Judge has very distinctly found that "the circumstances do not bring the matter under Cl. 2, S. 25, Act IX of 1872," as has been contended. To bring it within the provisions of that clause, it must be shown that what was voluntarily done by the plaintiff was done "for the promisors" or "something which the promisor was legally compellable to do," and the Judge finds that this has not been shown. He says he does not see clearly what it is that respondents had done for appellant, and that what he did was to please the Collector. In fact, when plaintiff established the Ganj, the defendants were not in his mind, and there was nothing done for them, for which compensation might be given. On the finding by the Judge there is no case for second appeal, and we cannot disturb the decree in respect of those defendants who have not been made parties to this appeal by the appellant. The appeal is dismissed with costs.

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APRIL 2.

APPELLATE CIVIL.

2 A. 850.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Straight.

TEJ SINGH (*Plaintiff*) *v.* GOBIND SINGH AND OTHERS (*Defendants*).

[2nd April 1880.]

2 A. 850.

Sale in execution of decree—Pre-emption—C.P.C., 1877, S. 310.

In the case of a share of undivided immoveable property sold in execution of a decree, a co-sharer entitled to pre-emption in respect of it, cannot acquire such right as against a stranger bidding for it, unless he also bids for it, and for the same price as such stranger ; mere assertion of his title, and payment of earnest money and of the balance of the purchase-money within fifteen days, will not do. Nor can he, under such circumstances, maintain a suit for pre-emption against the purchaser.

[F., 3 A. 827 (828) = 1 A.W.N. 86 ; **D.**, 3 A. 15 (17).**]**

During the sale of a share of certain undivided property in execution of a decree, the plaintiff, a co-sharer in such property, asserted his right of pre-emption and paid the deposit required by S. 306, Act X of 1877, on the full amount of the purchase-money as required by S. 307 of that Act, but did not bid at all for the property at the sale. His claim to pre-emption having been rejected by the Court executing the decree, he brought the present suit against the defendants—who satisfying the conditions required by Ss. 306 and 307 of Act X of 1877, had purchased the said share—to establish his right of pre-emption in respect of the property. The first Court having given him a decree, the defendants preferred an appeal, and the lower appellate Court held that the suit was not maintainable and dismissed it, its reasons for so holding being as follows : "In the view of the appellate Court the meaning and substance of S. 310, Act X of 1877, are not those that the Court of first instance has described ; on the contrary, the appellate Court is of opinion that the aim and substance of that section is merely this, *viz.*, that the share-holder ought also to bid at auction, and that, if the amount of the last bid by a stranger and the share-holder is the same, preference of purchase should be given to the share-holder ; that is to say, if the amounts bid by the stranger and the share-holder at auction be equal, it shall be knocked down to the share-holder. The rule as to the right of pre-emption in pattidari villages which was fixed under S. 14, Act XXIII of 1861 with a view to assimilating it to Act I of 1841, has been annulled by this section : and since it is admitted that the plaintiff made no bid at auction, the defendant alone having bid, and the officer conducting the sale knocked the same down to the bid of the latter, the plaintiff under such circumstances is in no way entitled to bring a suit in the Civil Court on the ground of pre-emptive right by virtue of his having filed an application for pre-emption before the officer conducting the sale on the date of the sale, and having paid earnest money, and having paid the remainder of the purchase-money within the period of fifteen days, and for the Court to have made a decree for maintenance of pre-emptive right." Whereupon the plaintiff preferred an appeal to the High Court.

JUDGMENT.

[851] PEARSON, J.—The construction put by the lower appellate Court on the terms of S. 310, Act X of 1877, appears to us to be correct. The appeal, therefore, fails and is dismissed with costs.

1880

APRIL 5.

APPELLATE CIVIL.

2 A. 800.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

BIKA SINGH AND OTHERS (*Defendants*) *v.* LACHMAN SINGH AND OTHERS (*Plaintiffs*). [5th April 1880.]

2 A. 800.

Hindu law—Mitakshara--Mortgage of ancestral property by father—Sale of father's rights and interests in execution—Liability of son's share.

(*a*) Where a Hindu father mortgages ancestral property, and, in execution of a decree on such mortgage, the rights and interests of the father only are sold, the purchaser cannot take possession of the whole estate; and in a suit against him by the sons for the recovery of their shares, it would be unnecessary to enquire into the nature of the debt on account of which the father's rights and interests were sold. (3 C. 198 (**P.C.**), *F*; 1 I.A. 321 (**P.C.**)=14 B.L.R. (**P.C.**) 187, *D.*).

(*b*) Rulings in the above two cases considered and reconciled.

A joint Hindu family consisted of a father (Gulab Singh) and his minor sons (five) and grandsons (two). While the undivided estate was in the possession and management of Gulab Singh, he mortgaged the same as security for re-payment of monies borrowed by him. Ganga Prasad the lender sued Gulab Singh on this bond and obtained a decree for the recovery of the bond debt by the sale of the family estate. The right, title and interest of Gulab Singh alone in the family estate was sold in the execution of this decree. The auction-purchasers took possession of the family estate. The plaintiffs, the sons and grandsons of Gulab Singh, joined and brought a suit against the auction-purchasers to recover their shares of the estate. It appeared that before the suit came to be tried the defendant Gulab Singh died.

The second and third issues fixed by the Munsif were as follow:—"(ii) Whether the property in dispute was the joint ancestral property of the plaintiffs and Gulab Singh the father of plaintiffs, and Gulab Singh was in possession thereof as the head of the family or not? (iii) Whether the debt in satisfaction of which the property was sold had been incurred under a legal necessity or not, and what rights have the defendants acquired by the auction-purchase?" With reference to the first of these issues the Munsif found that the property in dispute was the ancestral property of Gulab Singh and his sons, and not the separate property of Gulab Singh, and that Gulab Singh was in possession of it as the head of the family, and that it was not shown how the moneys borrowed from Ganga Prasad had been expended. The Munsif held that it was not necessary to ascertain how these moneys were expended, as whatever might have been the nature of the debt the defendants could not take under the execution-sale more than the right, title, and interest of the judgment-debtor. The judgment of the Munsif on this part of the case was as follows:—"But this issue is immaterial in the present suit. This case is exactly on all fours with *Deendyal Lal* v. *Jugdeep Narain Singh* (1) decided by the Judicial Committee of the Privy Council. In that case their Lordships held that 'whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution-sale more than the right, title, and interest of the judgment-debtor. If

(1) 3 C. 198.

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2 A. 800.

he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the right, title and interest of the father.' This ruling is applicable to this case. The bond was executed by the father and the decrees obtained against him only. The plaintiffs who were not parties to the bonds were not also made parties to the suits in which the decrees were obtained in execution of which the property in suit was sold. Following the ruling of the Privy Council, I hold that the defendants Bika Singh, Narain Singh, Bahlwan Singh, Tika Singh, and Pulandar Singh have acquired by the auction-purchase merely the right, title, and interest of Gulab Singh to and in the property in dispute."

The Munsif decreed in favour of the plaintiffs. On appeal, the District Judge affirmed the Munsif's decision, but varied his decree, the material portion of the District Judge's judgment being :—"The auction-purchasers appeal. The cases of *Girdharee Lall* v. *Kantoo Lall* (1), *Narayanacharya* v. *Narso Krishna* (2), *Venkatasami Naik* v. *Kuppaiyan* (3) have been cited on their behalf. The last-named precedent is so entirely at variance with their contention that it has probably been cited under a misapprehension. There can be no doubt, however, that the two first-noted precedents do support the appellants' case and lay down the rule that the sale of a father's ancestral estate in execution of a decree of Court will bind Hindu sons *in esse*, and there is no doubt that the property in this case was ancestral and that the sons were *in esse*. But there seems also to be no doubt that the principle enunciated in *Muddun Thakoor* v. *Kantoo Lall* (1) has been very materially varied by *Deendyal Lall* v. *Jugdeep Narain Singh* (4), which has been followed by two Madras Full Bench decisions. —*Venkatasami Naik* v. *Kuppaiyan* (3) ; *Venkataramayyan* v. *Venkatasubramania Dikshatar* (5)-in the latter of which the genesis of the law as now settled is detailed, and it must I think now be taken as certain that, when the sons are not parties to the suit in which the decree is passed, the right, title, and interest of the father can alone be considered as sold in execution. I find, therefore, no reason to differ from the lower Court upon the main point in this case, but I am of opinion with reference to the case of *Babaji Lakshman* v. *Vasudev Vinayak* (6) and *Kallapa* v. *Venkatesh Vinayak* (7) that the decree must be varied, and that its form should be in that given in *Babaji Lakshman* v. *Vasudev Vinayak* (6). The lower Court's decree is modified by declaring the plaintiffs entitled to joint possession along with the defendants of Gulab Singh's share in the zamindari estate of mauza Kishorepur. The relative proportions of their interests, if a division *in specie* be desired, must be determined in a suit to ascertain the same or by private arrangements."

The defendants preferred an appeal to the High Court.

JUDGMENT.

[804] PEARSON, J.—In the case of *Girdharee Lall* v. *Kantoo Lall* (1) and *Muddun Thakoor* v. *Kantoo Lall* (1) decided by the Privy Council on the 12th May, 1874, it was ruled that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to

(1) 1 I.A., 321=14 B.L.R., 187.
(2) 1 B. 262.
(3) 1 M. 354.
(4) 3 C. 198.
(5) 1 M. 358.
(6) 1 B. 95.
(7) 2 B. 676.

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pay his debts because a son is born to him, that it would be a pious duty on the part of the son to pay his father's debts, unless they had been illegally contracted or for immoral purposes, and that, it being a son's pious duty to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. In the later case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), decided by the Privy Council on the 1st [805] February, 1879, reference is made to the above-mentioned decision as an authority for the following proposition, *viz.*, that when a joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted.

In the case of *Deendyal Lall* v. *Jugdeep Narain Singh* (2) decided by the Privy Council in July 1877, it was ruled that the right and interest of one co-sharer in a joint ancestral estate may be attached and sold in execution of a decree obtained against him personally under the Mitakshara law, and that the purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

The rulings in the two cases of 1874 and 1877 appear to be perfectly consistent, and, in our opinion, the lower appellate Court has erred in holding that they are at variance with each other, and that the decision in the earlier case supports the appellants' contention. In that case the whole of the taluqa in which the plaintiffs were co-sharers had been sold by their fathers. The ruling in that case is therefore inapplicable to the present in which it has been distinctly found that the appellants only acquired by their auction purchase the rights and interests of their judgment-debtor Gulab Singh in the joint ancestral estate in mauza Kishorepur. That finding assimilates the case to that of *Deendyal Lall* v. *Jugdeep Narain Singh* (2).

The reason why it is unnecessary to inquire into the nature of Gulab Singh's debts on account of which his rights and interests were sold is that the rights and interests of the plaintiffs are found not to have been sold to the appellants. The appeal fails and is dismissed with costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justiee Oldfield, and Mr. Justice Straight.

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2 A. 819.

THAKUR OF MASUDA (*Plaintiff*) *v.* THE WIDOWS OF THE THAKUR OF NANDWARA (*Defendants*). [5th April 1880.]

2 A. 819.

1. *Reference to High Court by Chief Commissioner of Ajmere and Mairwara—Ajmere Courts Reg. I of 1877, S. 21.*

A question, arising before the admission of a civil appeal in the Court of the Chief Commissioner of Ajmere and Mairwara, as to whether the appeal lies to him or to the Privy Council, is a question arising "in the trial of an appeal"

(1) 5 C. 143.

(2) 3 C. 198.

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2 A. 819.

within the meaning of S. 21 of Reg. I of 1877, and could be referred by him to the High Court.

Per SPANKIE, J. *contra.*

2. *Reference to Chief Commissioner by Commissioner of Ajmere—Appeal from Commissioner's decree passed in accordance with Chief Commissioner's judgment—Ajmere Courts Reg. I of 1877, S. 36.*

Where the Commissioner of Ajmere refers under S. 36, Reg. I of 1877, to the Chief Commissioner, a question of the nature mentioned in S. 17, and, on receipt of his opinion, passes a decision in accordance with it, the appeal from such decision lies to the Privy Council and not to the Chief Commissioner.

[R., 8 P.R. 1903 (Rev.), 30 A. 290=5 A.L.J. 584 (586), A.W.N. (1908), 109.]

Reference to the Full Bench by a Division Bench (SPANKIE, J. and STRAIGHT, J.) of the High Court before which a reference to the High Court by the Chief Commissioner of Ajmere and Mairwara, under S. 21 of the Ajmere Courts Regulation, 1877, came for disposal.

ORDER OF REFERENCE.

[820] SPANKIE, J.—I feel great difficulty in disposing of this reference. The Chief Commissioner of Ajmere and Mairwara has, under S. 21 of the Ajmere Courts Regulation I of 1877, asked for a ruling from this Court on the case stated as follows :—

On an appeal from the decision of the Assistant Commissioner of Ajmere, the Commissioner feeling doubtful on a point of the nature specified in S. 17 of the above Regulation, referred the point under S. 36 to the Chief Commissioner. The Chief Commissioner dealt with the case as prescribed in S. 37, and returned it to the Commissioner, who disposed of it in accordance with the Chief Commissioner's judgment. Upon this, the plaintiff-appellant, considering that the Commissioner's decision, in accordance with that of the Chief Commissioner's judgment on the point referred, was final, applied to him for a certificate to appeal to Her Majesty in Council. The Commissioner did not consider his judgment to be final within the meaning of S. 595 of the Civil Procedure Code, and therefore declined to entertain the application for a certificate. Appellant then filed an appeal in the Chief Commissioner's Court against the judgment of the Commissioner, passed in **[821]** accordance with the ruling of the Chief Commissioner. The Chief Commissioner is doubtful whether he ought to proceed with the appeal, as it may be that the Commissioner's decision was final for the purposes of S. 595, Civil Procedure Code, and that therefore the application for a certificate should have been entertained by that officer. The question referred is, "Should the Commissioner's decree, given in conformity with the Chief Commissioner's ruling, be considered final for the purposes of an appeal to Her Majesty in Council?"

The wording of S. 21, Regulation I of 1877 (The Ajmere Courts Regulation, 1877), is expressed thus :—"When an appellate Court in the trial of a civil appeal entertains a doubt in respect of a question of the nature specified in S. 17, such Court may refer such question in manner provided by S. 18;" and a reference under the section shall be dealt with in the manner provided by Ss. 19 and 20.

The nature of the question specified in S. 17 is (i) doubt on a question of law; (ii) usage having the force of law; or (iii) the construction of any document; (iv) the admissibility of any evidence affecting the merits of the case; and it will be observed from the wording of S. 21 that the doubt must be entertained by the appellate Court making the reference "in the trial of a civil appeal."

The doubt would seem to be on one of the four points arising within the case itself, and it must arise in or on the trial of the appeal. It is

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clear that the Chief Commissioner has not as yet proceeded to the trial of the appeal. The case has been formerly entered as an appeal, but the doubt has not arisen in trial, on the pleadings or otherwise, as far as I am in a position to judge. The doubt was in the Commissioner's mind rather than in that of the Chief Commissioner, in whose Court the appeal is pending. The Chief Commissioner is himself of opinion that the appeal lies direct to the Privy Council from the Commissioner's judgment passed under S. 37.

I am disposed to think that the Chief Commissioner ought himself to determine, at the hearing. whether or not the Commissioner's decree having been appealed to him, the appeal is or is **[822]** not cognizable in his Court. The question seems to me merely one of procedure, and not strictly one of those questions arising in a case specified in S. 17, and one of which must give rise to the doubt to be referred when the appellate Court is actually trying the case.

I would suggest that we ask the Full Bench of this Court to settle the preliminary doubt entertained. If the Court at large hold that the question was properly referred, there will be no difficulty in determining the question submitted to us.

STRAIGHT, J.—I concur in the suggestion of Mr. Justice Spankie, that the preliminary question should be referred to the Full Bench.

JUDGMENTS OF THE FULL BENCH.

STUART, C.J.—The question referred to us by the Division Bench (SPANKIE, J. and STRAIGHT, J.) is whether, under the circumstances, the reference by the Chief Commissioner to this Court was competently made. As the record shows, the case proceeded on its course at Ajmere until it came before the Chief Commissioner on appeal from the Commissioner. It was stated to us by Mr. Colvin that notice had been given that the appeal would be heard by the Chief Commissioner, under S. 551 of the Code of Procedure, and that he himself appeared on that notice, and he was arguing the case on that footing when the Chief Commissioner stated that he entertained a doubt whether the appeal was validly before him, or whether the judgment of the Commissioner must not be regarded as a final one, and as such the judgment to be appealed to Her Majesty in Council. The Division Bench are on their part doubtful whether the Chief Commissioner could make such a reference to this Court and themselves refer their doubt to this Full Bench.

S. 21 of the Ajmere Regulation I of 1877 provides that "when any appellate Court on the trial of a civil appeal entertains a **[823]** doubt in respect of a question of the nature specified in S. 17, such Court may refer such question in manner provided by S. 18." The question referred to in S. 18 is a question of the nature specified in S. 17, and must therefore be "a question of law, or usage having the force of law, or the construction of any document, or the admissibility of any evidence affecting the merits of the case." Upon these provisions of the Regulation two questions arise, (i) whether the Court of the Chief Commissioner was under the circumstances an appellate Court within the meaning of the section, and (ii) whether the proceeding before the Chief Commissioner was in the nature of a "trial" of a civil appeal. My answer to the first question is that the Chief Commissioner's Court was clearly an appellate Court within the meaning of S. 21, and in the second place that the proceeding before the Chief Commissioner as such appellate Court was a trial within such meaning. For it was, although a proceeding under S. 551 and therefore *ex parte* of such a nature that judgment upon it against

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2 A. 819.

the appellant finally disposed of the case on the merits, the only other possible judgment being notice to the respondent to appear under S. 552 and following sections. Such a proceeding having such an effect must, in my judgment, be deemed a trial to all intents and purposes as intended by S. 21, and these questions being questions of law could legally be referred by the Chief Commissioner to the High Court.

Such is my answer to our colleagues of the Division Bench. But as I have made a careful examination of the record of the case, I trust they will allow me to point out to them certain irregularities of procedure on the part of the judicial authorities of Ajmere. The original suit appears to be of the nature described in S. 34 of the Ajmere Regulation, *viz.*, a suit in which a question of succession was clearly raised, and the Subordinate Judge gave his judgment on the 12th June, 1877, dismissing the claim. From such judgment an appeal was taken to the Commissioner. The date of this appeal does not appear from the record, nor does the memorandum of appeal itself bear any date: the appeal nevertheless proceeded, and while it was pending, and before giving his judgment, the Commissioner **[824]** referred to the Chief Commissioner a question of the nature mentioned in S. 17, which the Chief Commissioner answered, and thereupon the Commissioner disposed of the appeal before him according to the Chief Commissioner's opinion by a judgment dated the 28th February, 1879, reversing that of the Subordinate Judge and dismissing the suit. The appellant in that appeal, considering that the Commissioner's decision so given was final for the purpose of S. 595, Civil Procedure Code, applied under Ss. 598 and 600, Civil Procedure Code, to the Commissioner for a certificate that the case was a fit one for appeal to Her Majesty in Council. But the Commissioner did not consider his judgment final in that sense and refused the application, whereupon the appellant lodged a formal appeal in the Court of the Chief Commissioner against the judgment of the Commissioner. The Chief Commissioner ordered the case to be heard before him under S. 551, but while it was proceeding he was visited by the doubt to which I have referred. It is, however, to be observed that these proceedings took place without any apparent regard to the provisions of the Civil Proceedure Code, the record showing no order to admit it or directing it to be placed on the register of appeals, and it might therefore be doubted whether in strictness there was any appeal at all before the Chief Commissioner. It might at least be very fairly contended that the record did not show any appeal to the Chief Commissioner which could go direct to the Privy Council from his Court.

PEARSON, J.—The point for consideration appears to be whether the doubt in respect of the question of law referred to the High Court by the Chief Commissioner was entertained by him in the trial of the appeal preferred to him by the plaintiff in the suit.

That an appeal had been formally lodged in his Court is shown by the Chief Commissioner's statement. The counsel for the appellant informs us that he received a notice on behalf of his client to appear in the Chief Commissioner's Court on the 18th December last, and that when he appeared on that date the Chief Commissioner intimated that he was acting under the provisions of S. 551, Act X of 1877. The learned counsel further informs us that he then proceeded to address the Court, and was heard for some time and then stopped by the Court, in consequence of its **[825]** resolving to refer to the High Court the question of its competency to proceed with the appeal, or, in the form in which it is referred, the finality of the order appealed.

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2 A. 819.

Under the circumstances I am of opinion that the Chief Commissioner had commenced to hear and try the appeal, when the doubt which he desires the High Court to solve in respect of the question of law referred was entertained by him, and that the question was properly referred. The question whether an appeal can be heard is doubtless one which must be tried before the appeal can be tried on the merits, but the trial of that question is included in the trial of the appeal.

SPANKIE, J.—I am willing to acquiesce in the opinions of my honorable colleagues. At the same time I cannot help regarding the reference as made before the case came on for trial. The appeal appears to have never been formally admitted ; there is no order upon the memorandum of appeal either admitting it or directing that it should be registered. There is no order upon it summoning the respondent or directing that the appellant should appear on a certain date under S. 551 of the Civil Procedure Code. I cannot realise that the Chief Commissioner was acting under S. 551 of the Civil Procedure Code, which applies to procedure in the Ajmere Courts, having been made applicable thereto by the Ajmere Code. The object of S. 551 is to hear appellant *without* summoning respondent, and if the Court think that there is no case, it *confirms* the decision of the Court below on the merits. I can understand the Chief Commissioner's entertaining a doubt whether he should not reject an appeal as being beyond his jurisdiction. But if he rejected it, he would not be confirming the decision of the Court below, for there would have been no trial in his Court. What has been done now is that the difficulty appears to have arisen before the case came to trial, and therefore the position is not the same as that in S. 17 of the Ajmere Code.

OLDFIELD, J.—The Court seems to have been proceeding with the trial when it made this reference on the question of its jurisdiction, and I see no reason for supposing that the reference was not properly made.

[826] STRAIGHT, J.—I think that this reference was properly made by the Chief Commissioner of Ajmere, and that it should be disposed of by this Court.

The case having been again laid before the Division Bench (SPANKIE, J., and STRAIGHT, J.) the following opinion was given by the Division Bench :

STRAIGHT, J.—The Chief Commissioner appears to be right in his view, that the appeal of the Thakur of Masuda lies to Her Majesty in Council from the Commissioner's Court in this particular case.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

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APPELLATE CIVIL.

2 A. 826.

LACHMIN NARAIN (*Defendant*) *v.* KOTESHAR NATH (*Plaintiff*).

[5th April 1880.]

2 A. 826.

Mortgage—Condition against alienation—Purchase of equity of redemption—Extinguishment of security—Lis pendens.

Where land mortgaged first to one person with a condition against alienation is again mortgaged to another person, and afterwards sold to the first mortgagee pending a suit against the mortgagor on the second mortgage, the second mortgagee's right, under his mortgage, cannot be affected by the sale to the first

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mortgagee *pendente lite*, but neither can such purchaser deprive the first mortgagee of the rights he may otherwise have, by virtue of his prior mortgage and the condition against alienation. The purchase of the equity of redemption by the mortgagee does not necessarily extinguish the original security, when it is manifestly intended to keep it alive.

[Expl., 4 A. 518 (523).]

JUDGMENT.

[827] OLDFIELD, J.—The plaintiff held a mortgage of the property in suit under a deed dated 9th July, 1875, whereby the obligor stipulated that he would not make any mortgage of the property till the plaintiff's debt was satisfied, and on the 10th October, 1878, the property was conveyed to plaintiff under a deed of sale in consideration of the debt secured by the mortgage. The defendant obtained a mortgage of the same property under a deed dated the 5th September, 1875 from the obligor, notwithstanding the stipulation made to plaintiff, and having brought a suit on his bond he obtained a decree on 9th November, 1878, this suit being still pending when the sale-deed was executed in favour of plaintiff. The object of the suit now brought by the plaintiff is to have the property declared exempt from liability to be sold in execution of the defendant's decree. The lower Courts have decreed the claim and the decrees are not open to objections.

There is no doubt that the defendant's rights cannot be affected by the purchase made by plaintiff, since it was made while the suit brought by the defendant was pending, but neither will that purchase deprive the plaintiff of any right he may otherwise have against the defendant based on his prior mortgage and the condition in his bond against subsequent mortgages by his obligor. The purchase of the equity of redemption does not necessarily extinguish the original security when, as in this case, it was manifestly the intention of the plaintiff to keep it alive,—Story's Equity Jurisprudence, 11th Ed., vol. ii, S. 1035 c.—and there is nothing to prevent plaintiff from contesting the validity of the mortgage made to defendant so far as it affects him, on the ground that it is an infringement of the stipulation in the contract between him and his obligor. The appeal fails and is dismissed with costs.

SPANKIE, J.—I concur with my honorable colleague in his view of the case.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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APRIL 6.

APPEL-LATE CIVIL.

2 A. 828.

RAM NARAIN SINGH (*Defendant*) *v.* MAHTAB BIBI (*Plaintiff*).

[6th April 1880.]

Sale in execution of decree—Warranty of title.

In execution-sales of rights and interests in immoveable property, the extent and nature of the interest of the judgment-debtor, as described in the revenue registers, are notified at the time of sale, but the descriptions so given are neither intended by the decree-holder or the officer conducting the sale, nor taken by the auction-purchasers, to convey any warranty of the correctness of the description of such interest or any warranty of the extent and nature of such interest.

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Where, therefore, in such a case, the sons of the judgment-debtor obtained a decree against the auction-purchaser for the recovery of their interests in the property sold, he could not, in the absence of fraud or misrepresentation on the part of the decree-holder, or anything to show that an express or implied warranty of title was given by him, maintain a suit against the decree-holder for the refund of the purchase-money proportionate to the interests in the property recovered from him. (H.C.R., N.W.P., 1871, p. 67, *D.*).

[Appr., 23 A. 60 (62) ; **R.**, 23 A. 355 (357).]

JUDGMENT.

[828] OLDFIELD, J.—The two defendants in this case have instituted separate appeals which may be disposed of by one judgment. The defendants held decrees of the Revenue Court against Khair-un-nisa Bibi, and in course of execution of these decrees a share in mauza Dohowa, described as 11 annas, 5 kants, 3 jaus, was attached, and the rights of the judgment-debtor were sold and bought by the plaintiff in this suit. Subsequently the sons of the judgment-debtor brought a suit for the declaration of their right and possession in a portion of the said share and obtained a decree, and the **[829]** plaintiff, auction-purchaser, has brought this suit against the two appellants to obtain a refund of the sale-price proportionate to the interest which she had to give up and for the costs incurred by her in defending the suit. Amongst the pleas urged in answer to the suit, those material to the disposal of the appeals before us were that the plaintiff purchased the rights and interests of the judgment-debtor without any guarantee on the part of the decree-holders of their extent, and being a sister-in-law of the judgment-debtor and mother-in-law of one of those who succeeded in the suit for the recovery of a share, she bought with a full knowledge of the extent of the judgment-debtor's interest. The Subordinate Judge has held that there was a guarantee that the entire 11 annas 5 kants 3 jaus belonged to the judgment-debtor, and he has decreed the greater portion of the claim.

2 A. 828.

We are of opinion that the grounds of appeal, so far as they take up the objections which we have above noticed, are valid. In judicial sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor in the property sold, on the part of the decree-holder or officer conducting the sale. In sales of rights and interests in immoveable property, the extent and nature of the interest of the judgment-debtor as described in the revenue registers, are notified at the time of sale under the rules in force, but the description so given is not intended by the decree-holder or the officer conducting the sale or taken by the purchasers at those sales to convey any warranty of the correctness of the description of the judgment-debtor's interest given in the revenue registers, or any warranty of the extent and nature of those interests. The subject of sale is nothing more than the right, title, and interest of the judgment-debtor described in the revenue register to be of a particular extent and character. Such will be the rule if the usual and ordinary practice be observed in the publication and conduct of these sales ; and in the case before us nothing of an exceptional nature has been brought to our notice to show that there was any express or implied guarantee on the part of the decree-holders, nor are the facts such as will support any imputation of fraud or misrepresentation against the decree-holders. The application for sale is in the usual form for the sale of the rights and **[830]** interests of the judgment-debtor, and the proceeding of the Collector, dated 22nd February, 1875, at the close of the sale, shows very distinctly that the rights and interests of the judgment-debtor, whatever they

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might be in the 11 annas 5 kants 3 jaus entered in the statement were sold, and refute any supposition of express or implied warranty.

The plaintiff's case seems to rest on proceedings not so much with reference to the sale of the share in Dohowa, the subject of this suit, as to proceedings connected with the sale of the same judgment-debtor's interests in another mauza, *i.e.*, mauza Pakri. It appears that the sons of the judgment-debtor also claimed an interest in the share in mauza Pakri entered as that of the judgment-debtor and brought a suit, and that the defendants then denied that they had any interest, and asserted the share belonged to the judgment-debtor, and their suit was dismissed by the Court of first instance, though ultimately decreed in appeal, and it was before the decision of the appeal that the sale with which we are concerned took place. But those proceedings show nothing more than that the defendants, the decree-holders, *bona fide* contested the claim set up, which they were quite at liberty to do, and not that they induced the auction-purchaser in the case before us by fraud or otherwise to believe that the judgment-debtor had an interest which they knew she had not, or guaranteed that she had any particular interest. Moreover, looking to the relationship between the plaintiff and the judgment-debtor and the circumstances under which the sale took place, there is every reason to believe that the plaintiff was aware at the time of her purchase of the true character and extent of the judgment-debtor's interests which were put up for sale. The case of *Neelkunth Sahee* v. *Asmun Mathoo* (1) was brought to our notice by the counsel for respondent, but that case is to be distinguished from the one before us. There the decree under which a judgment-debtor's rights and interests had been sold and the sale so far affected him were set aside and the property recovered by the judgment-debtor. We decree the appeal and reverse the decree of the lower Court and dismiss the suit with all costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Spankie and Mr. Justice Straight.

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2 A. 831.

WILAYAT HUSAIN (*Plaintiff*) *v.* ALLAH RAKHI (*Defendant*).

[6th April 1880.]

Muhammadan law—Restitution of conjugal rights—Dower.

Under Muhammadan law, a husband who has not paid dower which is "prompt," cannot, even after continued co-habitation with consent for five years, maintain a suit against his wife for restitution of conjugal rights.

[Overruled, 8 A. 149 (161) (F.B.)=6 A.W.N. 53; F., 2 A.W.N. 96, 3 A.L.J. 432= A.W.N. (1906), 136.]

In a suit by a Muhammadan (Shia) against his wife for restitution of conjugal rights, the parties having been married in January, 1873, and cohabited until September, 1878 (when the defendant separated from the plaintiff) on the defendant contending *inter alia*, that the plaintiff had settled a "prompt" or "exigible" dower on her of Rs. 5,000; that he had not paid the dower-debt; and that, until he paid the same, he was not entitled, according to Muhammadan law, to restitution of conjugal rights,

(1) H. C. R., N. W. P., 1871, p. 67.

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the first Court decided that the defendant's dower was "prompt"; that it amounted to Rs. 1,000; and that the plaintiff had paid the dower-debt in June, 1877, by conveying certain immoveable property to the defendant of equal value; and in the event gave the plaintiff a decree. The lower appellate Court dismissed the suit, deciding that the dower-debt was Rs. 5,000, and that the plaintiff had paid no portion of it, and, holding that, according to Muhammadan law, the plaintiff was not entitled to restitution of conjugal rights until he had paid it. The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[831] STRAIGHT, J.—The only ground of appeal seriously urged before us was, that the lower appellate Court had erred in holding that **[832]** the plaintiff's suit failed by reason of his inability to prove payment of "exigible" dower. It was argued on his behalf, that a wife cannot refuse herself to her husband after such consummation or complete retirement as was proved in the present case by the cohabitation of the parties from 1873 to 1878. This contention was supported by a quotation from Baillie's Digest, p. 125; but upon careful consideration of it and a judgment of this Court, which appears directly in point, *Abdool Shukkoar* v. *Raheem-oon-nissa* (1), we are of opinion that the views propounded by Aboo Haneefa should be followed, and that a woman entitled to dower, that is "*maujjil*" or "prompt" may, even after consummation or valid retirement, deny her husband access to her person or her society, if it remains unpaid. Dower, it must be remembered, is the woman's right, and she may decline him the use of her person in order to enforce the man's pecuniary obligation to her. Of course where the dower is "*maujjil*" or "deferred," other considerations arise, which it is unnecessary to discuss. It may be added, that passages will be found favouring the opinion we have expressed in Macnaughten's Muhammadan Law, Ed. of 1870, p. 281; Baillie's Imameea, p. 73 (the plaintiff being a *Shia*); and Grady's Manual of Muhammadan Law of Inheritance and Contract, p. 246.

The lower appellate Court has found that the amount of dower in the present case was Rs. 5,000, that it was prompt, and that the plaintiff has not been paid it. The respondent's plea was therefore established and the plaintiff's claim has been properly disallowed. The appeal is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

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2 A. 832.

RAM LAL (*Plaintiff*) *v.* HARRISON (*Defendant*). [6th April 1880.]

1. *Amendment of plaint—Limitation—C.P.C. (1877), S. 53.*

The date of amendment of a plaint will not affect the question of limitation of a suit; limitation is determined with reference to the date of institution of a suit, and a suit is instituted when a plaint is presented to the proper officer, and its return for amendment and subsequent presentation and acceptance by the Court, will not constitute a fresh institution of the suit.

[F., 9 B. 373 (402), 7 C.W.N. 817 (821); R., 4 A. 37 (39)=1 A.W.N. 129, 12 A. 129 (145) (F.B.), 20 C. 41 (44).]

(1) H. C. R., N. W. P., 1874, p. 94.

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2. *Indistinct or vague document—Oral evidence—Indian Evidence Act, Ss. 92, 95.*

Where a mortgage-bond does not indicate by name the property mortgaged, evidence may be adduced to prove what property was mortgaged. (Evidence Act, Ss. 92 and 95.)

APPELLATE CIVIL.

OLDFIELD, J. and STRAIGHT, J. remanded the case to the lower appellate Court for the trial of the issues indicated in the order of remand.

ORDER OF REMAND.

2 A. 832.

[834] OLDFIELD, J.—The plaintiffs sue to recover money due on a bond by sale of a one-biswa five-biswansi share in mauza Sakhauli hypothecated in the bond. They made the obligors and T. B. Harrison defendants, the latter being the representative of a subsequent mortgagee, and who has objected to the sale of the mortgaged property. The first Court decreed the claim. The lower appellate Court has dismissed that part which seeks to make the property liable. The Judge holds that the period of limitation will run in this suit from the date of the bond, 23rd November, 1866, and though the suit was instituted on the 21st November, 1878, yet since the property mortgaged was not indicated by name in the original plaint, and not until 8th January, 1879, when an amended plaint was filed to the effect that the property hypothecated and claimed is in mauza Sakhauli, therefore the suit, so far as it affects the property, must be held to have been instituted on the 8th January, or after the expiry of the term of limitation; and the Court further holds that the deed does not distinctly show that the share of one biswa five biswansis hypothecated in the deed is a share to that amount in mauza Sakhauli; and on the above grounds the Judge dismissed the suit.

We are of opinion that the decision cannot be maintained. The date of amendment of a plaint will not affect the question of limitation for the institution of a suit; the limitation is determined with reference to the date of institution of a suit, and by S. 4 of the Limitation Act a suit is instituted in ordinary cases when the plaint is presented to the proper officer, and its return for amendment and subsequent presentation and acceptance by the Court will not **[835]** constitute a fresh institution of the suit.—(See cases referred to in note to S. 53, Broughton's Civil Procedure Code, Act X of 1877). It is true that when after the institution of the suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party, but this rule is inapplicable to the case before us, where the defendant Harrison had been made a party at the first institution of the suit. The principal ground, therefore, on which the Judge has dismissed the claim to bring the property to sale is invalid, and his remarks on the indistinctness of the deed as indicating that the share in mauza Sakhauli was mortgaged do not adequately dispose of the claim. It is for the Judge to determine whether as a matter of fact the parties to the deed did mortgage the share in Sakhauli by the bond, and evidence on the point may be adduced.—See *Proviso* 6, S. 92, and *Illustration* to S. 95, Evidence Act. The Judge must also decide the question (raised by one of the pleas taken by the respondent) whether, looking to the conduct of the plaintiffs at the time the second mortgage was made, they are debarred now from enforcing their prior lien.

We remand the case for trial of the issues indicated. On submission of the finding ten days will be allowed for filing objections.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Straight.

EMPRESS OF INDIA v. DEOKI NANDAN LAL.

[12th April 1880.]

2 A. 806.

Stamp Act I of 1879, S. 34—Offence against Stamp Act—Jurisdiction.

As the Stamp Act recognises the Collector as primarily responsible for the institution of prosecutions for offences against it, he should not himself try, in his capacity as a Magistrate, a person charged with an offence under that Act.

[D., L.B.R. (1872—1892), 400 (401).]

JUDGMENT.

[806] STRAIGHT, J.—The applicant in this case was convicted by the Officiating Magistrate and Collector of Gorakhpur of an offence against S. 34 of Act XVIII of 1869, for not having truly set forth in a sale-deed executed by him to one Amirta the full amount of consideration-money thereby secured, and was ordered to pay a fine of Rs. 135. He appealed to the Sessions Judge of Gorakhpur, but under the order of this Court his appeal was transferred for hearing to the Judge of Benares, who on the 3rd February, **[807]**1880, dismissed it. He now applies to this Court under S. 297 of the Criminal Procedure Code upon the following grounds:—(i) That a conviction could not properly be had in the absence of the original principal document; (ii) that the Officiating Magistrate and Collector, being by S. 43 of Act XVIII, the actual prosecutor of the case, should not have sat to hear and dispose of it in his judicial capacity.

Dealing with this latter objection first, I am of opinion it is a well-founded one and should prevail. Both the Stamp Acts of 1869 and 1879 recognise the Collector as primarily responsible for the institution of prosecution for offences against those Acts, except where the Local Government generally, or he himself specially, has authorised some other officer to discharge such duty. The letter of the Officiating Judge of Gorakhpur of the 1st September, 1879, and the *rubkar* directing an inquiry under the Stamp Act of 1869 against the present applicant and Amirta were amply sufficient to justify proceedings. But the Officiating Magistrate and Collector should have detailed the case for hearing and disposal to some other qualified Magistrate, more especially when it was almost impossible for him to prevent his mind being influenced by the very forcible language in which the Officiating Judge had couched his letter of 1st September, 1879. The conviction must be quashed and a new trial had before such Magistrate, as the now Officiating Judge of Gorakhpur may select. * * * * * * * * * * *

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CIVIL.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Spankie.

JAGAT NARAIN AND ANOTHER (*Defendants*) *v.* QUTUB HUSAIN (*Plaintiff*). [12th April 1880.]

2 A. 807.

2 A. 807. *Discharge of mortgage-amount—Claim to contribution.*

Where property subject to a mortgage is sold to two persons in shares, and only one of them is impleaded with the mortgagor in a suit brought by the mortgagee on the mortgage, and has to pay off the whole amount of the mortgage-decree in order to save his share from being sold, he can claim from the other sharer a contribution proportionate to his share; and his right is not affected by the circumstance that the mortgagee, by having omitted to implead the other sharer in his suit, may not be able to proceed against his share on the basis of the same bond.

[F., 20 B. 615 (616), 29 M. 217 (225); **R.**, 24 M. 96 (108); **D.**, 6 C.W.N. 583 (584).**]**

On the 23rd March, 1864, one Dildar Husain, the owner of an estate, mortgaged it to one Ilahi Bakhsh as security for the payment of certain monies. Subsequently portions of such estate were purchased by Qutub Husain, the plaintiff in the present suit, and the defendants, at an execution sale. Subsequently again Ilahi Bakhsh sued Dildar Husain and Qutub Husain for the mortgage-money, claiming to recover it by the sale of the portion of such estate purchased by the plaintiff. Having obtained a decree, Ilahi Bakhsh caused a portion of such portion to be sold in execution of the decree. In order to save the remainder of such portion from sale in execution of the decree, the plaintiff paid the balance of the judgment-debt. In the present suit he claimed contribution from the defendants. Both the lower Courts gave the plaintiff a decree. The defendants preferred an appeal to the High Court.

JUDGMENT.

[809] PEARSON, J.—The argument set out in the ground of appeal is more ingenious and plausible in appearance than agreeable in substance to reason and equity. The contention is that the properties purchased by the defendants-appellants, which were equally with that purchased by the plaintiff subject to the lien created by the bond executed on the 23rd March, 1864, by Dildar Hussain in favour of Ilahi Bakhsh, were released from liability because they were not included in the suit brought by the latter for the recovery of the bond-debt by enforcement of the lien. But the contention seems to be irreconcilable with the doctrine of contribution expounded in Story's Equity Jurisprudence. Assumimg that Ilahi Bakhsh by the frame of his suit abovementioned had put it out of his power to proceed at law by another suit on the basis of the same bond against the properties in the possession of the defendants in the present suit as purchasers, we are not prepared to admit, as a necessary consequence of such assumption, that the plaintiff's equitable right to recover a fair contribution from the defendants on the ground of his having paid the whole debt due to Ilahi Bakhsh is thereby invalidated. The appeal is dismissed with costs.

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2 A. 809.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

GANGA SAHAI AND ANOTHER (*Defendants*) *v.* HIRA SINGH (*Plaintiff*).

[12th April 1880.]

2 A. 809.

1. *Estoppel—Indian Evidence Act, S. 115.*

S. 115 of the Evidence Act embodies the rule of English law on the subject of estoppel. "The doctrine of estoppel is based on a fraudulent purpose and fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. There must be deception and change of conduct in consequence."

[Overruled, 20 C. 296 (313) (P.C.).]

2. *Award—Hindu law—Disqualified heir—Inheritance.*

A person who is not a party to an award, is not bound by it, and cannot claim any benefit under it. An award which is manifestly against the law cannot deprive a person of his legal rights nor confer on him rights which the law does not give him. An award which decides a right of inheritance in favour of a person disqualified under Hindu law, as against another person assenting to such award, cannot be construed into a gift by the latter to the former, for there could be no gift of property which is decided *not* to belong to the donor. A person, not a party to an award, cannot be said to be represented in it, by his brother who has been adopted into another family.

ORDER OF REFERENCE.

[813] SPANKIE, J.—In this case the claim was not to establish a right to inherit a share of the paternal property, but to obtain separate possession by partition of certain houses situate in mauza Asaura, in proportion to the share of the landed property already in plaintiff's possession since the death of his father in 1871. There does not appear to be any dispute regarding the family tree. But a quarrel arose between the plaintiff's brother Debi Singh and the defendants, in 1874, as to the succession to the properties left by Hulas Rai and Har Dial. The plaintiff is the elder brother of Debi Singh, but he is deaf and dumb from his birth, and thereby under the Hindu law admittedly disqualified from inheritance. Debi Singh is said to have been adopted by Rup Kuar, the wife of Hulas Rai, probably by the permission of her husband, as the adoption seems to have been recognized. It would appear that in 1874 defendants were objecting to Debi Singh putting in any claim to his own father's property, because of his adoption into Hulas Rai's family, and that the real subject of dispute between themselves and Debi Singh was Har Dial's property. Har Dial was father of the plaintiff. Debi Singh and defendants submitted their quarrel to the arbitration of Zalim Singh, whose award is dated 4th January, 1875. The award distinctly states that the question of succession to the property left by Rup Kuar, wife of Hulas Rai, is beside the real quarrel, which was, "who ought to be now and for the future the heir to the property left by Har Dial, deceased." The arbitrator found that "when Har Dial died in 1871, on account of Debi Singh being the adopted son of Rup Kuar, the name of Hira Singh (present plaintiff) was alone entered in the revenue papers as heir of his father, and he, **[814]** although he is dumb, alone is in proprietary possession of the estate and receives the income of the estate. The parties admit that Hira Singh is the sole heir and in possession of the property left by Har Dial

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and I am of opinion, therefore, that Hira Singh alone should, as heretofore, hold proprietary possession of the property, after him his male heirs will be the proprietors. If, may God forbid it, there be no male heirs, that inheritance will also devolve on Debi Singh and his descendants." The award then declares "that the first party (the present defendants), or their descendants, shall not be competent now, or in future, on any plea whatever, to claim any right to moveable or immoveable property left by Har Dial." The award was signed by Amin Singh for himself and party. They subsequently executed a compromise in the matter of their quarrel in which they declare as follows:—" The award was read to us, word by word, and we have fully understood it, and being of sound mind and in possession of our senses, we have agreed to its terms, and signified our assent to them, with free will and consent and without coercion, and have attached our signatures as showing our consent to and our acceptance of it. We have no objection to the finding of the arbitrator as to the person declared entitled to inherit the property now and for the future. We have therefore &c."

It is true that Hira Singh was not made a party to the reference to arbitration; that he was not so is probably due to the fact that he was deaf and dumb, and perhaps to the circumstance that Debi Singh was really his manager. It may be said that this is a pure assumption. But I find on record that nearly five years before the award, Hira Singh, plaintiff, was made lambardar in this very village of Asaura "under the management of Debi Singh." In the same way, in cases of infancy, or the nomination of a woman to a lambardari, some person is added as "sarbarakar" or "manager." At this time Hira Singh was already, according to the award, in possession of Har Dial's share, and though disqualified under the Hindu law, as not being a son competent to perform the obsequies of his father, he does not appear to have been regarded as incompetent as a man of business with his brother as manager for him. I cannot deny that the plaintiff, if suing for a share of his inheritance from his father, **[815]** is disqualified by the Hindu law. But he is not suing now for any such share. He is, rightly or wrongly, with reference to the Hindu law, in possession of the paternal estate, and all that he seeks in regard to the houses is a separation of his interest from the interests of the defendants. In supporting his claim, I think that he is at liberty to use the award and compromise of defendants in the former quarrel as evidence in his own favour and against defendants; for the award and the compromise alike expressly determine and acknowledge his right to retain possession over his father's property. The defendants appear to have confirmed that possession. In a suit for possession in the Calcutta High Court, where plaintiff put in a copy of a compromise to which defendant was not a party, it was held that, although no question of right or title could be decided adversely to the defendant on the basis of that agreement, yet it would be evidence that by an order of Court passed on the compromise the plaintiff was put in possession (1). I do not say that the award, as such, is conclusive against the defendants in the present suit, but it may be that the award and compromise might be proved in this case, and the defendants might be examined upon both documents. The Court would have to determine what weight was to be attached to them in the present suit in proof of the plaintiff's claim. The award finds the fact that Hira Singh was in sole possession in 1875 of his father's property, and that he had been so since

(1) *Sreemutty Dossee* v. *Pelaram Dossee*, 15 W.R. 261.

the death of his father in 1871. It is a confirmation of that possession rather than a declaration of his title under Hindu law. It states, as a fact, that, although he is dumb, he alone is in proprietary possession of the estate, that is, I suppose, ostensible proprietary possession, and receives the income of the whole estate. The parties admit that he is recorded as heir and in possession of the property, and the award of the arbitrator is thus made: "I am of opinion, therefore, that Hira Singh alone should, as heretofore, hold proprietary possession of the property left by Har Dial."

The compromise is practically a cession of their own claim by the defendants in favour of Hira Singh. The award and **[816]** the compromise likewise appear to have been acted upon, as Hira Singh remained as heretofore in possession of the property, and it may be that the cession by the defendants in favour of the plaintiff may confer, *as far as they are concerned*, a new title upon him, and that he may take henceforth by cession what he could not have inherited under the Hindu law. But the question is one of considerable difficulty, and I am desirous of obtaining the opinions of my honorable colleagues on the point. I would suggest that we should refer the case to a Full Bench.

The difficulty I feel is, whether or not, under the circumstances of this case, the plaintiff's claim must necessarily fail because the Hindu law disqualifies him from inheritance, or whether the award and compromise may not, if properly proved, be used as evidence against the defendants in favour of the plaintiff's case, and whether, if proved, they may not also be evidence of a family arrangement, or cession of claim by the defendants, which might be enforced as against the defendants, although the plaintiff, on the death of his father, had no title under the Hindu law to succeed to his father's property.

PEARSON, J.—I was prepared to deliver judgment in this case, but in deference to the wish expressed by my honorable colleague I assent to his proposal to refer the case to a Full Bench.

JUDGMENTS OF THE FULL BENCH.

PEARSON, J.—The plaintiff in this suit claimed to obtain separate possession by partition of a share which he alleged to belong to him by right in certain houses being ancestral property. The exact nature of his right he did not define. But it is not disputed and is not open to dispute that he is not entitled to the share or any share in the property in question by right of inheritance, inasmuch as he was admittedly born deaf and dumb and incapable of inheriting property under the Hindu law. The ground on which the lower appellate Court has allowed his claim is that his right as heir to his father's estate was declared by an award dated 4th January, 1875, to which the defendants in the present suit assented. The plaintiff **[817]** was not himself a party to the agreement to refer to arbitration the question who was Har Dial's heir, and the Judge is wrong in supposing that Debi Singh, the plaintiff's natural brother, agreed to the arbitration as his guardian and represented him before the arbitrator. The award could only bind the parties to the arbitration, and, the plaintiff, not being a party thereto, is not bound by it, and, not being bound by it, cannot claim to take any advantage from it. It could not confer on him, who was not a party to the arbitration, a right which he did not possess by law, nor can it constitute evidence of a right which the law disallows. The award does not profess to be based on the Hindu law, but rather seems to have been wilfully made in contravention thereof. Nor could the defendants' assent to the award convey to him a right of inheritance which did not devolve on him by law. The lower appellate Court is mistaken,

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I conceive, in holding that either they, or the arbitrator, could by anything done by them in the arbitration proceedings bestow on the plaintiff, who was not a party to them, a right which the law has refused to him, the law notwithstanding, and could cure the legal defect in his title. It has been urged and may be granted that a person who was not originally a party to arbitration proceedings may subsequently become a party to them; but it does not appear that the plaintiff ever became a party to the proceedings which terminated in the award dated 4th January, 1875. Had the award recognised the defendants' right to the inheritance, they might doubtless have made a gift of the property or any portion of it to him; but it seems impossible to contend that they could make a gift of what was adjudged not to belong to them.

The circumstance that he may have been allowed to continue as before in joint possession of the property is explained by the consideration that he is, under the Hindu law, though excluded from inheritance, entitled to maintenance. It has been suggested that the defendants, by their assent to the award, are estopped from questioning the plaintiff's right of inheritance in this suit by the provisions of S. 115 of the Indian Evidence Act; but that section, which is understood to embody the rule of the English law, seems to me to be inapplicable. "The doctrine of estoppel," says Mr. Justice Story, "is based on a fraudulent **[818]** purpose and a fraudulent result. If, therefore, the element of fraud be wanting, there is no estoppel. There must be deception and change of conduct in consequence." Now it can hardly be contended that the defendants in expressing their acquiescence in the award intended to deceive the plaintiff or that he was deceived thereby, and led to take any action which has put him in a different position from that which he occupied before in respect of the property in suit. The plaintiff then having no right in him either by the law of inheritance or under the award, or by reason of any conveyance made in his favour by the defendants, cannot possibly succeed, if they be not estopped from calling his right in question.

I conclude, therefore, that the Court of first instance rightly decided the first three of the issues laid down by it for trial and rightly dismissed the suit.

I must add that the Zila Judge failed to apprehend rightly this Court's order of the 17th January last, which directed him to dispose of the case according to law. The law by which his procedure should have been regulated is contained in Ss. 565, 566, and 567, Act X of 1877.

I would decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

STUART, C. J.—The judgment of Mr. Justice Pearson in this case is so entirely satisfactory to my mind that I cannot hesitate to express my concurrence in it. A distinction at the hearing appeared to be taken between incapacity to take by inheritance, and the capacity to enjoy by permitted actual possession of property, and the conduct of some members of Hira Singh's family would appear to recognise a legal status in him for that purpose. But that does not get rid of the disability which cannot from its nature be removed. Hira Singh is entitled to maintenance, but he has not other rights or status whatever. The appeal must, therefore, be disposed of according to the order proposed by Mr. Justice Pearson.

OLDFIELD, J.—I concur.

STRAIGHT, J.—I entirely concur in the judgment of Mr. Justice Pearson.

[819] SPANKIE, J.—I retain the opinion I have already expressed, and hold that the documents referred to may be used in evidence by the

plaintiff. I do not think that the circumstance that he is deaf and dumb disqualifies him necessarily from bringing the suit. This is not a claim to establish his right to succeed as heir of his father. Were it so, the suit would fail, as he could not succeed as heir under the Hindu law. But if he can show as against the defendants that they have recognised his possession, and confirmed it by ceding their own claims in his favour, there is nothing to prevent his doing so: a gift in favour of a deaf and dumb man would seem to be valid.

1880 APRIL 12. — FULL BENCH: — 2 A. 809.

CRIMINAL JURISDICTION.

PRESENT:

Mr. Justice Straight.

1880 APRIL 13. — CRIMINAL JURISDICTION. — 2 A. 835.

EMPRESS OF INDIA *v.* NAWAB AND ANOTHER. [13th April 1880.]

2 A. 835.

Crim. Pro. Code, 1872, S. 506—Security for good behaviour.

S. 506 solely relates to the calling upon persons of habitually dishonest lives and in that sense "desperate and dangerous," to find security for good behaviour as a protection to the public against a repetition of crimes by them, in which the safety of property is menaced, and not the security of person alone is jeopardised. A person merely guilty of acts of violence, could not be ordered to furnish security for good behaviour.

[R., 6 A. 132 (137).]

JUDGMENT.

[837] STRAIGHT, J.—In this case the applicants were charged under S. 323 of the Penal Code with voluntarily causing hurt. The Magistrate, upon a careful consideration of all the evidence, acquitted them, but being of opinion that they were persons of violent and dangerous character, under S. 506 of the Criminal Procedure Code, directed them each to furnish two sureties in the sum of Rs. 500 for their good behaviour for a period of three years, or in default to undergo rigorous imprisonment for a like term. I am of opinion that this order cannot be sustained. The Magistrate has misapprehended the terms of S. 506, which do not apply to a case like the present, where the original charge was one of injury to the person. That section solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised. It is not pretended that either of the applicants has been an habitual "robber, housebreaker or thief, or receiver of stolen property;" on the contrary, all the convictions standing against them are for acts of violence. Entertaining this view it does not appear **[838]** to me necessary to discuss the sufficiency or insufficiency of any evidence before the Magistrate, though I would remark in passing, that the mere fact of a previous conviction or of previous convictions of offences involving dishonesty, is not sufficient to justify the putting in force the powers of S. 506, unless there is some additional evidence to show, that the person complained against has done some act or resumed avocations, that indicate upon his part an intention to return to his former course of life and to pursue a career of preying on the community. The greatest thief is entitled to a *locus penitentiæ*, when

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2 A. 835.

he has served out his punishment; it is only when he outrages that grace which is extended to him and thereby shows he is unreformed, that the machinery of the Act should be brought into operation, in order to obtain a substantial guarantee for society that he will not commit further depredations upon it. The order of the Magistrate of the 7th February last must be quashed. But upon a consideration of all the circumstances of the case, I think it right to direct that this record be forwarded to the Magistrate of the District for his consideration, in order that he may, should it appear to him proper to do so, himself take steps under S. 491 of the Criminal Procedure Code to call upon the applicants to find sureties of the peace in such amount as to him may appear adequate.

APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

1880
APRIL 14.
APPELLATE CIVIL.
2 A. 838.

GUMANI (*Plaintiff*) *v.* RAM PADARATH LAL AND OTHERS (*Defendants*).

[14th April 1880.]

C.P.C., 1877, S. 43—Bond for money with collateral security—Omission of claim.

An obligation and a collateral security for its performance constitute one cause of action, and a plaintiff cannot, in respect of it, sue first to enforce the obligation, and afterwards to enforce the security.

[R., L.B.R. (1893—1900), 14 (16).]

JUDGMENT.

[839] STRAIGHT, J.—S. 43 of Act X of 1877, as amended by Act XII of 1879, is more apposite to the present case than S. 13. An obligation and a collateral security for its performance constitute the cause of action, and a plaintiff cannot be permitted to sue first in respect of the money-debt due on a bond hypothecating property, and afterwards, in respect of the same cause of action, for enforcement of lien. The appeal is dismissed with costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

1880
APRIL 15.
APPELLATE CIVIL.
2 A. 839.

ASHGAR ALI SHAH (*Plaintiff*) *v.* JHANDA MAL AND ANOTHER (*Defendants*).

[15th April 1880.]

Act XIX of 1878 (N.W.P. Land Revenue Act), Ss. 113, 114—Determination of title by Collector—Res judicata.

Where an objection to a partition raises questions of title or proprietary right, it is only when proceedings are recorded by the Collector or Assistant Collector under S. 113 of the Land Revenue Act, declaring the rights of the parties after going into the merits, that the order passed in such proceedings is an order of the nature of a decision of a Court of Civil Judicature under S. 114 of the Act,

which may be open to appeal, but cannot be contested in a regular suit. Therefore, when the questions of title raised on an objection are not gone into, the order passed under S. 113 cannot have the force of the decision of a Civil Court, and such questions can again be raised in a civil suit. (H.C.R., N.W.P., 1869, p. 35—H.C.R., N.W.P., 1868, p. 161 ; 2 A. 294—*D.*)

[R., 6 O.C. 372 (376), 7 O.C. 161 (162).]

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APRIL 15.

APPELLATE CIVIL.

2 A. 839.

JUDGMENT.

[841] OLDFIELD, J.—This is a suit for possession by establishment of right to a certain share of lands. In the course of proceedings for a partition in the Revenue Court under Act XIX of 1873 instituted on the application of defendant, the plaintiff objected to the extent of the share claimed by defendant and asserted his own right to the share he now claims. His objection was disallowed with reference to a decision in a suit for profits, which had been brought against the plaintiff as lambardar, which the Assistant Collector held to have finally determined the extent of the plaintiff's interest. and the Assistant Collector (1) made an order for the partition to proceed. Both Courts have held that the order of the Assistant Collector in those proceedings is an order of the nature of a decision of a Court of Civil Judicature, under S. 114, Act XIX of 1873, which may be open to appeal, but cannot be contested in a regular suit, and this is the question before us in appeal.

Under the provisions of S. 114 it is only orders or decisions passed under S. 113 of the Act for declaring the rights of parties which are held to be decisions of Court of Civil Judicature and open to appeal to the District or High Court under the rules applicable to those Courts : and we have to see if the Assistant Collector passed any such order in the course of the partition proceedings. S. 113 is as follows :—" If the objection raises any question of title, or of proprietary right, which has not been already deter-
[842] mined by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection. In the latter case the Collector of the District or Assistant Collector, after making the necessary inquiry and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interests of the party or parties applying for the partition, and any other party or parties who may be affected thereby ;" and then follow directions as to the procedure to be observed. It will be seen that the provisions of this section are only to be applied in cases where there has been no decision on the question of title raised by a competent Court, and it is only in such cases that the provisions of the section could properly be put in force, and the section allows the Collector two courses, either to decline to grant the application until the question has been determined by a competent Court, or to proceed to inquire into the merits, and make necessary inquiry and take such evidence as may be adduced, and having done so to record a proceeding declaring the rights of the parties. What is contemplated is clearly an adjudication on the merits, and it is only

(1) The material portion of the Assistant Collector's decision being:—" The claimants for partition state that the objection raised has been formerly determined. I am of opinion that a finding has been made on a former occasion ; because in the case of Jhanda Mal and Diwan Singh, plaintiffs, claimants for partition, against Akbar Ali Shah, guardian of Ashgar Ali Shah, involving a claim for Rs. 368, principal, and Rs. 34-5-0, interest on the arrears of profits for 1283 Fasli, the objector's first objection was the same as the one taken in this case. There the amount of the plaintiffs' share has been held to be correct. The above is sufficient for the rejection of the objector's application and continuance of the partition proceedings."

1880 APRIL 15. APPELLATE CIVIL. 2 A. 839.

when the Collector records a proceeding declaring the rights of the parties after such adjudication that his order will be an order passed under that section.

In the case before us the Assistant Collector held that there had been a decision by a competent Court on the question of title. This finding put it out of his power to proceed under the section, and as a matter of fact he did not proceed under the section, for he simply gave effect to the former decision and summarily rejected the plaintiff's objection and ordered the partition to proceed; there was no order for declaring rights of parties after adjudication on the merits such as the section contemplates. The Assistant Collector was in error in holding that the former decision was one of a competent Court determining the question of title, but this error on his part does not alter the character of the order which he passed. The cases noticed by the Judge,—*Rameshur Rai* v. *Subhoo Rai* (1), **[843]** *Bukhta* v. *Ganga* (2)—are to be distinguished from the one before us. They were cases under Act XIX of 1863, and there had been an adjudication apparently on the title, but the procedure observed had been irregular. A case was brought to our notice at the hearing—*Har Sahai Mal* v. *Maharaj Singh* (3)—that was also a case of partition made under Act XIX of 1863 and the same remarks apply to distinguish it from the case before us.

I would reverse the decree of the lower Courts and remand the case to the Court of first instance for trial on the merits. Costs to abide the result.

PEARSON, J.— I concur.

APPELLATE CRIMINAL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

1880 APRIL 19. APPELLATE CRIMINAL. 3 A. 404.

EMPRESS OF INDIA *v.* HAIT RAM. EMPRESS OF INDIA *v.* CHEDA KHAN. [19th April 1880.]

Excise Act X of 1871, Ss. 19, 63—Illicit possession of liquor—Ser, meaning of—Act XI of 1870.

S. 19 of Act X of 1871 provides that the quantity of country liquor unlicensed vendors may sell, should not be more than one "*Ser.*" Regarding the weight of one "*ser*," it was held that the weight of one *ser* as given in Act XI of 1870, *viz.*, a weight of metal in the possession of the Government of India, which weight when weighed in vacuum is equal to the weight known in France as the "*Killogramme des Archives*" was not very intelligible, and the contention of the Government that a *ser* was equivalent to 80 tolas, would not supersede the customary weight of a *ser* which was 95 tolas. Therefore, when an unlicensed vendor was in possession of only 96 tolas of country liquor, *held* that the excess of one tola over the local weight was not sufficient to warrant the presumption of the accused's guilt.

JUDGMENT.

[405] STUART, C.J.—The order of the Judge is clearly right and we must dismiss this appeal. It is not only an unsustainable but an unreasonable appeal, for it is based on a very strange law, and one still more strangely expressed, and which I must be allowed to say the people

(1) H. C. R., N. W. P., 1869, p. 35, 10th April.
(2) H. C. R., N. W. P., 1868, p. 161.
(3) 2 A. 294.

of this country cannot understand, showing thus a limit to the aphorism *ignorantia juris neminem excusat.* The accused are [406] Hait Ram who keeps a liquor shop and Cheda Khan his servant, and they were both convicted under S. 63 of the Excise Act, which provides :—"Every person, other than a licensed manufacturer or vendor, or a person duly authorized to supply licensed vendors, who has in his possession any larger quantity of country spirits, or tari, or pachwai, or intoxicating drugs, except opium, than may legally be sold by retail under the provisions of S. 19,"—and by S. 19 it is enacted that the quantity of country liquor unlicensed vendors may sell shall not be more than "one ser." The two accused were convicted of being illegally possessed of more than one ser of country spirits ; Cheda being sentenced to imprisonment for three months, and to pay a fine of Rs. 10, or in default to suffer one month's imprisonment in the civil jail, and Hait Ram to one month's imprisonment in the civil jail, and to pay a fine of Rs. 100, or suffer two months' imprisonment in the civil jail in default. These sentences appear to be warranted by S. 76 of the Excise Act X of 1871. On appeal to the Judge the convictions of the two accused and the sentences on them were annulled. In his judgment the Judge states that a ser of the Bareilly weighment, which he says in practice is frequently used in weighment of spirits and is accepted as a proper ser, contains nearly ninety-five tolahs,while the quantity traced to the accused was found to be as nearly as possible ninety-six tolahs of the *sirkari* or Government weight. In regard to this fact the Judge says that the quantity of liquor found on Cheda (and for which both the accused must be taken to be responsible) was so very nearly a ser that it was improper to assume that he was guilty and that he knew that he was possessed of an illegal excess quantity of the spirits. Against this judgment the Government appealed to this Court on grounds the principal of which is that the ser mentioned in the Excise Act is the Government ser of eighty tolahs, which was of course materially less than ninety-six tolahs which the accused were responsible for. It becomes material, therefore, to know whether the Government ser was eighty tolahs. The Judge tells us that in his opinion the Bareilly ser containing nearly ninty-five tolahs was the proper measurement, while it is contended on behalf of the Government that the ser is the standard of weight mentioned in S. 2, Act XI of 1870, and which it is there provided "shall be a weight of [407] metal in the possession of the Government of India, which weight, when weighed in a vacuum, is equal to the weight known in France as the "*Kilogramme des Archives.*" Now I would really beg to ask how the natives of this country can be expected to understand such language, and to be informed by it of the exact weighment in tolahs of a ser ? It was explained at the hearing that the difficulty had certainly been experienced, and it had been endeavoured to be met by the assumption, which to some extent had been acted on, that the Government ser was eighty tolahs, and that it had been found convenient that the tolah should be considered of the weight of one rupee. Now all this may be very well, but is it reasonable to hold that the convictions and sentences in these cases can be upheld under such a state of the law ? I think not. The practical view of the matter taken by the Judge based on the ascertained weight of the ser of the district of Bareilly, where the alleged offence was committed, is reasonable and tangible, and so much cannot be said of the calculation based on the French admeasurement and in the French language as provided by S. 2 of Act XI of 1870.

The appeals must, therefore, be dismissed, but it is not to be regretted that they have been brought before this Court if their decision will direct

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the attention of the Government and the Legislature to the very unsatisfactory state of the law, especially as provided by Act XI of 1870, with reference to which they have been considered by us.

STRAIGHT, J.—I am of opinion that the Sessions Judge was right in quashing the convictions of Cheda Khan and Hait Ram, and that the evidence was unsatisfactory and insufficient to sustain the charge against them of being in illegal possession of a larger quantity of country-made spirits than one ser. In cases of this kind it is necessary to establish guilty knowledge, and no doubt the presumption of it may be inferred with more or less force from the mere fact of possession, according as the quantity of liquor found with the person charged is to a larger or smaller extent in excess of the quantity defined in Ss. 19 and 63, Act X of 1871. No doubt cases might arise in which from surrounding and collateral circumstances a conviction might be had, where but a **[408]** few tolahs of liquor beyond the legitimate ser are found in a person's possession. But in the present instance there was no such evidence, and the Judge very reasonably argues that the Bareilly ser being about ninety-five tolahs and the liquor discovered in Cheda Khan's possession only weighing ninety-six, the presumption of guilty knowledge should not be drawn. It is not very clear what is the precise weight intended by the expression "one ser" as mentioned in S. 19 of the Excise Act. I think it would be reasonable to assume that it contemplated the ordinary and generally accepted ser of eighty tolahs or in other words the weight of eighty rupees. It seems to me that this is a more comprehensible standard of weight by which to be guided and certainly one much more likely to be understood by the natives of this country than the "*Kilogramme des Archives*" referred to in S. 2 of Act XI of 1870. I am unaware whether this last-mentioned Act, though it has become law, has been put into practical operation, and whether the authorizations, notifications, and rules to be made under it by the Governor-General in Council have ever been issued. Under any circumstances it would seem to me expedient that for the purpose of working the penal provisions of the Excise Act as to the possession of liquor, the weight of the ser therein mentioned should be statutably defined. The appeal is dismissed.

APPELLATE CIVIL.

1880
APRIL 22.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

APPELLATE CIVIL.

GULZARI LAL (*Defendant*) *v.* JADAUN RAI (*Plaintiff*).

[22nd April 1880.]

2 A. 799.

N.B.—See 2 A. 63 at pp. 600, 601, *supra*.

Suit to establish right to attached property—Jurisdiction.

In a suit to establish the plaintiff's right to property attached in execution of a decree, the jurisdiction of the Court must be decided with reference to the amount of the decree in execution of which the property is attached, and not the value of such property. (S. A. No. 320 of 1876 *decided* the 16th May, 1876, *F.*)

[**F.**, 15 C. 104 (106), 55 P.R. 1906=71 P.L.R. 1906=**Criticised** 94 P.R. 1908 (**F.B.**)=74 P.W.R. 1908; **D.**, 7 A. 230 (235) (**F.B.**), 9 A. 140 (141)=6 A.W.N. 328, 17 A. 69 (72, 73).]

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A quantity of wheat and gram having been attached in execution of a decree against a third party for Rs. 222-13-6, the plaintiff claimed that it was his property not liable to attachment. His claim having been disallowed by the Munsif, he sued in the Court of the Subordinate Judge for a declaration of his right to the property attached and for cancelment of the order of the Munsif, valuing the property at Rs. 1,200. The suit was dismissed by the Subordinate Judge, but was decreed on appeal to the District Judge. The defendant appealed to the High Court contending that the suit should have been instituted in the Court of the District Munsif.

JUDGMENT.

[800] OLDFIELD, J.—We are constrained to allow an objection taken by appellant, that the Subordinate Judge had no jurisdiction to try this suit. The claim is to have declared the plaintiff's right to some grain stored in pits, by setting aside an order of the Munsif for bringing the grain to sale in execution of a decree held by defendant against a third party, his judgment-debtor. A course of decisions of this Court has held that the value of the subject-matter in dispute for determining jurisdiction will be in such cases the amount of the decree in satisfaction of which it is sought to bring the property to sale.—S. A. No. 320 of 1876, decided the 16th May, 1876 (1). We decree the appeal and set aside the proceedings in the lower Courts, and direct that the plaint be returned to the plaintiff in order that he may, if so advised, present it in the proper Court. Each party will bear their own costs in all Courts.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

1880 APRIL 22. — FULL BENCH. — 2 A. 843.

MOHAN LAL (*Plaintiff*) *v.* RAM DIAL AND ANOTHER (*Defendants*).

[22nd April 1880.]

2 A. 843.

C.P.C., 1877, S. 13—Res judicata—Obiter dictum.

An issue which is directly and substantially raised between the parties to a suit, and has been determined, cannot be re-opened whatever the former decree may show.

In a suit for the recovery of a money-bond and of an over-payment made to the defendant, the latter preferred a counter-claim, and thus opened up the dealings and accounts between the parties. The suit as brought was dismissed, the Court finding in favour of the counter-claim. *Held* in a subsequent suit for the recovery of the bond on payment of the counter-claim found due, that the defendant cannot claim to re-open the accounts.

Held also that the remarks of a Division Bench of the High Court in the previous suit, (the finding on the accounts having become final) to the effect that when the matter comes up again, the accounts between the parties must be taken again, were mere *obiter dicta* and cannot enable the defendant to re-open the accounts.

[R., 7 A. 606 (614) (F.B.) = 5 A.W.N. 89; 17 A. 174 (196).]

ORDER OF REFERENCE TO FULL BENCH.

[844] OLDFIELD, J.—The facts of this case are stated in our order of remand dated the 19th May, 1879. The plaintiff intrusted a sum of

(1) Unreported.

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2 A. 843.

Rs. 5,000 to his agent, with the object of paying off some mortgages, under certain bonds due to the defendants, on property which plaintiff had purchased, and the agent was directed to effect mutation of names. The agent had an account taken with the defendants, and the result was that the mortgage-debts under two bonds were held to be satisfied by the payment of the above money, and those bonds were returned by defendants, and the property mortgaged restored, and mutation of names effected in plaintiff's favour, but a third bond for Rs. 850, dated 16th February, 1869, was retained by the defendants, a balance in their favour being found due. The plaintiff, being dissatisfied with his agent's acts and the account taken, instituted a suit in the Court of the Munsif of Mainpuri to recover the said bond as satisfied, and also a surplus sum of Rs. 20-15-7, including interest, which he alleged was due to him out of the sum of Rs. 5,000, which he had sent by his agent and which had been paid to defendants. The Munsif dismissed the suit on 24th November, 1875; he held, after going into the accounts on all the bonds and crediting plaintiff with the Rs. 5,000 which he had paid, that Rs. 188-7-4 were still due by the plaintiff to the defendants. The defendants appealed and the Subordinate Judge, on 16th September, 1876, while affirming the decree dismissing the suit, held that Rs. 520-2-2 were due by plaintiff to defendants. A special appeal was preferred to the High Court by the plaintiff who objected that the defendants could not appeal from the Munsif's decree to the Subordinate Judge. The High Court allowed this objection and set **[845]** aside the proceedings in the Subordinate Judge's Court; they remark in their judgment, which is dated the 10th August, 1877: "inasmuch as the suit was dismissed, the plaintiff now urges in special appeal that the defendants could not appeal; they were not aggrieved by the decree, but by the Munsif's judgment on a particular issue collateral to the issue decided by the decree. We must allow the force of the objection. It is to be regretted that, if the parties are again obliged to come into Court, the account must be again taken, and the plaintiff's suit might and should have been so framed as to avoid this; but as it was framed, the plaint merely claiming to get back the bond for Rs. 850, the Munsif properly passed a decree simply dismissing the suit, and it was not competent to the defendants to present an appeal from that decree,—*Pan Kocer* v. *Bhugwant Kooer* (1). We must set aside the proceedings in the Subordinate Judge's Court, but as the plea was not taken in that Court and the frame of the suit has led to the unsatisfactory result that the account has not been finally settled, we order each party to bear his own costs in the lower appellate Court and in this Court."

The plaintiff has now instituted the present suit in the Court of the Munsif of Mainpuri for recovering the same deed, by payment of the sum which the Munsif, in the former suit, found to be still due by him. The Munsif dismissed the suit on the ground that he had no jurisdiction with reference to the value of the claims. On appeal to the Subordinate Judge, he disallowed this ground of dismissal, but dismissed the suit on another ground, namely, that the plaintiff was bound by the act of his agent, when he settled the accounts with the defendants. The plaintiff has preferred a second appeal before us, and considering that the Subordinate Judge had not properly tried the issues which he had laid down for trial, as to whether the agent acted within the scope of his authority and whether his acts were collusive, we remanded the case with directions that he should re-try those issues. The Subordinate Judge has now found that

(1) H. C. R., N. W. P., 1874, p. 19.

there was no clear authority given for adjusting the account of the mortgage-debt.

[846] We accept this finding and at the same time observe that, under any circumstances, the plaintiff would be at liberty to set aside the adjustment of the account, if he could show mistake or fraud. But another question is raised in the appellant's third ground of appeal, namely, that the Munsif in his judgment, dated 24th November, 1875, has decided that a sum of Rs. 188-7-4 is due by plaintiff to defendants, after account was taken, on the several mortgage-bonds, and that this decision, which was not set aside when the decision of the Subordinate Judge in appeal from it was set aside by the High Court, by their judgment, dated the 10th August, 1877, is final and conclusive on the matter between the parties, and the account cannot be re-opened, notwithstanding anything said to the contrary in the judgment of this Court, dated the 10th August, 1877.

We think it desirable that this question be referred for the opinion of the Full Bench of the Court and we refer it accordingly.

JUDGMENTS OF THE FULL BENCH.

STUART, C. J.—On full consideration of this case and of the former appeal which was disposed of by Turner, J. and myself, I am not prepared to dissent from the conclusion arrived at by my colleagues. I am always unwilling to prevent the re-opening of an account where any material error can be shown, and I am not clear that S. 13 of the Procedure Code would bar such a proceeding in the present case, but the inconvenience of again opening up such an account as this would be so great and the result so uncertain, (in no event, I believe, material) that I feel quite willing that the case should be decided according to the opinions recorded by the other members of the Court.

PEARSON, J.—The remark of the High Court Bench in the judgment of the 10th August, 1877, that "if the parties are again obliged to come into Court, the account must be again taken" **[847]** must, in my opinion, be regarded as a mere *obiter dictum* which does not bind the Courts disposing of the present suit.

I am further of opinion that the Munsif's finding in the former suit that Rs. 188-7-4 was due by the plaintiff to the defendants was a finding on a matter directly and substantially in issue between the parties in that suit, and has become final. In that suit not only was the recovery of the bond claimed on the ground that the bond-debt had been discharged, but Rs. 20-15-7 were also claimed as having been over-paid, and, for the purpose of disposing of the latter claim, it was necessary to determine by taking accounts whether Rs. 20-15-7 as claimed were due to the plaintiff or whether on the contrary as pleaded by the defendants a larger sum was due to them.

SPANKIE, J.—I am disposed to hold that the account cannot now be re-opened. On looking into the former case it seems clear that the state of the account was really in issue. The plaintiff could not under any circumstances claim the return of the mortgage-bond, if there were still any sum due under it, and the defendants had contended that the entire sum had not been paid off. As this contention referred to the particular deed which the plaintiff sued to recover, the question whether the money had been paid or not had to be determined.

It is to be regretted perhaps that a remark in the judgment of this Court in the former case has induced the defendants to contend that the accounts are still open and can be gone into again. But the wording of S. 13 as amended is peremptory. I would, therefore, say that the account

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2 A. 843.

was settled by the Munsif's judgment of the 24th November, 1875, and cannot be re-opened.

OLDFIELD, J.—It appears clear to me that the decision of the Munsif, dated 24th November, 1875, has never been set aside and that it has finally decided that a sum of Rs. 188-7-4 was due by plaintiff to defendants on the several mortgage-bonds, and I hold that the accounts cannot now be re-opened.

The plaintiff in the former suit averred that a debt due to defendants on those bonds had been satisfied; and he sought to have [848] one of those bonds returned to him and to recover a sum of Rs. 20-15-7, including interest, due to him after satisfaction of the debt due on the bonds. The defendant pleaded that a large sum of money was still due to him on the bonds. The question as to what was the unpaid balance was necessarily on these pleadings directly and substantially in issue between the parties. and the decision on it has become final and cannot be re-opened in a fresh suit.

I am altogether unable to agree in the remarks made by the learned Judges in their order, dated 10th August, 1877, in second appeal in that case, that the accounts could be re-opened in a fresh suit; and obviously those remarks cannot amount to a judicial determination that the accounts might be re-opened, for that was a point which could only be determined judicially at the hearing of any fresh suit which might be brought and by the Court deciding such suit. Moreover, holding as the learned Judges did that no appeal lay from the Munsif's judgment, they were powerless to make any decision on the merits of the case.

STRAIGHT, J.—I am of opinion that the objection raised by the plaintiff-appellant in his third ground of appeal should prevail, and that the finding of the Munsif of the 24th November, 1875, is a bar to the defendants re-opening the accounts between themselves and the plaintiff. The claim of the plaintiff in his original suit was to recover the bond for Rs. 850, and to recover the Rs. 20-15-7, which he alleged had been improperly paid by his agent in excess of the amount due from him to the defendants for redemption of the bond. Two specific heads of claim were therefore included in his plaint, both of which the defendants were called upon to answer, or in default judgment must have passed against them. As to the Rs. 20-15-7, not only did they deny it was due, but they alleged a much larger amount was owing to them by the plaintiff. Here therefore was a matter alleged by the plaintiff and expressly denied by the defendants, in respect of which the relief asked by the plaintiff was refused him, and not only that, for the decree went on to state that Rs. 188-7-4 was due and owing from the plaintiff to the defendants. The judgment of the Munsif was final except in so far as he could have altered it on review, and equally so that of the lower appellate Court until it was disturbed by the [849] decision of this Court, which had the effect of restoring the Munsif's findings and his determination of the whole case. The state of the litigation, then, was that the plaintiff's claim was dismissed, and he was decreed to owe the defendants Rs. 188-7-4. With great respect to the two learned Judges who decided the former appeal to this Court, it would appear as if they had entirely lost sight of the second head of the plaintiff's claim and the provisions contained in S. 216 of the Civil Procedure Code, so far as they affected the plea put forward by the defendants. Moreover, it appears to me that the terms of S. 43 of Act X of 1877 were imperative upon the plaintiff, in suing for the recovery of the bond, to claim the Rs. 20-15-7, for that was directly involved and had reference to the question whether the bond had or had not been satisfied. I take it to be a well-

established principle that, unless there is any specific provision prohibiting a plaintiff from joining causes of action, he is bound to do so when they accrue at the same time and in respect of the same subject-matter. For a defendant is not to be subjected to the unnecessary expense and annoyance, either of defending or bringing a second suit, when all matters in difference between himself and a plaintiff can be disposed of in one. The state of the pleadings was such in the original suit between the now appellant and respondents, that the whole of the monetary dealings and accounts between them were opened up and evidence was taken and full consideration given to the proofs put forward on the one side and on the other. In the result the Munsif decreed Rs. 188-7-4 to be due and owing by the plaintiff to the defendants, and the latter appealed to the lower appellate Court, with the result that the full amount of their counter-claim was admitted by the Judge. It is beside the question now before me to criticise the decision of the learned Chief Justice and Turner, J., the effect of which was to leave the defendants entitled only to what the Munsif had decreed them. The plaintiff has accepted the Munsif's finding as binding on him, and has tendered the Rs. 188-7-4 to the defendants, who have refused to accept it. Hence the present suit. The remarks made by the two learned Judges in their judgment which are set out in the reference to the Full Bench are mere "*obiter dicta*," and can have no force or effect to alter the legal rights and disabilities of the parties.

1880
APRIL 22.
FULL BENCH.
2 A. 843.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

1880
APRIL 22.
FULL BENCH.
2 A. 851.

LACHMAN DAS (*Plaintiff*) *v.* DIP CHAND (*Defendant*). [22nd April 1880.]

2 A. 851.

Optional and compulsory registration—Act VIII of 1871—Act III of 1877, S. 50—Act I of 1868 (General Clauses), S. 6.

Under S. 50 of the Registration Act, 1877, a document compulsorily registrable and registered under that Act, takes effect, in respect of the property comprised in it, as against an unregistered document relating to such property, executed while the Registration Act of 1871 was in force, and optionally registrable under that Act. S. 6 of the General Clauses Act (I of 1868) has no saving effect in such a case.

[**F.**, 7 C. 570 (573), 5 A. 593 (594)=3 A.W.N. 136, 11 C. 661 (665); **Cons.**, 4 A. 227 (230, 231) (**F.B.**)=2 A.W.N. 19, 6 A. 164 (168)=4 A.W.N. 29; **R.**, 6 B. 168 (192) (**F.B.**), 1 A.W.N. 127, 18 B. 92 (95), 20 B. 158 (164), 27 B. 452 (467); **D.**, 7 A. 577 (581)=5 A.W.N. 115.]

Suit to recover Rs. 82-2-6 on two unregistered bonds—one dated the 11th June, 1875, for Rs. 25, payable on demand with interest at the rate of Rs. 2-8-0 per cent. per mensem, and the other dated 24th July, 1876, for Rs. 21, payable on demand with similar interest—by the sale of the property hypothecated in such bonds. The defendant Dip Chand, to whom the other defendants had transferred the property hypothecated in these bonds, under a deed of sale, dated the 13th July, 1878, contended that the deed of sale, being duly registered under Act III of 1877, took effect as regards the property in suit as against the unregistered bonds. The Court of first instance without determining this contention gave the

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plaintiff a decree in respect of the property. The lower appellate Court allowed the contention, having regard to S. 50, Act III of 1877, and reversed the decree of the Court of first instance so far as it affected the property. The plaintiff appealed to the High Court.

REFERENCE TO THE FULL BENCH.

STUART, C.J., and OLDFIELD, J., before whom the appeal came for hearing, having regard to the fact that there were conflicting rulings of the Calcutta and Allahabad High Courts,—*Oghra Singh* v. *Ablakhi Kooer* (1); S.A. 1196 of 1878, decided the 5th August, 1879 (2)—referred to the Full Bench the following question:—"Whether the provisions of S. 50, Act III of 1877, apply to give effect to the defendant's registered deed against plaintiff's deeds, so as to prevent the plaintiff enforcing his mortgage against the property bought by defendant."

JUDGMENTS OF THE FULL BENCH.

[853] STUART, C. J.—There cannot be the least doubt or difficulty as to the meaning and application of S. 50. Act III of 1877, to such a case as the present. I have held that opinion ever since that Act came into operation, and I lately gave effect to it in a judgment on a Division Bench, not then anticipating the present reference. As to S. 6 of the General Clauses Act, it is idle to contend that it has any bearing whatever in such a case as this.

PEARSON, J.—S. 50, Act III of 1877, declares that registered documents relating to land of which registration is optional shall take effect against unregistered documents; and the word "unregistered" is defined in the explanation thereunder to mean, in cases where the document is executed after the first day of July, 1871, not registered under Act VIII of 1871 or the Act of 1877. That definition appears to me to preclude and negative the view that an unregistered document of 1876 could be protected by S. 6, Act I of 1868, from being affected by S. 50. Act III of 1877. Whether such a view could be maintained was stated to be the point for consideration.

SPANKIE, J.—In reply I would say that the provisions of S. 50, Aet III of 1877, do apply to this case. I do not think that S. 6 of the General Clauses Act would apply to a case of this nature.

OLDFIELD, J.—The registration of the plaintiff's deeds is optional, and by S. 50 of Act VIII of 1871, which was in force at the time they were executed, they would take effect in preference to such a deed as that of the defendant though registered, since the registration of the latter is compulsory.

By the terms of S. 50, Act III of 1877, however, every registered document, whether its registration be compulsory or optional, shall take effect against every unregistered document relating to the same property, and hence the defendant's document executed since the Act came into force will now take effect in preference to the **[854]** plaintiff's. The effect upon the plaintiff's is of course that a document, which was perfectly valid and effective at the time it was executed against any such registered document as that of defendant which might subsequently be executed, has now become ineffectual against such a document.

I was at first inclined to consider that the Legislature could not have intended such a result, particularly as no provision is made for enabling parties to register within a reasonable time those unregistered documents

(1) 4 C. 536.

(2) Unreported.

affected for the first time by the provisions of the new Act; and I was inclined to think that the right of persons circumstanced like the plaintiff might be saved by the provisions of S. 6, General Clauses Act, whereby the repeal of any Statute, Act, or Regulation shall not affect anything done before the repealing Act shall have come into operation. But a careful examination of S. 50 and the explanation annexed to it has satisfied me that the application of S. 6 of the General Clauses Act will not save plaintiff's document from being affected by the provisions of S. 50, for Act III of 1877 does more than merely repeal Act VIII of 1871. It contains in S. 50 an express provision by which all unregistered documents executed at the time the former laws referred to in the section were in force are to be defeated by all registered documents of the nature of those mentioned in the section. I would, therefore, answer the reference in the affirmative.

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STRAIGHT, J.—It appears to me that S. 50 of the Registration Act of 1877 is conclusive, and that the defendant's registered deed takes precedence of the plaintiff's unregistered bonds.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1880
APRIL 27.
APPELLATE CIVIL.
2 A. 854.

GULAM MUSTAFA (*Plaintiff*) *v.* HURMAT AND ANOTHER (*Defendants*).

[27th April 1880.]

Mahomedan law—Gift by person labouring under fatal disease—Dower-debt.

The provisions of the Mahomedan law applicable to gifts made by persons labouring under a fatal disease, do not apply to a gift made in lieu of a dower debt, for such a gift really amounts to a sale.

[R., 135 P.R. 1907, 13 C.W.N. 160.]

The defendant Ali Ahmad transferred a five biswansis share of a village called Benipur to the plaintiff under a deed of sale dated 11—2—1879, asserting himself to be the owner of seven biswansis and a half out of the ten biswansis share of Benipur, by inheritance from one Nur Muhammad. Plaintiff instituted a suit, claiming possession of the property sold on payment of Rs. 52-8-0, being the dower-debt due to the defendant Hurmat by her deceased husband, Nur Muhammad. The whole of the ten biswansis share of Benipur had been transferred by a deed of gift, 4 days before his death which took place on 25—8—1875, by Nur Muhammad to Hurmat, the consideration for the transfer purporting to be Rs. 1,600, part of the sum of Rs. 2,500 alleged to be due by him to his wife for dower. The lower Courts found that Nur Muhammad executed the deed of gift while in his full senses, and held that the Muhammadan law applicable to gifts made by a person labouring under a fatal disease did not apply to a gift made in consideration of a dower-debt. The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[855] PEARSON, J.—The provisions of the Muhammadan law applicable to gifts made by persons labouring under a fatal disease do not **[856]** apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale. Case No. 21 in Macnaughten's Precedents of

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2 A. 854.

marriage, dower, divorce, and parentage is on all fours with the present case and entirely supports the decision of the lower Courts. The just claims of the heirs are not interfered with by the payment of debts which must be paid before the heirs can enter upon the inheritance. The lower Courts have found on the evidence that the executant of the deed in question in the present case was in his sound senses when he executed the deed; and from the medical evidence it is doubtful whether he was then labouring under the disease which caused his death shortly afterwards. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

1880
APRIL 28.
APPEL-LATE CIVIL.
2 A. 856.

BHAGWAN PRASAD (*Judgment-debtor*) *v.* SHEO SAHAI (*Decree-holder*).

[28th April 1880.]

Decree charging immoveable property—Execution—C.P.C., 1877, S. 326.

Where a decree directs the sale of immoveable property in pursuance of a contract specifically affecting the same, S. 326 of the C.P.C., 1877, is not applicable so as to enable the Court to stay or postpone the sale of such property, or to authorize the Collector to make arrangements for the satisfaction of the decree.

In a suit on a bond for the payment of certain money charging certain land paying revenue to Government with such payment, one of the reliefs asked being the sale of such land for the satisfaction of the debt, a decree was made on 16—8—1878 directing *inter alia* the sale of such property in satisfaction of such debt. On the attachment of the same in execution of the said decree, the Collector, having regard to S. 326, Act X of 1877, made a representation to the Subordinate Judge, the Court executing the decree, by a proceeding dated 17—12—1878, that the sale of the land was objectionable and that the decree might be satisfied by instalments within eight years by a lease of the land for that term; and asked the Subordinate Judge to postpone the sale of the land which was fixed to take place on 20—12—1878 and to authorise him to provide for the satisfaction of the decree in the manner recommended by him. The sale was accordingly postponed and the Collector's recommendation was sanctioned on 11—3—1879. The decree-holder appealed to the District Judge who set aside the Subordinate Judge's order. The judgment-debtor thereupon appealed to the High Court.

JUDGMENT.

[857] PEARSON, J.—Reading S. 326 with S. 322 of the Code, we are of opinion that the lower appellate Court's order, referring to a decree which directs the sale of immoveable property in pursuance of a contract specifically affecting the same, is right; and we therefore dismiss the appeal with costs.

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APPEL-LATE CIVIL.

2 A. 857.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

MUMFORD (*Plaintiff*) *v.* PEAL AND ANOTHER (*Defendants*).

[29th April 1880.]

2 A. 857.

Bond payable by instalments—Waiver—Limitation Act 1871, Sch. II, Art. 75—Cause of action.

(*a*) Where a bond for money payable by instalments, provides that in default of payment of one or more instalments, the whole amount shall become payable, the mere acceptance by the obligee, of instalments after default, does not amount to a "waiver" of his right to enforce such provision, within the meaning of Art. 75, Sch. II, of Act IX of 1871. The most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach, and creating new relations with the party in default.

(*b*) In the case of such a bond, the cause of action arises, and limitation begins to run, when the first default is made.

[**Not F.**, 4 C.P.L.R. 21 (22); **F.**, 14 C. 397 (399), 39 P.R. 1899, 12 M. 192 (195); **R.**, 20 B. 109 (113, 115), 31 C. 83 (87) = 8 C.W.N. 66; **D.**, 5 A. 289 (292) = 3 A.W.N. 33, 11 A. 482 (484) = 9 A.W.N. 186.]

JUDGMENT.

[858] STRAIGHT, J.—This is a suit brought by the plaintiff to recover from the defendants the sum of Rs. 3,917-8-6, being the amount of principal and interest due upon a bond bearing date the 27th September, 1871, and executed by one James Giddens, deceased, of whom defendant No. 1 is the widow, by Robert Peal, defendant No. 2, and by one George Richards, who has not been included in the proceedings. The plaintiff also seeks to realize the amount of his claim by sale of a certain bungalow, hypothecated by the before-mentioned James Giddens as security for the above sum of Rs. 3,917-8-6, and the cause of action is alleged to have accrued on the 27th September, 1874, the date before which the amount covered by the bond was agreed to be repaid.

Defendant No. 1 in reply states that the plaintiff voluntarily undertook to discharge the amount of the said bond, of which the Uncovenanted Service Bank was the obligee, and that as security for doing so he had possession given him of the hypothecated bungalow and received the rents therefrom for a long period of time; that he promised not to charge interest for any payments made by him to the Bank; and that she is willing the bungalow should be sold to satisfy the principal debt due to the plaintiff, but not to pay any interest, which he had promised not to demand. Defendant No. 2 pleads that, as he was no party to the deed by which the plaintiff became assignee of the bond of the 27th September, 1871, and had no notice of the assignment, he is not liable to plaintiff, and that the bond was not assignable by law; that upon the death of the obligor, James Giddens, he wrote to the manager of the Bank, requiring him, in consequence of defaults that had been made in the payment of instalments, to enforce hypothecation by sale of the mortgaged bungalow, but that the Bank failed to do what he requested, and he (the defendant No. 2) is accordingly freed from all liability; that he was only a surety for the obligor and not a co-obligor; that the suit is

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2 A. 857.

[859] barred by limitation, as any cause of action the plaintiff might have had arose on the 11th October, 1872, the date of the death of James Giddens, or on some prior day when the last payment in liquidation of the bond was made. The first Court, holding the plea of limitation to be fatal to the plaintiff's claim as against the persons of the two defendants, dismissed it to that extent, but gave him a decree against the property, and this decision was upheld by the lower appellate Court.

The plaintiff now appeals to this Court, and the only argument seriously urged before us was that, inasmuch as the obligee of the bond took no steps to sue on the default by the obligor to pay his instalments, and accepted payments after default made, he must be taken to have waived the breach of the contract that had then been made.

The case is one of some complication, and in order to satisfactorily consider it, it is necessary to detail the following facts. One James Giddens, a Government employé and resident of Allahabad, in the year 1871, seems to have been in pecuniary difficulties, and in order to tide over them he had recourse for assistance to the Uncovenanted Service Bank, of which a Mr. Fairlie was the Agent and Manager. He ultimately effected a loan of Rs. 3,350, and the transaction was completed on the 27th September, 1871, by the execution of a joint and several bond for that amount by himself, his brother-in-law by marriage, Mr. Robert Peal, and one George Richards, in which it was agreed that the Rs. 3,350 should be repaid by regular monthly instalments of Rs. 80 each, together with interest "at 12 per cent. payable monthly by deduction from each remittance or payment or otherwise added to the principal at the end of each half-year, namely, on the 30th June and the 31st December." The first instalment was to become payable on the 10th November, 1871, and it was further provided, "that in the event of failure in the payment of any one or more instalments, and whether advice be or be not given of such default, we hereby jointly and severally render ourselves liable to pay up the full amount or such balance thereof as may become due according to the account-current of the said Bank, with all interest and other charges that may or shall be incurred on account of the said loan." [860] Concurrently with the execution of this bond James Giddens by deed mortgaged a bungalow in Allahabad to the Bank, and gave authority therein to the Bank to sell the same to the best advantage either publicly or privately, "should the loan of Rs. 3,350 be not liquidated with all other charges within the time and in the manner agreed upon in the bond, or in case of my death in the interim before the discharge of the said debt."

It is an admitted fact in the case that the Rs. 3,350 were paid to James Giddens, and that he alone had the benefit and the use of the money. The instalments, it will be observed, had to be paid on the 10th of each month, and those for November and December, 1871, were punctually discharged. But this regularity was not continued with those that followed, the payments being made on the following dates:—

				Rs.
January	10th, 1872	...	...	50
,,	17th ,,	...	...	30
February	12th ,,	...	...	80
March	8th ,,	...	...	80
May	8th ,,	...	...	80
August	3rd ,,	...	...	40
or in all		...	...	360

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On the 11th October, 1872, James Giddens died, and at that time there were five monthly instalments due—that is Rs. 400, and this independent of interest, in respect of which nothing had been paid. Soon after Giddens' death Mr. Fairlie wrote to Mr. Richards and Mr. Peal, inquiring of them what arrangements they proposed to make to liquidate the unpaid balance owing on the bond, and on the 14th November, 1872, the latter replied as follows:—"As you hold a collateral security in the mortgage of Mr. Giddens' house, and as this mortgage was executed with the object of securing his securities from becoming liable, or at least incurring any loss in the event of any contingency preventing Mr. Giddens liquidating the debt, I request you will foreclose the mortgage and pay off the Bank's debt. The widow of Mr. Giddens wrote to me [861] the other day stating that she had called on you with the object of requesting you to take possession of the house and with it pay off the Bank's claim, but that you were out. I shall feel obliged if you will communicate with her and let me know the result." Upon receipt of this letter Mr. Fairlie does appear to have threatened to put the powers of the Bank under the mortgage into force, and thereupon the plaintiff, Mumford, a step-brother of the deceased James Giddens, at the earnest solicitations of his widowed sister-in-law, first introduced himself into the matter by paying on the 19th December, 1872, the sum of Rs. 450 to the Bank on account of the bond. In passing it may be remarked that at that date seven instalments, or in other words Rs. 560, was the amount actually due. Mumford afterwards made the following further payments:—

		Rs.
January 28th, 1873	...	225
February 20th ,,	...	225
March 20th ,,	...	225
		675

From this latter date to the 26th January, 1874, the principal and interest were allowed to accumulate till they reached Rs. 2,540, which sum on the 26th January, 1874, was liquidated in full by Mumford, who thus out of the Rs. 4,185 actually received by the Bank in respect of the bond had found no less than Rs. 3,665. On the 18th February, 1874, Mr. Fairlie on behalf of the Bank whose claim had been satisfied, assigned to Mumford by deed all its rights, interests, and powers in the bond of the 27th September, 1871, and the collateral mortgage of the same date. About this time an account was opened in the books of the Bank headed "James Giddens, Esq., in loan account with E. A. Mumford, Esq.," the first item of which on the debit side was as follows:—"27th January, 1874—To amount paid to the Uncovenanted Service Bank, Rs. 3,653-4-0." It is clear that Mumford had then been put in possession of the hypothecated bungalow by defendant No. 1, and indeed the facts establish it beyond question, for on the credit side of the same account will be found a succession of [862] entries down to October 2nd, 1874, recording the receipt of the rent of it, apparently by Mumford direct, and after that date until the 12th August, 1875, through defendant No. 1. The total of the former is Rs. 410 and of the latter Rs. 750, or Rs. 1,116 in all. The balance appearing as due for the principal debt on the 12th August, 1875, was Rs. 3,145-8-6 and for interest Rs. 772, making a total of Rs. 3,917-8-6, for recovery of which sum the plaintiff instituted his present suit on the 17th September, 1877.

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It has been necessary to go at this length into the facts in order to make the point taken in appeal intelligible. The case was most ably and exhaustively argued before the learned Chief Justice and myself on three different occasions, and we took time to consider our judgment, in order to examine the numerous authorities quoted on either side. The simple and sole point for our consideration is whether the Uncovenanted Service Bank, the obligee of the bond of the 27th September, 1871, by accepting payments after default had been made in the instalments, waived the benefit of its provisions, within the meaning of Art. 75, Sch. ii, Act IX of 1871.

It does not appear to me that any question properly arises as to the competency of the plaintiff to bring this suit, or as to the primary liability of defendant No. 2 under the bond. I see no reason to hold that the assignment of the Bank by the deed of 18th February, 1874, was otherwise than legal, and the plaintiff stands in no better or worse position than his assignor. The terms of the bond preclude the contention that defendant No. 2 was only a surety, and it is clear that he made himself jointly and severally liable as an obligor with the other two persons executing it. It is much to be desired that the bond were equally plain and explicit in other respects. Its terms as to mode of payment are so singularly contradictory that if strictly interpreted they could not have been carried out. For it was absolutely impossible to discharge a sum of Rs. 3,350 within three years from the 27th September, 1871, by monthly instalments of Rs. 80, the first of them commencing on the 10th November, 1871. To the 27th September, 1874, by which date the bond was redeemable, would be exactly 35 months, which multiplied by 80 gives Rs. 2,800, or Rs. 550 short of the principal sum covered by it, to say nothing [863] of interest. The contracting parties are not to be congratulated on their arithmetic, and by their carelessness they have raised a difficulty which with ordinary circumspection might have been avoided. It seems to me, however, that the bond must be regarded as one payable by instalments, on default in payment of one or more of which the whole principal amount then due could at once be demanded. To this extent its language is certain and precise, and I do not know that, for the purpose of disposing of this appeal, we are called upon to determine what the intentions of the parties were, as to when and how the balance over and above the 35 instalments should be discharged, though that it was, in some way and at some time, within the three years, to be forthcoming seems plain. Then comes the question whether default was made in the instalments, and if so, whether the conduct of the Uncovenanted Service Bank in accepting subsequent payments amounts in law to a waiver.

Both the lower Courts have in substance answered the first of these propositions in the affirmative and the latter in the negative. The ground upon which we are invited to disagree with their decisions is, that the finding on the latter point is in the teeth of the evidence, and that the mere fact of money having been received on account of the bond by the Bank is sufficient of itself to constitute a legal waiver. I cannot for a moment accede to this view. On the contrary, I think that the most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach and creating new relations with the party in default. "A waiver must be an intentional act with knowledge, and it is incumbent on any party insisting on a verbal agreement in substitution of a written contract to show that both parties understood the term of this substituted

agreement."—*The Earl of Darnley* v. *The London, Chatham and Dover Railway Co.* (1). In the present case the first default occurred on the 10th January, 1872, when only Rs. 50 instead of Rs. 80, the proper instalment, was forthcoming; and though it is true that the remaining Rs. 30 were paid on the 17th of that **[864]** month, the fact is not altered that a cause of action had accrued to the Bank under the terms of the bond. In February the payment was two days late; in March two days before time. In April, however, nothing was forthcoming, and it was not until the 8th May that another Rs. 80 found its way to the Bank. Then there was a further suspension during June and July, and finally on the 3rd August there was a payment of Rs. 40, the last ever made by James Giddens prior to his death. At that date, irrespective of interest, only Rs. 520 had been paid as against Rs. 720 due, and consequently during the period between November, 1871 and July, 1872, no less than three instalments, or Rs. 240, had fallen into arrears. Even could we hold that the two payments in January, 1872, were so near to one another as not to constitute a default, it would be impossible to place a similar construction upon the absence of any payment in April, 1872. Looking at all these facts, I see nothing whatever to establish that the Bank entered into any arrangement or understanding to forego the cause of action that had arisen on the 10th January, 1872, or that any fresh parol agreement qualifying the provisions of the bond of 27th September, 1871, was ever made. But even were there evidence of this to bind Giddens and his representatives, it appears to me that an insurmountable obstacle lies in the plaintiff's way, in the circumstance that there is not a particle of proof that defendant No. 2 was ever a party to any such subsequent verbal contract. On the contrary, as far as there is material for forming an opinion, it would seem as if Mr. Peal was all along in ignorance that any default in the payment of instalments had been made, until he received the letter from Mr. Fairlie, shortly after Giddens' death, asking him what arrangement he proposed to make to liquidate *the unpaid balance of the loan*. It is not attempted to be set up by the plaintiff that as between Peal and the Bank there was any agreement or understanding come to in abrogation or substitution of the terms of the bond under which he had contracted, and the argument for appellant therefore really comes to this, that we are to hold defendant No. 2 bound by a parol arrangement of which he had no knowledge and to which he never gave his acquiescence. The plaintiff is on the horns of **[865]** a dilemma, either the bond of September, 1871, was superseded and rescinded, or it was not. If it was, the defendant No. 2 was no party to its supercession and recission; if it was not, the cause of action arose on the 10th January, 1872, and his claim is barred by limitation. To contend that the acceptance of subsequent payments by the Bank from the plaintiff has any binding effect upon defendant No. 2 proceeds upon an entire misconception of the principle on which the doctrine of waiver is based, nor is the fact itself worthy a moment's serious consideration in face of the demand made upon defendant No. 2 by the Bank, immediately after Giddens' death, for "*the unpaid balance of the loan*," a pretty strong indication that at that time its right to the whole principal sum covered by the bond was considered to have accrued. The plaintiff by his assignment of the 18th February, 1874, took the position theretofore occupied by his assignor with all the rights, interests, and disabilities pertaining thereto, and he had abundant time, between that date and the 10th January, 1875, when limitation finally barred him, even after the

(1) L. J., 36 Eq., 404.

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APRIL 29.
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2 A. 857.

27th September, 1874, the day before which the bond had to be satisfied, to take his claim into Court. Upon what principle the plaintiff alleged his cause of action to have accrued on the 27th September, 1874, is far from intelligible. The bond was, as has already been pointed out, payable by instalments, on default in one or more of which the whole amount became due and payable, and the law is perfectly clear upon the point, that the cause of action in such a case accrues on the first default, from the date of which limitation begins to run. Decisions without end to this effect may be found, but it is sufficient for me to refer to *Hemp* v. *Garland* (1); *Madho Singh* v. *Thakoor Pershad* (2); and *The Uncovenanted Service Bank* v. *Khetter Mohan Ghose* (3). It therefore appears to me that the cause of action, which accrued to the Bank and was passed on with the bond to the plaintiff by the assignment, arose on the 10th January, 1872, and that the present suit is barred by limitation. The plea of waiver entirely fails. I would accordingly dismiss this appeal and confirm the judgment of the Courts below with costs.

[866] STUART, C. J.—I am so entirely satisfied with the examination of this case, in fact and in law, afforded by the judgment of my colleague Mr. Justice Straight, that I feel I need add nothing to what he has so clearly and satisfactorily stated. The case of *Madho Singh* v. *Thakoor Pershad* (2) was a judgment of my own concurred in by my colleague Mr. Justice Spankie, and is correctly stated as an authority in support of the opinion that the cause of action in the case of an instalment-bond accrues on the first default, whence limitation begins to run. The appeal is dismissed with costs in all the Courts.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

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APRIL 30.
APPEL-LATE CIVIL.
2 A. 866.

BUJHAWAN LAL (*Defendant*) *v.* SUKHRAJ RAI (*Plaintiff*).

[30th April 1880.]

Cross-suits—Attachment of amount claimed before decree passed—Cross-decrees—C.P.C. (1859), S. 209.

Where there are cross-suits for money between two parties against each other, the attachment by a third party of what might be found due on the smaller claim, can have no operation or effect so as to prevent the decree (when it is passed) for the smaller amount from being absorbed in the one for the larger amount, and so as to prevent the decree-holder in the latter case from setting off the amount of the smaller decree under S. 209, C.P.C. (1859).

JUDGMENT.

[867] STRAIGHT, J.—The following facts must be recapitulated in order to make the grounds upon which this appeal is based intelligible. On the 24th April, 1877, Mahadeo Lal, defendant No. 2, brought a suit for work done and materials provided against Sukhraj Rai, the plaintiff. On the 10th May, 1877, Sukhraj Rai, the plaintiff, instituted a suit on a bond against Mahadeo Lal, defendant No. 2. On the 23rd June, 1877, the claim in each case was decreed, that of Sukhraj Rai, the plaintiff, being for the larger amount. Meanwhile, namely, on the 9th May, 1877, Bujhawan Lal, defendant No. 1, lodged an application for attachment of the amount pending in the suit of Mahadeo Lal, defendant

(1) 12 L.J.B., 134; S.C. 4 Q.B., 519. (2) H.C.R., N.W.P., 1873, p. 35.
(3) H.C.R., N.W.P., 1874, p. 88.

No. 2, against Sukhraj Rai, the plaintiff, and an order was made to that effect. It is alleged by defendant No. 1, appellant before us, that notice was issued to Mahadeo Lal, defendant No. 2, not to receive, and to Sukhraj Rai, plaintiff, not to pay, any sum that might be found to be due by the latter to the former. The receipt of any such intimation is denied by Sukhraj Rai, the plaintiff, but the matter is not very important either one way or the other in the decision of this case. On the 23rd June, 1877, the plaintiff, Sukhraj Rai, having obtained leave in the execution department to set off the amount of defendant No. 2's decree against him, gave credit for the amount of that decree, and deducting it from his own decree against Mahadeo Lal, defendant No. 2, applied for execution in respect of the balance thereafter remaining due. About the same time Sukhraj Rai, the plaintiff, made an objection in the execution department to defendant No. 1's attachment of the 9th May, 1877, but it was disallowed, and the present suit is brought to have the Munsif's order to that effect set aside and the propriety and legality of the set-off already mentioned established. On the 25th July, 1877, Bujhawan Lal, defendant No. 1, obtained an order for the attachment of the decretal amount of Mahadeo Lal, defendant No. 2's decree against Sukhraj Rai, the plaintiff, and on the **[868]** 15th March, 1879, he brought to sale and purchased it. The present suit was dismissed by the Munsif, but upon appeal the lower appellate Court decreed the claim, and Bujhawan Lal, defendant No. 1, now appeals on the following grounds :—(i) that the decree of Mahadeo Lal against Sukhraj Rai having been previously attached, it was not competent for Sukhraj Rai to apply it as a part set-off to his decree against Mahadeo Lal ; (ii) that as the decrees were not being simultaneously executed, no set-off could be made, and even if it could, it required to be sanctioned or refused in the execution department and cannot be made the subject of a regular suit.

The substantial point for consideration appears to be whether the order of the Munsif of the 9th May, 1877, attaching the amount of claim pending in the suit of Mahadeo Lal against Sukhraj Rai, was a good and valid one, and could effectually bar Sukhraj Rai from making a subsequent set-off of the amount of that decree in execution of a decree of his own against Mahadeo for a larger sum.

The provisions of Act VIII of 1859 are applicable to the case. It will be observed that, at the time the order of the Munsif was passed, no amount had been ascertained to be due from Sukhraj Rai to Mahadeo, and for aught that might appear to the contrary nothing was due. As a matter of fact, there was no debt owing from Sukhraj Rai to Mahadeo Lal, but Mahadeo Lal was indebted to him in a much larger amount, and when the two decrees were passed on the 23rd June, he being the holder of the decree for the larger amount was bound by the provisions of S. 209 of the old Procedure Code to take out execution for so much only as remained due to him, after deducting the amount due to Mahadeo Lal as to which satisfaction had to be entered up. As Mahadeo Lal had no claim against Sukhraj Rai and no debt was due, the order of the Munsif could have no operation or effect, and though it was possibly a wise precaution of Bujhawan Lal to get it made, his proper course would have been to follow it up by attaching the decree of Mahadeo Lal against Sukhraj Rai. This step, however, would not have put Bujhawan Lal in a better position, because S. 209 being followed and the decrees being essentially **[869]** cross-decrees, that for the smaller amount became absorbed in the one for the larger, and attachment could not affect it. The appeal, therefore, fails and is dismissed with costs.

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FULL BENCH.

2 A. 676.

FULL BENCH.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

MUL CHAND (*Plaintiff*) *v.* SHIB CHARAN LAL AND OTHERS (*Defendants*).

[3rd May 1880.]

2 A. 676.

Court-fees Act, 1870, S. 17—Distinct subjects.

The words, "distinct subjects," in S. 17 of the Court-fees Act, 1870, mean "distinct and separate claims or causes of action" in single and separate suits, which for the purpose of jurisdiction or convenience of procedure, may be united in one suit.

[**F.**, 2 A. 682, 27 A. 186 (189) = 24 A.W.N. 210; **Cons.**, 16 A. 401 (405 & 406) = 14 A.W.N. 124; **D.**, 3 A. 131 (133).]

JUDGMENTS OF THE FULL BENCH.

[678] STUART, C. J.—This is a reference to the Full Bench of the Court by Straight, J., and myself respecting a deficiency of Court-fees reported to us by the Office (1). The question was raised in a first appeal (No. 15 of 1879) which came before us as a Division Bench, and the report of the Office stated that the plaintiff claimed **[679]** to recover possession of certain immoveable properties valued at Rs. 1,666-1-10½, and also to recover certain documents and other moveable properties valued at Rs. 1,032-9-11, the total claim being laid at Rs. 2,698-11-9½. The report suggested that there were here two distinct subjects embraced in the suit, and that the court-fees in the appeal should be Rs. 190, *i.e.*, Rs. 110 for the claim relating to immoveable property, and Rs. 80 for the claim relating to documents and other moveables. But the plaintiff-appellant had only paid Rs. 160 in the lower Court and this Court, the deficiency being Rs. 30 in each or Rs. 60 in both Courts.

The question thus raised has been before a Full Bench in the case of *Chamaili Rani* v. *Ram Dai* (2), but as the law did not appear to us so distinctly laid down in the opinions of some of the Judges in that case as was desirable, it appeared to us that it would be satisfactory that the question should be reconsidered by the Court, and we therefore referred the matter to the present Full Bench.

On the general question of the construction to be applied to the case, I am not aware that I can express myself more clearly than I did in my judgment in *Chamaili Rani* v. *Ram Dai* (2). I there stated that "the meaning of the words 'distinct subjects' in S. 17 of Act VII of 1870 is shown with sufficient clearness in that section itself, when it states that 'the plaint or memorandam of appeal shall be chargeable with the

(1) The report of the taxing officer stated as follows:—"The plaintiff claimed to recover possession of certain immoveable properties, valued at Rs. 1,666-1-10½, as also to recover certain documents and other moveable properties valued at Rs. 1,032-9-11: total claim laid at Rs. 2,698-11-9½. The court-fee payable on the two distinct subjects embraced in the suit and the appeal would amount to Rs. 190, *i.e.*, Rs. 110 for the claim relating to the immoveable properties, and Rs. 80 for the claim relating to documents and other moveable properties, but the plaintiff-appellant has paid only Rs. 160 in both the Courts. There is then a deficiency of Rs. 30 in each or Rs. 60 in both the Courts."

(2) 1 A. 552.

aggregate amount of the fees to which *the plaints or memoranda of appeal in suits embracing separately each of such subjects* would be liable under the Act.' This I think can only mean that the two or more distinct subjects are to be so chargeable as being distinct causes of action. The words '*plaints* or memoranda of appeals in *suits*' in the section show this to my mind conclusively, and it is not enough that the distinct subjects should be merely separate and distinct matters embraced in the claim:" and I remain entirely of the same opinion. This S. 17 plainly relates to multifarious suits which are allowable by S. 45 of the Code of Procedure, Act X of 1877, a circumstance which appears to me to supply us at once with the principle by means [680] of which we may solve the difficulty, showing that "distinct subjects" must for the purpose of the Court Fees' Act be distinct and separate claims or causes of action in single and separate suits, but which for the purpose of jurisdiction, or the convenience of the procedure, may be united in one suit. And this is shown still more clearly in S. 17 itself, where "distinct subjects" are described as distinct subjects "in *suits* embracing *separately* each of *such* subjects," in other words, as I understand this section, even if we had not the light thrown upon the point by S. 9 of the old and by S. 45 of the new Code of Procedure, distinct and separate causes of action in distinct and separate suits.

In regard to the present case I am of opinion that the report of the Office is right. The plaint clearly claims, first, possession of the disputed property by voidance of the deed of gift, and, secondly, to recover certain moveable property or the price or value thereof. These are plainly two distinct subjects of suit or causes of action, and they must be separately considered with reference to the court-fees to be charged on each. I would, therefore, make an order in conformity with the report of the office.

STRAIGHT, J.—I entirely agree in the views and conclusions of the Chief Justice.

SPANKIE, J.—If there was any vagueness in the opinion expressed by me, when the subject of this reference was last before the Court, I desire to explain my meaning, and I hope more successfully on the present occasion, as follows. It was admitted at the hearing, and indeed, looking at the marginal note to S. 17 of the Court Fees' Act, it could not be denied, that the section refers to multifarious suits. The wording of S. 17 of the Court Fees' Act, "Where a suit embraces two or more distinct subjects," may be read with S. 45, Act X of 1877, which runs as follows—"Subject to the rules contained in S. 44 the plaintiff may unite in the same suit several causes of action, and any plaintiffs having causes of action against the same defendants may unite such causes of action in the same suit." Such a suit would embrace two or more distinct subjects. The second paragraph of this section corresponds with S. 9, Act VIII [681] of 1859, referred to in the second paragraph of S. 17 of the Court Fees' Act. The third paragraph of S. 45 provides that, "When causes of action are united, the jurisdiction of the Court as regards the *suit* shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit." This provision is of course made with a view to determine the jurisdiction of the Court to entertain the suit. But it is noticeable that "causes of action" and "subject-matters" are clearly distinguished in this section. I would, therefore, say regarding the two or more "distinct subjects of a suit," that they are the "subject-matters of a suit" in which several "causes of action" have been united, under the provisions of S. 45 subject to the rules contained in S. 44 of Act X of 1877, and, therefore, in such a suit the plaint or memorandum of appeal is chargeable with the

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aggregate amount of the fees to which each plaint or memorandum of appeal would be chargeable under the Act. The words, be it observed, are "would be liable," not "is liable," under the Act. There must, therefore, be several causes of action, and these several causes of action must be united in the same suit, and the subject-matters, "or two or more distinct subjects," of each cause of action united in the same suit, must be charged, as if each cause had not been so united in the same suit, but had been taken into Court by a separate plaint or memorandum of appeal.

OLDFIELD, J.—The words "multifarious suits" in the margin of S. 17, Court Fees' Act, and the reference in the last part of the section to S. 9. Act VIII of 1859, with which part of S. 45, Act X of 1877, corresponds, sufficiently show, in my opinion, that S. 17, Court Fees' Act, has reference to a suit which embraces two or more distinct subjects under separate causes of action, which might or ought to have been made subject of separate suits, in fact, when the suit is multifarious and the nature of those referred to in S. 9, Act VIII of 1859, and S. 45, Act X of 1877.

In this view, I am of opinion that the Court-fee should be levied in the suit before us, which is not of the nature of those to which S. 17 refers, on the total value of the claim, *i.e.*, Rs. 2,698-11-9½.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

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APPELLATE CIVIL.
2 A. 869.

OSTOCHE (*Plaintiff*) *v.* HARIDAS AND ANOTHER (*Defendants*).

[3rd May 1880.]

Declaratory decree—Consequential relief—Court-fees Act, S. 7, IV, Sch. II, No. 17, III.

Under the Court-fees Act, the valuation of the relief sought rests with the plaintiff, and not with the Court.

In a suit for a declaration of right to certain property and for the removal of an attachment of such property in execution of a decree, in which possession is not sought, the value of the relief claimed is not the market-value of the property. and as, in such a suit, the declaration of the right claimed necessarily carries with it the consequential relief sought, the value of such relief is merely nominal.

[**Appr.**, 32 C. 734 (739)=9 C.W.N. 690; **F.**, 17 B. 56 (60); **R.**, 11 C.W.N. 705 (709, 710)=6 C.L.J. 427.]

Abdul Rahman, the original plaintiff in this suit—instituted in the Court of the Subordinate Judge of Jaunpore—, stated in his plaint that he had purchased a certain house at a sale in execution of a decree against Sarah Mathews, that he was unable to obtain possession of it, as it was in the possession of a mortgagee, that the market-value of the house was Rs. 1,441 and that his cause of action was the proclamation of the house for sale in execution of a decree held by the defendant Hari Das against Sarah Mathews, and claimed a declaration of his proprietary right to the house "by setting aside the order of the 13th May, 1878, maintaining the attachment of the property" in execution of Hari Das's decree. He paid in respect of his plaint a Court-fee of Rs. 10, being the fee payable under No. 17, iii, Sch. ii of Act VII of 1870, in a suit to obtain a declaratory decree where no consequential relief is prayed. The purchaser was made

a defendant in the suit, the house having been put up for sale in execution of Hari Das's decree while the plaintiff's suit was pending. The defendants contended *inter alia*, that the plaintiff should have paid in respect of his plaint a Court-fee computed on the market-value of the house, which they alleged was not less than Rs. 3,500. On this point, the Subordinate Judge held as follows:—"I think the plaintiff has properly paid his fees according to No. 17, iii, Sch. ii of Act VII of 1870, as no consequential relief is asked: if the plaintiff proves his proprietary right, the attachment and sale in execution of defendant's decree will *ipso facto* be void and will be set aside by moving the Court in the execution department: this view is confirmed by the ruling in *Chunia* v. *Ram Dial* (1); in this case the sale took place after the institution of the suit and the plaintiff did not sue for its annulment: the market-value of the property may be assumed to be Rs. 2,000, at which the plaintiff had valued it in his objection filed under S. 278, C.P.C." Subsequent to the dismissal of the suit on its merits by the Subordinate Judge, the original plaintiff conveyed his rights and interests to one Ostoche who appealed to the District Judge, paying in respect of his memorandum of appeal, the same Court-fee as had been paid in respect of the plaint. The District Judge demanded from him within a fixed period an additional Court-fee of Rs. 200 in respect of the plaint and a similar additional fee in respect of his memorandum of appeal, and, on his failing to carry out the order, dismissed his appeal, the material portion of his decision being:—"The prayer in the plaint is for cancelment of a miscellaneous order bearing date May 13th, 1878, which in turn confirmed an order of attachment and brought to sale the property in suit, and for establishment of plaintiff's proprietary right. The plaintiff-appellant is the *locum tenens* of one Abdul Rahman, who says he purchased the property claimed from Mrs. S. Mathews on the 24th August, 1876. There is on the record a paper dated 13th May, 1878, in which it is set forth by the lower Court, and admitted by both parties, that Abdul Rahman himself admits that he had never up to that date obtained possession of this property, but that it was still in the possession of one Abdullah, a mortgagee of the aforesaid Mrs. S. Mathews. This fact is also set forth in the appellant's plaint before the lower Court. It follows, therefore, that appellant's prayer cannot be looked upon as a prayer for a mere declaratory decree: such a decree could only declare him to be the purchaser of Abdul Rahman's rights—rights which have never been reduced to possession, and for which he could not sue in this way, seeing that he was able to seek further relief and omitted to do so. The prayer for establishment of proprietary right must be looked upon as a prayer for a declaratory decree with consequential relief; this being the case, appellant was directed to file the deficient duty amounting to Rs. 400 on or before the 16th of this month: as he has failed to do so, his suit must stand dismissed, and the appeal also be dismissed with costs." The plaintiff preferred an appeal to the High Court.

JUDGMENT.

[872] PEARSON, J.—The lower appellate Court has dismissed the appeal preferred to it apparently on the ground that the appellant had not paid a sum of Rs. 400 demanded from him as court-fees due in respect of the consequential relief sought by him in the suit on the plaint and the memorandum of appeal, and has on the same ground also dismissed his claim which had been dismissed on the merits by the Court of first

(1) 1 A. 360.

1880 MAY 3. — APPELLATE CIVIL. — 2 A. 869.

instance. The lower appellate Court has assumed Rs. 3,500, the market-value of the property as alleged by the defendants, to be the value of the consequential relief sought, but the consequential relief sought was not the possession of the property, but the removal of an attachment from it.

The value of the relief sought should have been stated in the plaint. It is not stated therein; and the Court of first instance did not cause the defect to be supplied. The plaint states the value of the property to be Rs. 1,441, but that amount cannot be taken to be the value of the relief sought. Under the Court Fees Act, the valuation of the relief sought rests with the plaintiff and not with the Court. In this particular instance the declaration of the right claimed necessarily carried with it the consequential relief sought, of which the value was merely nominal. We accordingly set aside the lower appellate Court's decree and remand the case to it for fresh disposal on the merits. The costs of this appeal will follow the event.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie,

1880 MAY 4. — APPELLATE CIVIL. — 2 A. 872.

THAKURYA (*Defendant*) *v.* SHEO SINGH RAI AND ANOTHER (*Plaintiffs*).

[4th May 1880.]

1. *Suit for money due on accounts stated—Limitation Act, 1877, Sch. II, Art. 62—Limitation Act, 1877, S. 2—Title acquired under previous Limitation Act—Right of action.*

In a suit for money due on accounts stated when Act IX of 1871 was in force, it is not correct to say that the plaintiff's right to sue upon such accounts was a title acquired *under* Act IX of 1871, so as to save it from the operation of the repealing Act XV of 1877. A right of action is one thing and the completion of title is another thing. A right of action arises from the acts of parties, and the limitation law simply provides a period within which such right of action must be exercised. Such a suit is therefore governed by Act XV of 1877.

2. *Limitation Act, 1877, Sch. II, Art. 64—Suit on accounts not signed by defendant.*

Where the accounts are not signed by the defendant, Art. 64, Sch. II, does not apply, and the suit must be regarded as one for money lent.

[Not F., 23 A. 502 (503) = 21 A.W.N. 150; **Appr.**, 3 A. 148 (150) **(F.B.).]**

ORDER OF REMAND.

[873] STUART, C.J., and SPANKIE, J.—The plaintiff-respondent sued to recover a sum of money upon an account stated on the 14th December, 1874, between defendant and himself, which, however, was not signed by the defendant or his agent duly authorised in this behalf. The Subordinate Judge held that the claim was barred by Art. 64, Sch. ii of Act XV of 1877, the new law of limitation. It is not necessary to give his reasons, which indeed are not very clear: one item of Rs. 15, however, the Subordinate Judge thought might be in time under Art. 64. On the merits, however, he held that there had been no adjustment of accounts on the day named, and he appears to have discredited the plaintiff's claim altogether, including the item of Rs. 15 referred to above, and he dismissed the suit. The plaintiff in appeal to the Judge urged that Act IX of 1871 applied and not the more recent Act. The Judge, considering the bearing of S. 2, Act XV of 1877, of the words " nothing herein shall be deemed to

affect any title acquired under Act IX of 1871," held that plaintiff had acquired a right under that Act to sue on accounts stated within three years from the date upon which the accounts were stated, and also that Act XV of 1877 did not bar the claim. On the merits the defendant had contended that all his accounts with plaintiff had been settled and closed in 1927 Sambat. He had failed to establish this plea, producing no accounts of his **[874]** own, though on a former occasion he had relied upon his books in proof of money being due to him. On the other hand, the Judge, for reasons assigned by him, held the books produced by plaintiff and other evidence on his behalf to be entirely satisfactory in proof of the truth of the claim, which he decreed in full with costs, reversing the decree of the Subordinate Judge.

It is contended that the suit is certainly governed by the provisions of Act XV of 1877, that no balance in adjustment of account was proved, and that the reasons assigned by the Judge for accepting the plaintiff's accounts were insufficient. It appears to us that the Judge has misapprehended S. 2, Act XV of 1877. The words "title acquired, or to revive any right to sue barred under that Act, or under any enactment thereby repealed," do not affect the claim in the way suggested by the lower appellate Court: a right of action is one thing and the completion of a title is another thing. The plaintiff's right of action did not accrue by reason of Act IX of 1871, but because, according to his averment, on a certain day a sum of money was found to be due to him from the defendant on accounts stated between them. The limitation law simply provided a period within which the right of action must be exercised. The plaintiff acquired in this case no "title," to use the words of the Act, under Act IX of 1871, or any other Acts thereby repealed. Act XV of 1877 is certainly the law of limitation to be applied to the suit.

But the claim as brought upon an account stated is not covered by Art. 64, Act XV of 1877, inasmuch as the accounts though stated in writing are not signed by the defendant or his agent duly authorised in this behalf. The plaintiff, therefore, cannot claim the benefit of this article, and if the suit is to be entertained at all, the claim must be brought under some other article in Sch. ii, if the plaintiff desires to save limitation. The Judge has found in favour of the correctness of the plaintiff's accounts and the indebtedness of the defendant, and has, on the evidence, held that defendant did not settle and close accounts with plaintiff as contended in Sambat 1927. Assuming, then, that the plaintiff cannot avail himself of the limitation provided in Art. 64, Act XV of 1877, he may be regarded as suing merely for money lent to the defendant, and **[875]** it may be that some portion of the moneys lent may not be barred by limitation and therefore is claimable from the defendant, and under the Judge's view of the case any such sum would still be due. The Subordinate Judge has suggested that Rs. 15 are within the period of limitation, if Art. 64 does not apply to the claim, but this would not be sufficient to enable us to dispose of the appeal.

The Judge should ascertain and determine whether any and what sums included in the claim are within the period of limitation of three years from the dates of the loans of such sums, and return his finding on this issue. On receipt of the finding one week will be allowed for objections, and at the expiration thereof the appeal will be decided.

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APPEL-LATE CIVIL.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

SHEO PARTAB NARAIN SINGH (*Defendant*) *v.* SHEO GHOLAM SINGH (*Plaintiff*). [4th May 1880.]

2 A. 875.

2 A. 875.

1. *Appeal when presented—Memorandum of appeal insufficiently stamped—Limitation.*

For the purposes of limitation, an appeal is presented when the memorandum of appeal is presented to the proper officer of the Court, and not when, after being returned as insufficiently stamped, it is re-presented properly stamped.

[Cons., 12 A. 129 (145) **(F.B.)]**

2. *C.P.C., 1877, S. 54 (b).*

An appellate Court returning a memorandum of appeal as being insufficiently stamped, must fix a time within which the deficiency must be supplied.

[Cons., 12 A. 129 (145) **(F.B.).]**

[876] PEARSON, J.—The memorandum of appeal (1) to the lower appellate Court was presented on the 23rd June, 1879, admittedly within time. The lower appellate Court was therefore wrong in declaring, on the 18th July (2) following, that the appeal was not within time. The orders passed by the lower appellate Court on the 23rd June and 5th July in the matter of the deficiency of the court-fee were not in accordance with the provisions of S. 54 (*b*), Act X of 1877 (3). The Judge should have fixed a time within which the deficiency was to be paid up, and on the expiry of that period, in the event of its not beng paid up, should have rejected the appeal.

Having regard to the irregularity of the lower appellate Court's procedure, we must allow the appeal, and, reversing the Judge's order, direct him to place the appeal on his file and proceed to dispose of it according to law. We make no order as to costs.

FULL BENCH.

PRESENT:

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

FULL BENCH.

ISRI SINGH (*Defendant*) *v.* GANGA AND ANOTHER (*Plaintiffs*). [5th May 1880.]

2 A. 876.

2 A. 876.

1. *Wajib-ul-arz—Act XIX of 1873 (N.W.P. Land Revenue Act), Ss. 61, 65, 257.*

The wajib-ul-arz or administration paper forms part of the record-of-rights of a mahal, which is prepared under the provisions of S. 61 and following sections of the Land Revenue Act, and with reference to the provisions of S. 65 and the rules framed under S. 257, it is a public record, *inter alia*, of customs and rights affecting the share-holders of the mahal and including such as relate to pre-emption.

(1) by the defendant.
(2) the date of re-presentation.
(3) because no time was fixed for payment of deficiency of the Court-fee.

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FULL BENCH.

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2. *Pre-emption, varieties of.*

The right of pre-emption may be founded on Muhammadan law; or, as is more generally the case, where it affects the Hindus, on long-established custom having the force of law, or on special contract between the share-holders; and the *wajib-ul-arz* may record the practice of pre-emption as based on any of these grounds; and the entry may be evidence either of custom or of the contract.

3. Wajib-ul-arz, *evidentiary value of.*

A *wajib-ul-arz* prepared and attested in the form and manner prescribed by the Board of Revenue, is *prima facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom; and when it records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the entry, and, in consequence, were assenting parties to the contract of which it is evidence, and it will be for those repudiating the contract to rebut this presumption.

[F., 1 A.W.N. 114, 5 A.W.N. 189; Appr., 8 A. 434 (437), 12 A. 234 (257) (F.B.); R., 7 A. 720 (727), 21 A.W.N. 29, 25 A. 90 (96), 26 A. 549=1 A.L.J. 278.]

ORDER OF REFERENCE TO THE FULL BENCH.

[877] STUART, C. J.—This is a second appeal from the judgment of Mr. G. E. Knox, acting with powers as a Subordinate Judge in the district of Allahabad, in a suit in which the plaintiffs claim a right of pre-emption in preference to the vendee, Babu Isri Singh, defendant No. 5, who is a stranger. The clause in the *wajib-ul-arz* is paragraph twelve, and is in these terms.—"A sharer in the patti shall have a right to purchase at the time of sale and mortgage at the price offered by a stranger in preference to a sharer in another patti." This is certainly not very clear, and it is difficult to know what is meant by it unless we hold that "stranger" and "a sharer in another patti" are synonymous, which was probably intended, indeed, must have been intended, for otherwise the paragraph has no meaning. We may take it, then, that the paragraph means that a sharer in a patti shall have a right of pre-emption over a stranger vendee.

The Munsif found that the *wajib-ul-arz* had not been signed by the vendors, and that there was no evidence to show that they consented to be bound by its terms, and he, therefore, held that the *wajib-ul-arz* was not binding upon them or the defendant-vendee. In appeal to Mr. Knox, he found that the *wajib-ul-arz* in the case had been prepared in accordance with the rules prescribed by the Board of Revenue for the guidance of Settlement Officers under Act XIX of 1873, S. 257, and the conclusion he arrived at was, that although the *wajib-ul-arz* had not been signed by the vendors, the right of pre-emption had been "recognized" by the share-holders, and was binding on each one of the brotherhood. He therefore held that the vendors were bound to offer the share to the plaintiff **[878]** before disposing of it to a stranger. The Subordinate Judge therefore decreed the appeal to him, reversed the decree of the Munsif, and granted the plaintiff the right of pre-emption claimed.

In second appeal to this Court it is contended, as had been found by the Munsif, that the *wajib-ul-arz*, having not only not been signed, but not having been assented to by the vendors, the paragraph respecting the right of pre-emption was not binding on them.

The word "recognized" used by the Subordinate Judge is rather a loose term in a judicial finding, but taken in connection with the Subordinate Judge's decretal order, it must mean that the *wajib-ul-arz*, though not actually signed, had been assented to and accepted by the share-holders, and the question before us is whether such assent, without actual signature, is sufficient to hold all the sharers bound by the *wajib-ul-arz* generally,

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and in particular by the proviso respecting the right of pre-emption. It is also to be observed that the record-of-rights in the case appears to have been prepared under S. 62 of the Revenue Act, which provides, among other things, that the record shall contain a list of all the co-sharers; and by S. 90 of the same chapter of the Act it is provided that the Board shall, from time to time, prescribe the form in which the record is to be made up. The Board have, in fact, issued rules for the formation of the record-of-rights which is to consist of three statements, the third being the *wajib-ul-arz*, which is defined to be a record of village-customs. Such being the character of the record-of-rights in the case before us, it must be presumed that the condition of pre-emption in the *wajib-ul-arz* was known to the vendors, and it was not enough to contend that it was not binding on them and their vendee simply because the *wajib-ul-arz* was not signed by them, and that there was no other evidence to show that they had expressly consented to its terms.

I have carefully examined the rulings of this Court in pre-emption suits, and the following appear to be the principle of these :—In *Chowdhree Brij Lall* v. *Goor Suhai* (1) it was held that the *wajib-ul-arz* is to be regarded rather as an official record of usages or agreements than as a contract. In *Sheoumber Sahoo* v. *Bhowanee* **[879]** *Deen* (2) it was ruled that claims of pre-emption might be made both on contract and custom. In *Dabee Dutt* v. *Enait Ali* (3) it was laid down that a *wajib-ul-arz* is not a mere contract, but a record of rights made by a public officer, and it would, therefore, follow that without attestation or signature by the sharers the *wajib-ul-arz* was entitled to weight as evidence of custom. In *Chadami Lal* v. *Muhammad Bakhsh* (4), it appears to have been decided that the *wajib-ul-urz* is a special agreement, and that it excludes evidence of custom. This perhaps, as a general proposition, is a doubtful ruling, especially in regard to another definition which has been given of the *wajib-ul-arz*, that it is a record of custom, and it is so called in the Revenue Act, XIX of 1873. In *Maratib Ali* v. *Abdul Hakim* (5), it also appears to have been ruled, although not very clearly, that the *wajib-ul-arz*, must be held to exclude evidence of custom, but that depends on the terms of the *wajib-ul-arz*, and the nature and scope of the custom, the two might not be inconsistent. And there are numerous cases not reported, in which the decisions appear to have been hastily written on the paper-books, to the effect that the *wajib-ul-arz* was *prima facie* evidence of custom, and that to be binding on sharers it was not absolutely necessary to be signed by them, but by their silence showing acquiescence, they must be understood to have accepted or acquiesced in its terms.

No exception can be taken to the record-of-rights in the present case, seeing that it has been prepared according to the provisions of the Revenue Act, XIX of 1873, and the rule I deduce from the Revenue Act and the rulings I have referred to is, that the *wajib-ul-arz* is a public record-of-rights *prima facie* binding on all the co-sharers; that it is not binding on any sharer in the patti who has expressly repudiated it, but that it becomes a contract binding on all who may have signed it, or who may be taken by their acquiescence, express or implied, to have accepted its provisions.

Such is my understanding of the law on the subject, but I desire to refer the matter to the Full Bench of the Court with the following **[880]** questions :—(i) Is the *wajib-ul-arz* to be regarded as a public

(1) H. C. R., F. B., N.W. P., 1866-67, p. 128. (2) H. C. R., N.W. P. 1870, p. 223.
(3) H. C. R., N.W.P., 1870, p. 395. (4) 1 A. 563. (5) 1 A. 567.

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record-of-rights, *prima facie* binding on all the co-sharers, but which may be repudiated by any of the sharers on coming into the patti? (ii) Does the *wajib-ul-arz* become a contract when it is either expressly or by necessary implication or acquiescence assented to by the co-sharers?

STRAIGHT, J.—I fully concur in the reference to the Full Bench of the two questions propounded by the learned Chief Justice.

JUDGMENTS OF THE FULL BENCH.

STUART, C. J.—After hearing the argument addressed to us in Full Bench, I remain substantially of the opinion expressed in my referring order; but I desire now to add one or two observations. In the first place I have to express my regret that my statement of the case of *Chadami Lal* v. *Muhammad Bakhsh* (1) is not quite accurate and scarcely does justice to my colleagues, Pearson, J., and Oldfield, J., who decided it. I state that by their judgment "it appears to have been decided that the *wajib-ul-arz* is a special agreement and that it excludes evidence of custom," adding that "this perhaps, as a general proposition, is a doubtful ruling," and so it undoubtedly would be as a general proposition. But again looking into the report of the case I find that the suit was for pre-emption founded on a special agreement which the *wajib-ul-arz* in that case was considered to be, "and not," as the judgment states, "on any well-established custom apart from the contract made under the administration-paper." So that the case really lays down no general principle of law excepting perhaps this, that a *wajib-ul-arz* may be a contract or agreement complete in itself under which evidence of any contradictory custom would be excluded.

I have next to remark that, as S. 91 of the Revenue Act XIX of 1873 was suggested at the hearing as supplying an answer to the [881] first question in the order of reference, that section has not in my opinion such effect. It simply provides that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." But it does not necessarily follow that such entries are *prima facie* binding on the co-sharers. On the contrary, I believe that, according to the practice recognized by the Revenue Department of these Provinces, entries in the record-of-rights are not binding on those who have attested and signed it, but they may be contested and the parties allowed to prove that the record is wrong, unless the entries have been made by order of the Settlement Officer when they would appear to be considered *prima facie* binding.

In regard to the second question in the order of reference, I have been struck by a remark made by my colleague Mr. Justice Spankie that, if the *wajib-ul-arz* is to be looked upon as a contract, it might be required to be stamped, and he would prefer that entries of such a nature should rather be regarded as evidence of the agreement. I gladly adopt this view which, besides stating the law in very appropriate terms, has the merit of avoiding any infringement of the Stamp Act. With these modifications, I would answer both questions put to the Full Bench in the referring order in the affirmative, leaving any further expression of my views till the case which gave rise in the reference comes back to my colleague Straight, J, and myself as the referring Division Bench.

OLDFIELD, J.—The *wajib-ul-arz* or administration-paper forms part of the record-of-rights of a mahal which is prepared under the provisions of S. 61 and following sections of the Land Revenue Act, and with reference to the provisions of S. 65 and the rules framed under S. 257, it is a public

(1) 1 A. 563.

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record, *inter alia*, of customs and rights affecting the shareholders of the mahal and including such as relate to pre-emption. The right of pre-emption may be founded on the Muhammadan law, or, as is more generally the case, where it affects Hindus, on long established custom having the force of law, or on special contract between the share-holders, and the *wajib-ul-arz* may record the practice of pre-emption as based on any of these grounds, and the entry may be either evidence of custom or of the contract. The law (S. 90, Land Revenue Act) prescribes that the record-of-rights shall be drawn up in a form and attested in a manner to be [882] prescribed by the Board of Revenue, and S. 91 of the Act directs that "all entries in the record so made and attested shall be presumed to be true till the contrary is proved." Such being the legal presumption in favour of the truth of the entries in the record-of-rights, and considering the public character of the document and the publicity with which it is prepared, there can be no doubt, when it has been prepared and attested in the form and manner prescribed by the Board of Revenue, that the *wajib-ul-arz* becomes *prima facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom; and when it records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the entry, and in consequence were assenting parties to the contract of which it is evidence, and it will be for those repudiating the contract to rebut this presumption.

A case,—*Chadami Lal* v. *Muhammad Baksh* (1),—which was decided by Mr. Justice Pearson and me, has been noticed in the order of reference of the learned Chief Justice, and I wish to add, with reference to some remarks on the judgment in that case, that I do not find that we ruled "that the *wajib-ul-arz* is a special agreement and that it excludes evidence of custom." All we said was that the plaintiff in the case before us had brought his claim on the contract in the recent administration-paper and not on any well established custom, and we refused to allow him to shift the ground of his action, but we expressly observed that an entry of the right of pre-emption in a former administration-paper might be evidence towards proving a custom though it does not necessarily establish it.

PEARSON, J.—I concur in the remarks of my learned colleague Mr. Justice Oldfield on the questions referred to the Full Bench.

SPANKIE, J.—In reply to the first question I would say that S. 90 of Act XIX of 1873 authorises the Board of Revenue from time to time to prescribe the form in which the record to be made under the provisions of Chapter III of the Act shall be drawn up [883] and the manner in which it shall be attested. Accordingly, orders have been drawn out by the Board, and the *khewat* and the *wajib-ul-arz*, which form a portion of the record-of-rights, are to be attested by the Settlement or Assistant Settlement Officer in the presence of all the lambardars of each mahal or their authorised agents, and as far as possible of all other persons whom they may concern and shall be signed by the Settlement Officer or Assistant Settlement Officer and by all the lambardars and the patwari. When a document has been so attested, all the entries in the record shall be presumed to be true until the contrary is proved, as provided by S. 91. Such a record is *prima facie* binding on all the co-sharers, and cannot be repudiated by any one succeeding to or acquiring a share except as permitted by S. 91.

(1) 1 A. 563.

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FULL BENCH.
2 A. 876.

As to the second question, I would say that the *wajib-ul-arz* is a record of those arrangements made by the Settlement Officer in accordance with the provisions of S. 65, Cl. *(c)* of which includes in the record so formed any other matters which the Settlement Officer may be directed to record under rules framed under S. 257 of the Act, and the documents must be attested and drawn up as provided by S. 90; amongst other matters the Settlement Officer is required to record the custom relating to pre-emption in the village. The *wajib-ul-arz* then is a record of village-customs. But when it relates to pre-emption, it may record the custom existing in the mahal or the agreement which the share-holders have already made amongst themselves. I do not look upon it as the contract itself, for as such it might require to be stamped, but when it recites the fact of the existence of any agreement amongst the share-holders as to the condition under which pre-emption might be claimed, I would regard the entry as evidence of that agreement. In either case, the custom, if it exists, is binding upon the share-holders, or they are bound by an agreement which can be proved, and the nature of which has been recorded in the administration-paper for the guidance and information of all the share-holders, a document in which the truth of the entries is to be presumed until the contrary be shown.

STRAIGHT, J.—I agree with my honorable colleague Mr. Justice Spankie.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

1880
MAY 6.
APPELLATE CIVIL.
4 A. 180.

BANDA HASAN (*Defendant*) *v.* ABADI BEGAM (*Plaintiff*).

[6th May 1880.]

Lease of mortgaged property by usufructuary mortgagee to mortgagor—Hypothecation of same property as security for rent—Suit for rent in Revenue Court—Suit for enforcing of lien in Civil Court—C.P.C., 1877, S. 43.

Where a mortgagor to whom the mortgaged property has been leased by the mortgagee, hypothecates such property to the latter as security for the rent payable by him, the decision of the Revenue Courts in a suit for rent brought by the mortgagee would not bar a suit by him in the Civil Court for the enforcement of the hypothecation; for, in the suit for rent, the parties stand merely in the relation of landlord and tenant, and the enforcement of the lien could only be sought in the Civil Court.

[F., 4 A. 318 (320) = 2 A.W.N. 46.]

The usufructuary mortgagee of certain land, who gave a lease of it to the mortgagors, the latter hypothecating the land as security for the payment of the rent, sued the mortgagor for arrears of rent, in the Revenue Court and obtained a decree on 12—9—1876. Subsequently one Banda Hasan got a decree on 24—9—1878 for such land under a right of pre-emption. In a suit by the usufructuary mortgagee against Banda Hasan in the Civil Court for the recovery of the amount of Revenue Court's decree by the sale of such land, on both the lower Courts disallowing the contention of the defendants, that as plaintiff had omitted in her former suit to claim enforcement of her lien on such land, she was barred from claiming the same, by the provision of S. 43, Act X of 1877, the defendant preferred a second appeal to the High Court.

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MAY 6.
APPEL-LATE CIVIL.
4 A. 180.

JUDGMENT.

[181] STRAIGHT, J.—We desire to add, with regard to the contention urged before us on behalf of the appellant, that the present suit was excluded by S. 43 of Act X of 1877, or the analogous provision of Act VIII of 1859, that we are clearly of opinion such objection has no force. At the time of the suit in the Revenue Court the parties stood in the relation of landlord and tenant, and the arrears of rent were therefore properly sued for in the Revenue Court. [182] The present claim could only be made through the medium of the Civil Court, and the shape in which it is presented appears to us perfectly regular.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Straight.

1880
MAY 7.
APPEL-LATE CIVIL.
2 A. 884.

LACHMAN PRASAD (*Defendant*) *v.* BAHADUR SINGH AND OTHERS (*Plaintiffs*). [7th May 1880.]

2 A. 884.

1. *Second appeal—Objection raised at hearing—Cause of action—C.P.C., 1877, S. 542.*

Per PEARSON and STRAIGHT, JJ. SPANKIE, J., *dissenting.* The High Court can under S. 542 of the C.P.C., 1877, entertain and consider at the hearing of a second appeal, the question whether the plaintff has any cause of action to sue (this being a question of law), though such question has not been raised by the defendant either in the Courts below or in the memorandum of second appeal.

[R., U.B.R. Civil (1892—1896) 265 (266), 1 L.B.R. 184 (185).]

2. *Conditional sale—Pre-emption—Cause of action—Agreement for pre-emption subsequent to date of conditional sale.*

Per PEARSON and STRAIGHT, JJ. SPANKIE, J., *dissenting).* (*a*) The cause of action for a suit for pre-emption, for property the subject of a conditional sale, arises on the date of such conditional sale, and not when the sale becomes absolute.

(*b*) A clause in a *wajib-ul-arz* containing an agreement for pre-emption can refer only to future and not to past transactions. Therefore a claim for pre-emption, in the case of property transferred by a deed of conditional sale, is not maintainable when such claim is based on a *wajib-ul-arz* that came into existence subsequent to such conditional sale.

[R., 3 A. 610 (619) (F.B.), 14 C. 761 (767).]

On second appeal by the defendant to the High Court the learned Judges of the Division Bench differed in opinion on the point whether the question whether the plaintiffs had any cause of action or not could be considered on second appeal, such question not having been raised by the defendant in the Courts below or in his memorandum of second appeal, but having been raised at the hearing of such appeal; and on the point whether the plaintiffs had any cause of action or not.

JUDGMENTS OF THE DIVISION BENCH.

[885] PEARSON, J.—But the material point for determination in my opinion is whether a valid cause and right of action accrued to Jagraj Singh on the 13th February, 1875, and that question I am free and competent to consider under S. 542 of the Procedure Code. I observe that the sale of Umeda Singh's share to the defendant did not take place on that date. His share had been sold conditionally, it is true, so long before as the 3rd of May, 1867. What happened on the 13th February, 1875, was merely that the sale became absolute. No fresh transfer was made, but

the character of the transferee's possession was modified by the operation of the terms on which the original transfer had been made. The transaction commenced on the earlier and came to an end on the latter date. No new transaction was effected on the latter. The clause **[886]** in the *wajib-ul-arz* dated 6th February, 1873, must, I conceive, be held to refer to future not to past transactions. Umeda Singh did not sell his share after the date of the *waijb-ul-arz*, but only failed to redeem it from mortgage. He was not when the year of grace was expiring in a position to offer the property to Jagraj Singh. He could not have empowered Jagra Singh to redeem it as his substitute. At the time of conditional sale it is not shown that any right of pre-emption was possessed by the proprietors of mauza Tikarbhan. I conclude, therefore, that the present suit is unmaintainable, and I would decree the appeal without costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

SPANKIE, J.—I regret that I cannot agree with Mr. Justice Pearson in the latter part of his judgment. The objection taken by my honorable colleague is not one taken by appellant in the Court below, nor indeed in this Court. I admit that under S. 542 the Court is not confined to the grounds set forth in the memorandum of appeal. But the chapter in which the section is found refers to appeals from original decrees. I am aware that S. 587 of Act X of 1877 provides that the provisions of Chapter XII should apply as far as may be to appeals from appellate decrees. But the words "as far as may be" are of importance, and they should be considered with reference to S. 584, Cls. (*a*), (*b*) and (*c*). On no other grounds than those allowed by the section does a second appeal lie. The objection on which my honorable colleague relies was not, as we have seen, raised below, and I doubt whether we can now set aside the Judge's decision solely upon the objection taken by my colleague. I certainly think it was for the appellant to urge that there was no valid cause and right of action on the grounds taken by my honorable colleague, and it was not for the Court to make the objection in second appeal. But, however this may be, I go further, and would say that there was no sale without power of redemption until the foreclosure had been completed, and defendant had obtained a decree for possession as owner. Until these conditions had been fulfilled the transaction was one of mortgage and a power of redemption remained. After these conditions had been fulfilled and rendered valid by decree of Court, the transaction once partaking of **[887]** a double character became a single one, and an absolute sale and possession was given under the sale-deed. On this the plaintiff's cause of action arose, and under the terms of the administration-paper, he was at liberty to bring or continue this suit.

I would remand the appeal to enable the Judge to determine the amount of the sale-consideration on payment of which the plaintiffs would be entitled to obtain the property in suit and to fix a period within which that amount should be paid. When the lower appellate Court returns the finding on this point, one week may be allowed for objection, and on its expiration I would dispose of the appeal.

FINAL JUDGMENT.

STRAIGHT, J.—This appeal has been referred to me by order of the learned Chief Justice under S. 575 of the Civil Procedure Code, in consequence of a difference of opinion on points of law between Pearson, J., and Spankie, J., composing the Division Bench before whom the case originally came.

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APPELLATE CIVIL.

2 A. 884.

The two questions properly arising out of this reference appear to be as follows :—(i) Was it competent for Pearson, J, to dispose of the appeal on a point of law not taken in the Courts below nor raised by the appellant's pleas ? (ii) If it was competent for him so to do, has he held rightly in decreeing the appeal, on the ground that no cause of action ever accrued to the plaintiffs-respondents, upon which they were entitled to maintain a suit for pre-emption ?

Upon the first of these two points I think it was competent for Pearson, J., to entertain the objection that the suit could not be sustained, in the absence of any cause of action having arisen to the plaintiffs, even though such objection had not been taken in the lower Courts, and was not urged in the grounds of appeal. It is argued for the appellant that both in his original statement of defence and in the second of his pleas to this Court he substantially, if not specifically, called the plaintiff's title to sue in question. But whether this be so or not, I **[888]** think that the terms of S. 542 of the Civil Procedure Code, so far as they are applicable to second appeals, allow the appellate Court a discretion, of which Pearson, J., was in my opinion fully justified in availing himself. The point upon which his judgment is based is purely one of law, and it arises directly upon the facts which are admitted and about which there can be no contradiction or controversy. Many cases might occur in which a careless and unreflecting use of S. 542 would cause hardship and injustice, but in the present instance the objection is simply a legal one, aiming directly at the status of the plaintiff to come into Court at all. Such an objection it seems impossible for the Court to avoid taking cognizance of in special appeal, even though it be raised for the first time at the hearing, any more than it could disregard a new point as to limitation or want of jurisdiction.

The second question for my consideration is not without difficulty, though the equities are clearly in favour of the view taken by Pearson, J. The mortgage or conditional sale-deed of the 3rd May, 1867, executed by Umeda Singh to the defendant-appellant, Lachman Prasad, for Rs. 700, charges his two-anna share in mauza Tikarbhan for three years on condition that the principal sum and interest shall be paid "within the said term, on the last day of the said term : if I fail to do so and do not get the mortgaged property freed from the mortgage, this mortgage-deed shall be considered as a conditional sale-deed and the mortgage-money a consideration therefor, and the mortgagee shall take proprietary possession of the property." From this it will be seen that the Rs. 700 with interest was to be repaid on or before the 3rd May, 1870, and then, if the mortgagor made default, the mortgagee was competent at once to take foreclosure proceedings to convert the conditional sale into an absolute one. No doubt Umeda Singh remained in possession until he was ousted by Lachman Prasad under process of law, and till the final order in the foreclosure proceedings was passed he still had his equity of redemption, but all this same time Lachman Prasad had his equitable rights and interests over the property pledged with him as security, and after the three years had expired and default had been made by the borrower, the only alternative open to Umeda Singh **[889]** was to pay the money within one year from the date of receiving notice of foreclosure, otherwise Lachman Prasad's proprietary title would by efflux of time become completely established. At the time Umeda Singh signed the *wajib-ul-arz* he could not put the land, in which Lachman Prasad was jointly interested with him, under disabilities and conditions, so to speak, of which the mortgagee had neither notice nor

knowledge, nor could he make any contract which could have the retrospective effect of rendering an agreement he had already entered into incapable of fulfilment, in that other persons were to have a priority of right to purchase over the head of his conditional vendee. Whether the plaintiffs lay their cause of action as having arisen on the 13th February, 1875, when the foreclosure proceedings became final, or on the 26th September, 1875, when the defendant-appellant obtained possession, can make no difference. Umeda Singh had "no share" to offer for sale, pursuant to the terms of the *wajib-ul-arz*, and he was not in a position to fulfil its conditions, for all that remained to him till the 13th February, 1875, was his equity of redemption, which then became irretrievably lost. There was in effect no sale on that date in respect of which the plaintiffs could set up a right of pre-emption; all that took place was that the conditional vendee by operation of law became an absolute proprietor.

I am, therefore, of opinion that the view of Pearson, J., is correct upon both points referred to me, and I concur in his order that the appeal should be decreed and the decision of the first Court restored without costs.

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APPELLATE CIVIL.

PRESENT :

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

1880 MAY 7. — APPELLATE CIVIL. — 2 A. 889.

MEHDI HUSAIN (*Plaintiff*) *v.* MADAR BAKSH AND OTHERS (*Defendants*).

[7th May 1880].

Plaint insufficiently stamped—Failure to supply deficiency—Dismissal of suit—C.P.C., 1877, S. 578.

The fact that a plaintiff has paid too small a Court-fee on his plaint, and that he, as respondent, failed or refused to supply the deficiency when called upon to do so, is only an error or irregularity which does not affect the merits of the case, (S. 578 of the C.P.C.), and does not justify the Appellate Court in dismissing his suit without going into the merits.

JUDGMENT.

[890] STUART, C. J. and OLDFIELD, J.—In this case the Munsif decreed the claim, but his judgment was reversed by the Judge (1), not on the merits, but because the plaintiff had paid a court-fee too small for the suit, Rs. 35 instead of Rs. 45. In this view he may or may not be right, but clearly the objection is not one affecting the merits of **[891]** the case, and therefore as provided by S. 578, Act X of 1877, he ought not to have made the order he did reversing the decision of the Munsif. We must, therefore, set aside the Judge's order and direct him to try the appeal that was taken to his Court on the merits. Costs to abide the result.

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(1) The decision of the lower appellate Court was in the following terms :—"Full fees have not been paid in this suit, and the appeal is decreed and the suit is dismissed in consequence of the plaintiff-respondent's refusal to make good the value of the fees. The suit is for a declaratory decree and consequential relief and falls under S. 7, Cl. iv, letter *c*, Act VII of 1870. In this section it is declared that the amount of fee payable in such a case shall be computed according to the amount at which the consequential relief sought is valued. Now the value of the suit is stated in the petition of plaint to be Rs. 600, and in the table of rates of *ad valorem* fees leviable on institution of suits of the Act, Rs. 45 is given as the fee chargeable. The plaintiff has paid Rs. 35 only: this finding of the Court is explained to the plaintiff in Court through his vakil, and payment of the balance being refused, this Court cannot but throw his case out. The appeal is decreed with costs and interest. The lower Court's decision in reversed, the suit being dismissed."

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APPEL-LATE CIVIL.

3 A.W.N. 7.

APPELLATE CIVIL.

PRESENT :

Straight and Mr. Justice Oldfield.

AHMADUDDIN KHAN *v.* SHEORAJ SINGH. [11th May 1880.]

3 A.W.N. 7.

C.P.C., S. 311—Execution sale—Persons competent to set aside sale.

Under S. 311, C.P.C., the persons who can prefer objections are the decree-holder and any person whose immoveable property has been sold. A stranger is not entitled to come in under that section to set aside a sale.

JUDGMENT.

[8] STRAIGHT and OLDFIELD, JJ.—Under S. 311 the persons who can prefer objections are the decree-holder and any person whose immoveable property has been sold. The appellant was not one of such persons, he was a stranger, and no immoveable property of his was sold. What was sold was the rights and interests of other persons. He was therefore not in a position to object under S. 311, and the Subordinate Judge had no jurisdiction to entertain his objection and should have similarly rejected it. Under the circumstances it is sufficient to dismiss this appeal.

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APPEL-LATE CIVIL.

2 A. 891.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

NASIR HUSAIN (*Defendant*) *v.* MATA PRASAD AND ANOTHER (*Plaintiffs*). [13th May 1880.]

2 A. 891.

Voluntary alienation by debtor—Good faith—Fraud against creditor.

(*a*) Where a debtor makes a gift to his son, out of natural love and affection, and to secure a provision for him and his descendants, and such gift has taken effect, and the donor has reserved sufficient property for the discharge of his debts, the mere fact, that the property so reserved is beyond the jurisdiction of the Court which made the decree in favour of his creditor, and that the property gifted away is within such jurisdiction, is no ground for such creditor to claim to set aside the gift as fraudulent and as not having been made in good faith, and to proceed against such property.

(*b*) "Mere indebtment would not *per se* establish that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors." (Story's Equity Jurisprudence, 11th Ed., Vol. I, S. 365).

[R., 10 B. 395 (397), U.B.R. Civil (1892—1896), 315 (317).]

ORDER OF REMAND.

[891] OLDFIELD, J. (SPANKIE, J., concurring)—It appears that Zulfikar Husain executed a deed of gift dated 14th December, 1872, by **[892]** which he bestowed a large portion of his property on his son Nasir Husain. The plaintiff held at the time of gift a decree against him dated 21st November, 1867, and the debt which was unsecured amounted at the time of institution of the suit to Rs. 4,838-15-0; and he seeks in this suit to have it

declared that the deed of gift was fraudulent, that certain house-property and a garden, part of the property conveyed by it, is the property of Zulfikar Husain and is liable to be sold in satisfaction of his decree. Nasir Husain, appellant, before us, pleaded that the deed was *bona fide* and valid, and that his father still possesses ample property sufficient to satisfy the debt, which he reserved from the operation of the gift; that the suit is barred by limitation; and that the decree sought to be satisfied is also barred by limitation. The first Court decided that there was no valid objection on the ground of limitation taken, and that the gift was valid, being on good consideration and *bona fide*, and the executant had at the time reserved to himself shares in twenty-five villages with an income of Rs. 200 a month. The Judge has reversed this decree; he remarks that Zulfikar Husain "transferred by deed of gift the bulk of his property lying in many districts including Cawnpore to his son for no consideration, but merely as it is orally alleged, because of his own reckless expenditure in charitable acts, charging his son with the redemption of the mortgages existing on a considerable portion of the said property, and reserving to himself for maintenance the income of some twenty-five villages, more or less, in the district of Sarun. The debts secured by mortgages are mentioned in the deed of gift but unsecured debts are not alluded to, nor is the house property in Cawnpore which appellant now seeks to attach and sell in satisfaction of his decree covered by any mortgage, nor is there mention made in the deed of any reservation of property by the donor for his own purposes. If the gift be looked on as a *bona fide* valid alienation, the creditor who has not been prudent enough to secure his debt by collateral security must, regardless of the distance or expense attending the effort, proceed to Sarun in Bengal to satisfy his decree from such property as his debtor may possess in that district; he may or may not find it already incumbered in a manner he did not expect. There is no authentic indication on the record of any property being reserved by the judgment-debtor to himself. It is true that respondents offer to prove it but such proceeding is unnecessary: the law protects judgment-creditors as well as their **[893]** debtors from the consequence of a fraudulent act or from that which although not exactly a fraud cannot be held to be done in good faith towards all creditors. Ordinarily the law would not presume bad faith if a judgment-debtor, when alienating a portion of his property, leaves the means to his creditors of recovering their dues from his other assets. A creditor has the power to attach his debtor's property both before and after decree, and on failure to do so he has no lien on any particular portion of the property for the discharge of his claim more than the rest; but at the same time where, as in the present case, the unincumbered property is alleged to be some hundred miles beyond the jurisdiction of the Court executing the decree, and the decree could have been satisfied from unincumbered property lying within the jurisdiction of the Court, it is neither fair nor equitable to the creditor to require him to do that which his debtor acting in good faith should have done for him, or by accepting as valid the post-decretal transfer of the property to subject him to the possibility of finding himself shut out from relief by other lien-holders' preferential claims on the residue of the property;" and the Judge concludes by not finding the alienation to be made in good faith. The Judge then seems to find that there was no good consideration for the gift and that it was not *bona fide*. But his judgment shows he has arrived at these conclusions through an inaccurate view of the law on the subject of voluntary conveyances. He holds that the conveyance, if made from a motive to provide for the son

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and to protect him from the consequence of the father's habit of careless expenditure in charitable purposes, cannot be held to be on good consideration, and in finding that it was fraudulent, he has rejected as quite immaterial the explanation that at the time of the gift Zulfikar Husain reserved to himself ample property to satisfy existing creditors, and has clearly been guided in his decision by the consideration that it was not only the duty of the debtor to reserve sufficient property to meet his creditors' demands, but to reserve property within the jurisdiction in which his creditors might reside or in which they might hold decrees against him; and the Judge appears even to think that a creditor who holds a decree at the time his debtor makes a voluntary conveyance of his property can claim to have it set aside, if it does not reserve property to [894] meet his decree within the jurisdiction of the Court that gave the decree.

Voluntary conveyances of property liable to be taken in execution for payment of debts must be shown to be made on good consideration and to be *bona fide*, in order that they may be protected against the claims of creditors who hold claims at the time the conveyances were made; and there will be a presumption that voluntary conveyances are not *bona fide* in respect of debts that existed at the time, but this presumption will be rebutted when the circumstances of the indebtment and the conveyances repel fraud. The law may be taken to be as given in Story's Equity Jurisprudence, 11th Ed., vol. i, S. 365,—" Mere indebtment would not *per se* establish that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors. In the latest English case, touching this subject, it was unequivocally held that a voluntary deed, made in consideration of love and affection, is not necessarily void as against the creditors of the grantor, upon the common law, or the statute of Elizabeth, but that it must be shown from the actual circumstances, that the deed was fraudulent, and necessarily tended to delay or defeat creditors."

In the case before us the deed gives the reasons for the conveyance as follows: " I have no other male child, and through him I expect to perpetuate my name and lineage, and also because he has ever been very dear to me, and since his attaining discretion up to this day has been devoted to my service and to please me and never acted contrary to my will, I put the donee in full proprietary possession, &c.; " and all rights of creditors secured by the mortgages of the said property are specially reserved by the deed.

If it be as stated that Zulfikar Husain, knowing himself to be a man of expensive habits, and out of affection for his son and in order to secure a provision for him and his descendants, made the gift in question, it cannot be said to have been made otherwise than on good consideration, and if the gift was made *bona fide* [895] and had operation, there is no reason why it should not be valid; and it is clearly a most material circumstance for judging of the *bona fide* character of the conveyance to determine what property Zulfikar Husain reserved to himself, and whether it was sufficient to satisfy all debts existing at the time of the conveyance for which no other provision had been made, and the Judge has attached too much importance to the fact that no property was reserved within the jurisdiction of the Court that gave plaintiff's decree, since there could be no difficulty in reaching other property, the law providing for such cases.

I would remand the case in order that the Judge should re-try the

issue of the *bona fide* character of the conveyance, after more fully ascertaining the circumstances of the conveyance and of the indebtment of Zulfikar Husain at the time he made it, and allow ten days for objections to the finding after its submission.

1880 MAY 13. — APPELLATE CIVIL. — 2 A. 891.

JUDGMENT.

OLDFIELD, J. (PEARSON, J., concurring).—We have now before us the Judge's finding on the issue remitted, and there can be no question that the deed did not operate by conveyance of the property or that it was not made on a perfectly good consideration, and there is nothing to show that, when the deed of gift was executed, the defendant had not reserved to himself ample property sufficient to meet all existing claims of creditors; indeed, it has been found that he is now in possession of seventeen villages and has property abundantly sufficient to satisfy the present claim.

Under such circumstances it is impossible to accept the Judge's finding that the gift was not *bona fide*, but that it was in fraud of creditors, or to permit plaintiff to have it set aside and to allow him to proceed against the property it conveyed for the satisfaction of his debt. The Judge's reason for still holding the gift to be not *bona fide* is the same which we held to be irrelevant in our order of remand, *viz.*, that by the gift of the property it refers to, the plaintiff has been deprived of the power of proceeding against property in his **[896]** own neighbourhood for satisfaction of the debt. This consideration is too insignificant to stamp the gift with fraud. We decree the appeal and reverse the decree of the lower appellate Court and restore that of the first Court and dismiss the suit with all costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Oldfield.

1880 MAY 13. — APPELLATE CIVIL. — 2 A. 896.

RAM BARAN RAM (*Plaintiff*) *v.* SALIG RAM SINGH (*Defendant*).

[13th May 1880.]

2 A. 896.

Landlord and tenant—Right to trees standing on land—Act XVIII of 1873 (N.W.P. Rent Act), S. 42 (a).

(*a*) Whatever rights a tenant has to standing trees can be exercised only during his tenancy. At the termination of the tenancy the trees pass to the landlord, being on accession to the soil; and the tenant cannot remove them, as he would be a trespasser. A purchaser of the tenant's rights after eviction can have no better rights.

(*b*) The only rights reserved to an ejected tenant are to the growing crops or other ungathered products of the earth belonging to him and growing on the land at the time of his ejectment, and the right to use the land for the purpose of tending and gathering in such crops or other products, paying adequate rent therefor. (Rent Act, S. 42-*a*.)

[F., 2 O.C. 281 (283); **R.**, 8 A. 467 (472), 10 A. 159 (161), 22 C. 742 (750) and 1 O.C. 231 (248).]

JUDGMENT.

[897] OLDFIELD, J.—The law may be stated to be that trees accede to the soil and pass to the landlord with the land, and unless the tenant

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2 A. 896.

uses, during the term of his tenancy, his privilege, where he has it, to remove the trees, he cannot do so afterwards; he would then be deemed a trespasser.

In this case the tenant had been ejected by his landlord in execution of a Revenue Court decree for arrears of rent from the land on which the trees stand, forming part of his tenant-holding; his tenancy then terminated and with it all right in the trees or power of dealing with them. The plaintiff bought the tenant's rights and interests after his eviction and cannot maintain this suit for possession of the trees.

We cannot allow the contention of the plaintiff's pleader that a tenant in this country has any right in trees standing on the land of his holding as something distinct from and independent of the tenant-right by which he holds the land, so that eviction from the land will not affect his right in the trees. It is difficult to see how he could after eviction assert any such right without being deemed a trespasser. No such right to trees is reserved by the Rent Act to an ejected tenant, the only right reserved are by S. 42-*a* to the growing crops or other ungathered products of the earth belonging to the tenant, and growing on the land at the time of his ejectment, and the right to use the land for the purpose of tending and gathering in such crops or other products paying adequate rent therefor. The appeal is dismissed with costs.

APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

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2 A. 898.

GANRAJ DUBEY (*Defendant*) *v.* SHEOZORE SINGH (*Plaintiff*).

[13th May 1880.]

2 A. 898.

Hindu Law—Joint family—Assent of co-parcener to alienation.

Neither a co-parcener, who makes an alienation to a stranger, nor the stranger who thus enters into the co-parcenary, can object to similar alienations by other members, on the ground that they were made without his consent. (1 A. 429, *F.*)

[R., A.W.N. (1908), 200.]

Sheozore Singh—, who obtained possession of a one-third share of certain lands belonging to one Kishen, by virtue of a usufructuary mortgage created in his favour by Kishen's widow Makhtola, as mother and guardian of his minor sons, having been dispossessed of the same by Ganraj a mortgagee from Kishen's brother Kalahal of his one-third share as well as of Kalahal's one-third share—, brought a suit against Makhtola, in her own name, and as guardian of Kishen's minor sons, and against Kalahal and Ganraj, for possession of Kishen's share. On Ganraj contending that the mortgage to the plaintiff was invalid as Makhtola was not the lawful wife of Kishen and on Kalahal contending that he and his brother Kishen and a third brother owned and held the land jointly in equal one-third shares, both the lower Courts decreed in plaintiff's favour, although neither of them determined whether Kishen's estate was separate and divided property or not. Whereupon Ganraj preferred an appeal to the High Court, contending *inter alia* that the mortgage to the plaintiff by Makhtola without the co-sharer Kalahal's consent was invalid.

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2 A. 898.

[899] PEARSON, J.—The plea which constitutes the second ground of the appeal was not taken in the Court of first instance. There it is true Kalahal pleaded that Kishen's estate was not a separate one, but not that the mortgage made by his widow and sons was invalid because it had been made without his consent; and Ganraj pleaded that it was invalid because she was not a lawful wife and his children were illegitimate. The plea now set up is here for the first time set up, not by Kalahal, who alone might under other circumstances, *i.e.*, if he had not by his own act incapacitated himself, have been competent to urge it, but by Ganraj, a stranger to the family, in whose mouth it does not lie,—*Ballabh Das* v. *Sundar Das* (1). The second ground of appeal is consequently disallowed. The appeal is dismissed with costs.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

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FULL BENCH.

REFERENCE BY BOARD OF REVENUE, N.W.P., UNDER ACT I OF 1879.
[19th May 1880.]

2 A. 664.

1. *Instrument of partition—Stamp Act (I of 1879), S. 3, Cl. 11.*

The words, "the final order," in S. 3, Cl. 11 of the Stamp Act, mean not the order passed by a Revenue Court authorizing a partition to proceed, but the order passed after the partition has been made, declaring the various allotments of land.

2. *Ibid—Stamp-duty—Stamp Act, 1879, Sch. I, No. 37.*

The stamp-duty leviable on an instrument of partition should be calculated upon the value of the entire property sought to be divided, and not merely on the value of the portion assigned to the applicant for partition.

3. *Value of property partitioned, how computed.*

The value of the property partitioned must be computed, for the purposes of the Stamp Act, with reference to its market-value, and not according to the rules laid down in the Court-fees Act for determining the fee payable on plaints and appeals.

REFERENCE BY THE BOARD OF REVENUE, NORTH-WESTERN PROVINCES, UNDER S. 46 OF ACT I OF 1879.

[664] "The new Stamp Act requires that partitions effected by the Revenue Courts shall be liable to stamp duty, and Cl. (11) of S. 3 defines an 'instrument of partition' as 'the final order for effecting a partition passed by any Revenue Authority.' The question has been raised whether this 'final order' is the order passed by a Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land. The Board think that the latter is unquestionably 'the final order' referred to. The import of this order is defined in the 21st rule of the Board's rules for partitions (Circular No. $\frac{8}{11\text{-}34}$, dated the 13th November, 1875, page 63, Part II of Board's Circulars (2).

(1) 1 A. 429.

(2) See p. 668.

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"The question is also raised as to the extent of the property specified in the instrument of partition. Sch. I, No. 37, directs that the duty on an instrument of partition shall be 'the same duty as a bond for the amount of the value of the property divided as set forth in such instrument.' The instrument of partition sets forth that out of such property previously undivided a certain portion is assigned to *A* the applicant for partition. Is the entire property to be valued for the purposes of the Stamp Act, or merely the portion assigned to the applicant for partition? The Board **[665]** think that the stamp-duty should be computed on the whole of the undivided property which the parties seek to divide, and which is mentioned for this purpose in the partition instrument.

"There remains the further point as to how the *value* of the property is to be computed, as it has been thought that the method of valuation laid down by Cl. v. of S. 7 of the Court Fees Act for the case of land should be followed. The Board consider that the provisions of the Court Fees Act cannot apply to valuations of stamp-duty under the General Stamp Act. The value of property for the purposes of the latter Act is the market-value, *i.e.*, what the property would fetch if sold, and this must be ascertained by the Court issuing the final orders in the partition proceeding."

JUDGMENT.

STUART, C. J.—I concur in the view taken by the Board of Revenue on all the questions submitted to us by this reference. I would point out, however, that it is scarcely correct to describe an instrument of partition as "the final order for effecting a partition passed by any Revenue Authority." By S. 3, Cl. (11), an instrument of partition is defined to be "any instrument whereby co-owners of any property divide or agree to divide such property severally, and *includes also* a final order for effecting a partition passed by any Revenue Authority." So that there must be in the first place the recorded act of partition or division by the co-owners or their agreement or contract to make it, and the "final order" which follows is simply the *fiat* of the Revenue Authority sanctioning the partition by means of which the partition becomes a completed act, and there can of course be no effectual partition until this is done. And such must also be taken to be the meaning of S. 131 of the Revenue Act XIX of 1873, which provides that "every partition shall either be made by the Collector of the district, or, if made by an Assistant Collector, be reported to the Collector of the district for his sanction and confirmation," a provision which, if taken by itself, without reference or relation to any other enactment, would seem to signify that partition of **[666]** property rested exclusively on the independent action of the Collector without any necessary regard to the views or purposes of the co-owners.

As to the question submitted to us in the third paragraph of the Board's letter, I am clear that the Board is right in suggesting that the stamp-duty shoud be computed on the *whole* of the undivided property which the parties seek to divide, and in my opinion no matter how far or within what limits that division may be carried out. Our attention was directed to S. 29 of the new Stamp Act, which provides that the stamp-duty on an instrument of partition shall be payable "by the parties thereto in proportion to their respective shares in the property comprised therein," and it was argued that the portion of property divided off to the particular co-sharer or co-sharers who apply for partition should only be chargeable with stamp-duty corresponding in value to the particular share or shares partitioned. But this view of S. 29 appears to me to be based upon too narrow a construction of its terms. That section does not say

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that the stamp-duty shall only be payable on the share or shares partitioned off, but on the contrary declares that the expense of providing the proper stamp shall be borne by the parties thereto in proportion to their respective shares in the property comprised in the instrument of partition. By the expression "the parties thereto" must be understood not merely the party or parties applying for partition, but the whole co-sharers who must necessarily be parties in the partition proceedings and equally bear the proper stamp-duty. For, the effect of the partition proceedings is that the property thereby loses its identity as a previously undivided mahal, and there is nothing unreasonable in making any instrument of partition, it matters not how limited the division may be, chargeable with stamp-duty pertaining to the value of the whole.

In further support of this view the stamp-duty chargeable on an instrument of partition as given in No. 37, Sch. i of the new Stamp Act was referred to. The duty is there declared to be "the same duty as a bond (No. 13) for the amount of the value of the *property divided* as set forth in such instrument." Here the words "the value of the property divided" must as I have shewn mean **[667]** the value of the entire property affected by the partition proceedings. And on turning to No. 13 of the same schedule the stamp-duty of two annas and upwards according to the value is distinctly set out.

In regard to the last question referred to us, I am clearly of opinion in concurrence with the Board that the value of the property to be computed is the market-value, and that the Court Fees Act has no application to such a question.

PEARSON, J.—The first question proposed for our consideration is whether the order passed by a Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land, is the final order for effecting a partition spoken of in Cl. (11), S. 3, Act I of 1879. An order authorising a partition to proceed is in some sense an order for effecting a partition, but the order which declares the various allotments of the land is in my opinion the final order which effects the partition.

The next question is the extent of the property specified in the instrument of partition. That instrument sets forth that of such and such property previously undivided a certain portion is assigned to *A* the applicant for partition. We are asked whether the entire property is to be valued for the purposes of the Stamp Act or merely the portion assigned to the applicant for partition. In my opinion the entire property has been the subject-matter of partition, and the stamp-duty required by No. 37, Sch. i, Act I of 1879, should be calculated upon its value and not merely on the value of the portion assigned to the applicant for partition. The portion assigned to the applicant could only be separated and allotted to him in severalty by a process which dealt with the entire property and separated and allotted the remainder of it to another party. The opinion now expressed appears to be supported by the terms of Cl. *e*, S. 29 of the Act, which provide that the stamp-duty shall be payable in the case of an instrument of partition, not by the applicant for partition, but by the parties thereto,—and the other co-sharers in the entire undivided property must be parties to the partition of it equally with the applicant for partition—in **[668]** proportion to their respective shares in the property comprised therein, and it cannot be denied that the partition comprises the entire undivided property.

The last question is how the value of the property is to be computed, whether in reference to its actual value in the market, or to the rules laid

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down in the Court Fees Act for determining the fee payable on plaints and appeals. The Court Fees Act has no relevance to the present matter, and in my opinion the market value of the property, the subject-matter of partition, should furnish the basis for calculating the stamp-duty required by No. 37, Sch. i, Act I of 1879.

Thus on the questions referred by the Board of Revenue, I have arrived at the same conclusion as the Board has formed.

SPANKIE, J.—Looking at the first question, the "final order for effecting a partition passed by any Revenue Authority" appears to be that which would be made under S. 131, Act XIX of 1873. I find no place in the Act for the agreement referred to in the 21st paragraph (1) of the Board's Circular. The notification published by the Collector under S. 131 of the Act would probably contain all the particulars referred in the Board's letter.

As to the second question, looking at the definition of "instrument of partition" in Cl. (11), S. 3 of Act I of 1879, it would seem that it is "any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also the final order for effecting a partition by any Revenue Authority." By S. 29 of the Act, in the absence of an agreement to the contrary, in the case of an instrument of partition, the expense of providing the proper stamp is to be borne by the parties thereto in proportion to their respective shares in the property comprised therein, or when the partition is made in execution of an order passed by the Revenue Authority in such proportion as such Authority directs. The property comprised in the instrument of partition **[669]** has to be valued, and the parties thereto contribute towards the expense of the stamp in proportion to their shares in the property. If a stamp of one hundred rupees was required, and the property was worth ten thousand rupees, and five share-holders, being co-owners, *divided* or *agreed* to divide in severalty, the proportionate value of their shares would be two thousand rupees each, and each one would pay the duty on two thousand rupees, unless there was an agreement to the contrary, or where a Revenue Authority had directed otherwise in a partition made under his orders. The last part of Cl. *c*, S. 29 of the Act, gives the revenue officer full authority in the matter and the "final order" is the instrument of partition.

As to the third question the value is doubtless the market-value.

OLDFIELD, J.—I agree with the Board of Revenue that the order which declares the various allotments of the land requires the stamp. The stamp should be paid on the value of the whole property which by the instrument of partition the co-owners are dividing or agreeing to divide: so far as I understand this is the view taken by the Board.

I also agree with the Board that the stamp should be computed on the market-value of the property.

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(1) Rule 21.—"If all agree to the proposals or to such amended proposals as the Collector may think fit to make, their agreement shall be recorded and attested by the Collector. If any objections are raised, the Collector shall hear them and record an order overruling them, or amending the proposals to meet them as he thinks fit."

APPELLATE CIVIL.

PRESENT:

Mr. Justice Oldfield and Mr. Justice Straight.

CHANDRA SEN (*Defendant*) *v.* GANGA RAM AND ANOTHER (*Plaintiffs*). [21st May 1880.]

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APPELLATE CIVIL.

2 A. 899.

2 A. 899.

Hindu law—Joint family property—Personal decree against father—Sale of father's rights and interests in execution—Son's rights.

Where in execution of a personal decree for money against the father in a joint Hindu family, his rights and interests in the joint property are only sold, the purchaser cannot take possession of the whole property. If he does take possession, the sons would be entitled to recover their shares. (5 C. 184, *D.*)

JUDGMENT.

[901] OLDFIELD, J.—The plaintiffs are two minor sons of one Gopal: the latter misappropriated some jewels which were pledged to him by one Ram Kinkar, who brought a suit against him for damages and obtained a decree, and in its execution caused his judgment-debtor's rights and interests in a joint ancestral house to be sold and appellant became the purchaser. Plaintiffs sue to recover their shares of the house. Both Courts have decreed the claim, and we consider that the appeal fails.

The law is that, when joint ancestral property has passed out of the joint family under a sale in execution for a father's debts, his sons by reason of their duty to pay his debts cannot recover the property, unless they show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted and a purchaser at an execution-sale being a stranger to the suit, if he has not notice that the debts were contracted for immoral purposes, is not bound to make inquiries beyond what appears on the face of the proceedings—*Suraj Bunsi Koer* v. *Sheo Prasad Singh* (1).

In the case before us the debt is not one which the sons were in duty bound to pay, but it may be that, had the property passed out of the family under the sale in execution of the decree, they could not recover it from the appellant, who is an auction-purchaser and a stranger to the suit; but an examination of the suit and decree and execution-proceedings shows that no more than the right, title, and interest of the judgment-debtor in the property **[902]** passed under the execution-sale. The claim was not for a joint family debt, but a personal claim against Gopal, who was alone represented in the suit, and the decree was against him personally for a money-claim, and it was only his right, title, and interest that was put up for sale and bought by the appellant. I would dismiss the appeal with costs.

STRAIGHT, J.—I concur in the judgment of my honorable colleague entirely on the ground that the decree was purely a personal one against Gopal, and that all that was put up and brought to sale was his right, title, and interest. The appeal should be dismissed with costs.

(1) 5 C. 148.

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FULL BENCH.

2 A.W.N. 82.

FULL BENCH.

PRESENT:

Sir Robert Stuart, Kt., C.J., Mr. Justice Pearson, Mr. Justice Straight and Mr. Justice Oldfield.

MISR DEO KISHEN *v.* MAHESHAR SAHAI. [25th May 1880.]

2 A.W.N. 82.

C.P.C., 1877, S. 561—Notice of objection by respondents—Limitation.

The notice of objections referred to in S. 561, C.P.C., must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties.

REFERENCE TO THE FULL BENCH.

The question referred to the Full Bench in this case was, whether the law requires that the notice of objections referred to in S. 561 of the Civil Procedure Code should be filed not less than seven days before the date first fixed for the hearing in the summonses issued to the parties, or seven days before the date on which the first hearing of the case actually comes on.

JUDGMENT.

[82] STUART, C.J., and PEARSON, STRAIGHT and OLDFIELD, JJ.—The day fixed for the hearing of an appeal is that fixed under S. 552, Act X of 1877, and that alone. The hearing of the appeal may be adjourned to another day, but the latter is not in the language of the law the day fixed for the hearing of the appeal, which is only the day originally fixed for that purpose. In Ss. 555, 556 and 557, the day originally fixed for the hearing is plainly and carefully distinguished from any other day to which the hearing may be adjourned. S. 561 requires a respondent to file any objection he may wish to take to a decree which is the subject of an appeal, not less than seven days before the day fixed for the hearing of the appeal. The words "the day fixed for the hearing" in S. 561 correspond with the words "the day so fixed" in Ss. 555, 556 and 557, and refer to the day fixed for the hearing under S. 552 of the Code.

No doubt a day to which the hearing of an appeal has been adjourned is also a day fixed for the hearing: but in the law, as has been pointed out, "the day to which the hearing has been adjourned" is distinguished from "the day fixed for hearing" and cannot be included in the latter expression.

Some appeals may be heard on the day fixed for the hearing. In others, the hearing may be once, or twice, or thrice, or more frequently adjourned. That some respondents should only have one opportunity of filing objections, and that others should have two or three, or more numerous opportunities of so doing, and that the number of their opportunities should depend upon the accidents which prevent a Court from hearing an appeal on the day originally fixed for the hearing, or on the days to which the hearing may have been adjourned, is a proposition which does not recommend itself to approval. A fixed and not a variable time within which objections may be filed is what the law may reasonably be understood to have established.

APPELLATE CIVIL.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

CHIMMAN SINGH (*Plaintiff*) v. SUBRAM KUAR AND OTHERS (*Defendants*). [26th May 1880.]

2 A. 902.

Act XL of 1858, S. 18—Mortgage by certificate-holder without sanction of Court—Indian Contract Act, S. 23.

A mortgage of the immoveable property of a minor, executed by a person holding a certificate for the administration of the estate of such minor, under Act XL of 1858, without the sanction of the Civil Court previously obtained, is void under S. 23 of the Indian Contract Act, even though the mortgage-money may have been advanced for the discharge of ancestral debts and to save ancestral property from sale in execution of a decree.

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JUDGMENT.

[902] STUART, C.J., and OLDFIELD, J.:—The widows of Thamman Singh and guardians of his son the plaintiff, and of another son, Sirdar Singh, since deceased, executed on 19th July, 1870, three deeds of mortgage of property left by Thamman Singh in favour of the defendants or persons now represented by defendants. The sons of Thamman Singh were **[903]** minors, and the widows had obtained a certificate under Act, XL of 1858 in respect of the minors' estates. The plaintiff has brought this suit on attaining majority to set aside these deeds on the ground of their illegality and to recover possession of property conveyed by two of them. The deeds are (i) mortgage of 10 biswas in Dharanpur, (ii) mortgage of 10 biswas in Beharipur, (iii) mortgage of 35 biswas 4 biswansis of resumed muafi land in Dharanpur; and a ground taken by the plaintiff in the Court below was that the widows had no power to make the mortgages without the sanction of the Civil Court. The defence is that the money was advanced by defendants on the mortgages to satisfy ancestral debts and to save from sale in execution of decree the ancestral property which had been attached and put up for sale. The Court below has held that the ground urged by the plaintiff was not one on which the deeds could be set aside, and has found this defence to be good in respect of the first and second deeds, but not in respect of the third, and the Court decreed the claim only in respect of the third deed. There are separate appeals preferred by both parties.

The plaintiff has again urged in appeal that the deeds are invalid with reference to the provisions of Act, XL of 1858, and this plea is good and disposes of both appeals. The deeds of mortgage were executed by persons holding a certificate under Act, XL of 1858, without the sanction of the Civil Court previously obtained, and the contracts so made are void with reference to section 23, Indian Contract Act, since their object is of such a nature that if permitted it would defeat the provisions of S. 18, Act, XL of 1858, which enacts that no person taking a certificate under the Act shall have power to sell, mortgage, &c., without the order of the Civil Court previously obtained. The following cases in point may be referred to:—S. A. No. 180 of 1870, decided the 25th March, 1870 (1); S. A. No. 1078 in 1878, decided the 17th April, 1879 (2); *Surat Chander Chatterjee* v. *Ashootosh Chatterjee* (3); *Dabee Dut Shahoo* v. *Subodra Bibi* (4). The appeal on the part of the plaintiff is decreed with costs, and that on the part of defendants is dismissed with costs.

(1) Unreported. (2) Unreported. (3) 24 W.R. 46. (4) 25 W.R. 449.

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APPEL-LATE CIVIL.

2 A. 904.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Oldfield.

KARMAN BIBI AND OTHERS (*Petitioners*) *v.* MISRI LAL (*Plaintiff*).

[27th May 1880.]

2 A. 904.

Addition of parties—C.P.C., 1877, Ss. 32, 588—Act XII of 1879, S. 90 (2).

Under S. 588 of the C.P.C., 1877, as amended by Act XII of 1879, orders under S. 32 striking out or adding the name of any person as plaintiff or defendant are appealable; but an order refusing an application by a person to be made a defendant is not appealable.

[F., 21 C. 539 (541), 12 C.P.L.R. 41 (52).]

JUDGMENT.

[904] PEARSON, J.—Under S. 588, Act X of 1877, as amended by Act XII of 1879, orders under S. 32 striking out or adding the name of any person as plaintiff or defendant are appealable; but the order which is the subject of the present appeal is not an order of the kind above mentioned. It is an order refusing to make the appellants defendants in the suit; and there is no provision in the law for an appeal from such an order. The appeal is therefore disallowed with costs.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Oldfield and Mr. Justice Straight.

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HARI SINGH (*Defendant*) *v.* BALDEO SINGH AND ANOTHER (*Plaintiffs*).

[27th May 1880.]

2 A. 905.

APPEL-LATE CIVIL.

Haq-i-chaharum based on contract—Suit of Small Cause nature—Second appeal.

A suit by a zamindar for haq-i-chaharum or one-fourth of the price of trees cut down by tenants is, when based upon a *razinama* or agreement, one of a nature cognizable by a Small Cause Court, and consequently, when the amount claimed in such a suit is below five hundred rupees, there can be no second appeal. (Principle of 1 A. 444, *F.*).

2 A. 905.

Suit by the plaintiffs, the zamindars of the land on which the trees were situated, against the defendant, the occupancy tenant of such land for one-fourth of the price of the trees cut out by him, based on a *razinama* dated 10th August, 1871.

JUDGMENT.

[906] STRAIGHT, J.—The lower appellate Court has found that the *razinama* was duly and properly executed; in other words, that the defendant agreed in writing to allow the plaintiffs "*haq-i-chaharum.*" The suit was therefore for money due upon a contract and of a nature cognizable by a Small Cause Court. Accordingly no second appeal lay to this Court, and the preliminary objection taken by the respondent's pleader must prevail. Our attention was called at the hearing to the case of *Nanku* v. *The Board of Revenue* (1), but the view we are now taking is in no way inconsistent with, on the contrary is entirely in accordance to, the principle laid down in that case by the Court at large. The appeal is not entertainable and must be dismissed with costs.

(1) 1 A. 444.

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APPELLATE CIVIL.

PRESENT:

Mr. Justice Pearson and Mr. Justice Straight.

CHANDIKA SINGH AND ANOTHER (*Defendants*) *v.* POHKAR SINGH (*Plaintiff*). [31st May 1880.]

APPELLATE CIVIL.

2 A. 906.

2 A. 906.

Joint mortgage—Foreclosure as to portion.

Where a mortgage is clearly a joint one, and the whole property mortgaged is made liable for the whole debt, without any specification that a particular portion of the property is liable for a particular portion of the debt, the mortgagee cannot claim to foreclose a portion of the mortgage against some of the mortgagors, exempting the rest. Such a foreclosure proceeding is irregular, and a suit for possession based on it is not maintainable.

[**Diss.**, 28 A. 174 (179) (**F.B.**) = 2 A.L.J. 630 = A.W.N. (1905), 244 ; **R.**, 3 C.P.L.R. 3 (5), 3 O.C. 8 (11) (**F.B.**) ; **D.**, 15 B. 186 (189), 5 A. 257 (258) = 3 A.W.N. 10.]

JUDGMENT.

[907] STRAIGHT, J.—This is a suit for possession of a one pie share of mauza Rai, pargana Ghatanpur, upon the basis of a mortgage dated the 2nd July, 1869, and a foreclosure proceeding of the 23rd May, 1878. Both the lower Courts decreed the claim and the defendants now appeal. The short facts are that the appellants with one Shankar Singh executed a conditional sale-deed to the plaintiff-respondent on the 2nd July, 1869, for a period of 4 years, of their one and one-half pie share of mauza Rai for an advance of Rs. 125. Sometime afterwards Shankar Singh paid Rs. 62 principal and interest to date, as representing one-third of the mortgage amount due, and the mortgagee-respondent accepted it as such and endorsed the receipt on the deed. The appellants failed to pay the balance then remaining and foreclosure proceedings were taken against them alone, Shankar Singh and his half-pie share being exempted. The usual notice was given, and when the required twelve months' grace had elapsed, the proceeding was recorded on the 23rd May, 1878, upon which the present suit was instituted. The appellants contend that as the mortgage was joint and the share of Shankar Singh was equally liable with their own for the joint debt, that the foreclosure proceedings were irregular in that he was not made a party, and that the present suit is not maintainable.

We are of opinion that this plea must prevail. The mortgage was clearly a joint one, and there is no specification in it that any individual share or portion of a share is identified to and charged with the re-payment of any defined proportion of the money advanced. The liability of the mortgagors was mutual and indivisible in that their property, as a whole, was made responsible for the debt. We therefore do not think it was competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be **[908]** calculated as his reasonable share of the joint indebtedness and to release his share from further liability. Such payment could only properly be treated as made for the whole of the mortgagors and ought to have been carried to the credit of all of them in reduction of the principal sum jointly due. Consequently the plaintiff-respondent was not justified in exempting the half-pie share of Shankar Singh from the foreclosure proceedings and in directing his claim against the property of the appellants alone. The present suit cannot under the circumstances be entertained. The appeal is decreed with costs.

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APPEL-LATE CIVIL.

2 A. 908.

APPELLATE CIVIL.

PRESENT :

Mr. Justice Pearson and Mr. Justice Straight.

AKBARI BEGAM AND OTHERS (*Defendants*) *v.* WILAYAT ALI (*Plaintiff*).

[31st May 1880.]

2 A. 908.

Remand—Objections to finding—Appellate Court, powers of—C.P.C., 1877, Ss. 566, 567, 578—Error or irregularity.

(*a*) Even in the absence of objections from the parties, the Court is not bound to accept the finding blindly, without examining the evidence on which it was founded and satisfying itself that it was correct and fit to be accepted.

(*b*) Even assuming that an appellate Court acts irregularly in not accepting the findings returned by the lower Court on remand the irregularity is one which does not affect either the merits of the case or the jurisdiction of the Court, and is cured by S. 578 of the C.P.C.

[F., 6 A. 383 (384)=4 A.W.N. 127, 6 A. 391 (392)=4 A.W.N. 129.]

On appeal from the dismissal by the first Court of a suit wherein the plaintiff claimed a right of way over land belonging to the defendants, the lower appellate Court remanded the case to the Court of first instance for the trial of certain issues, fixing a period of one week for objections to the finding of the Court of first instance. But the lower appellate Court subsequently refused to accept the finding of the Court of first instance which was adverse to the plaintiff's claim though no memorandum of objection was filed by the plaintiff, and gave the plaintiff a decree. The defendants preferred an appeal to the High Court.

JUDGMENT.

[909] PEARSON, J.—The main contention of the learned counsel for the appellants was outside the grounds of the appeal. He contended that the lower appellate Court was bound to accept the finding returned to it by the Court of first instance under S. 566, Act X of 1877, because no objections thereto were presented in the form of a memorandum within the time allowed, and was not free or competent to decide the case in a manner inconsistent with and opposed to such finding. In support of his contention he referred us to a decision of a Bench of this Court (Morgan, C. J., and Pearson, J.), dated 29th June, 1866 (1). In the case then decided it was pleaded in appeal that, "no objection having been raised on the part of the respondent against the Munsif's decision, under S. 354, it was improper to award a decree for fourteen bighas and six biswansis of the resumed muafi land"; and the plea was allowed, and that portion of the Munsif's judgment which had not been objected to was restored. But the question as to the meaning and intention of the terms of S. 354, Act VIII of 1859, and S. 567, Act X of 1877, has since 1866 been not unfrequently considered, and the ruling of 1866 has not been followed A Full Bench decision—*Ratan Singh* **[910]** v. *Wazir* (2)—held that, when a memorandum of objections had not been presented by a party, he might with the permission of the Court urge them orally at the hearing. In the case now before us it may be that the Subordinate Judge allowed objections to the Munsif's finding on remand to be taken orally. But, even if no objection to it was preferred in writing or orally, we are not of opinion that the lower appellate Court's duty was to accept it blindly, without examining the evidence on which it was founded and satisfying itself that it was correct and fit to be accepted.

(1) H.C.R., N.W.P., 186, p. 50.

(2) 1 A. 165.

No doubt an appellate Court would hesitate to set aside such a finding in the absence of objections, and would deem it proper to record its reasons at length for coming to a contrary conclusion. In the present case the Subordinate Judge has fully stated the grounds on which he differs from the Munsif, and makes it clear that he has given a close and intelligent attention to the points in issue and the evidence relating to them. It is impossible to hold that his action has contravened the terms of S. 567 of the Code, which merely direct that "after the expiration of the period fixed for presenting such memorandum, the appellate Court shall proceed to determine the appeal." But even had we been of opinion that the lower appellate Court's action in the matter was irregular, we should be precluded from reversing its decree or remanding the case on account of the irregularity which is not of a nature affecting the merits of the case or the jurisdiction of the Court.

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CRIMINAL JURISDICTION.

PRESENT :

Mr. Justice Oldfield.

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CRIMINAL JURISDICTION.
2 A. 910.

EMPRESS OF INDIA *v.* ILAHI BAKHSH. [31st May 1880.]

2 A. 910.

Crim. Pro. Code, 1872, Chap. XV—Enquiry by Magistrate of case triable by Court of Sessions—Annulling conviction—Commitment on same evidence.

Where, on appeal, the Sessions Judge annulled the conviction and sentence passed upon a person charged with an offence exclusively triable by a Court of Session, the subsequent committal of the accused to the Sessions was not vitiated, because the Magistrate committed him on the evidence given before him at the trial, inasmuch as the mere conviction and sentence were set aside and not the proceedings held at the trial.

Ilahi Bakhsh was convicted on 28—1—1880 by a Magistrate of the first class, of the offence of preferring a false charge of robbery. On appeal, the Court of Session annulled the conviction and sentence on the grounds that the Magistrate was not competent to try an offence committed against his own office or person, and that the offence with which Ilahi Bakhsh was charged was one exclusively triable by the Court of Session. The Magistrate without further inquiry committed Ilahi Bakhsh for trial to the Court of Session, stating in his committing order that the grounds of committal were set forth in his decision of the 28th January, 1880.

The Sessions Judge was of opinion that the commitment was illegal and should be quashed, his reasons were as follows : "The decision alluded to is that given in the trial concluded on the 28th January, which trial the Sessions Judge had on 3rd April quashed, as being irregular and held by a Magistrate who was not competent to hold it. If it were otherwise regular, this order of the Sessions Judge would deprive the evidence taken in the trial of Ilahi Bakhsh held in January of any value, but it appears to me to be opposed to the provisions of Chapter XV of the Criminal Procedure Code, that a Magistrate should commit an accused person on evidence which has not been taken for the purposes of the commitment, but for the purpose of holding a trial, more specially as that trial was itself illegal. It appears to me that none of the provisions of Chapter XV have been observed in the inquiry into this case, and I do not consider

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myself at liberty to go on with a trial thus commenced or pass a sentence either of acquittal or conviction. Any sentence passed would be of doubtful legality."

CRIMINAL JURISDICTION.

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ORDER.

[912] OLDFIELD, J.—The commitment is not vitiated because the Joint Magistrate did not commence a fresh inquiry and take evidence *de novo*. The inquiry and the evidence at the trial are sufficient for the purposes of commitment. The proceedings held at the trial were not set aside by the Judge, whose order only set aside the conviction and sentence of the accused, and though those proceedings could not form the basis of a conviction by the Magistrate, there is no reason why a commitment by the same Magistrate should not be based on them. In the analogous case when in the course of a trial the Magistrate finds that he must commit the accused to the Sessions Court, S. 221 of the Criminal Procedure Code directs that he "shall stop further proceedings under this Chapter (*i.e.*, Chapter XVII, for trial of warrant cases) and shall commit the prisoner under the provisions hereinbefore contained," that is, under the provisions contained in Chapter XV. This direction does not mean that the Magistrate is to commence the inquiry and take the evidence *de novo*, since his procedure under Chapter XVII in the matter of examination of the complainant and witnesses has been conducted under Ss. 190 to 194 of Chapter XV (see S. 214), but only that the further procedure necessary for commitment shall be taken as directed in Chapter XV. Moreover, trial is not vitiated by mere irregularity in the proceedings up to trial. The Judge should proceed with the trial.

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Act XXXV of 1858 (Lunacy, Courts).

S. 9—Act XIX of 1873 (N. W. P. Land Revenue Act), S. 195—Lunatic—Court of Wards.—Act XXXV of 1858 declares that, when a person possessing a certain kind of property is adjudged to be of unsound mind and incapable of managing his affairs, the Court of Wards "shall be authorized to take charge of the estate," and that, in all other cases, the Civil Court shall appoint a manager of the estate. The Act, therefore, does not render it imperative on the Court of Wards to take charge of the estate, but merely confers on the Court of Wards authority to do so. Similarly, S. 195 of the N.W.P. Land Revenue Act declares the Court of Wards competent in its discretion to assume or refrain from assuming the superintendency of the person or property of any disqualified person pronounced by a District Judge to be of unsound mind. Till the Court of Wards exercises its power, it is competent for the Civil Court to appoint a manager of the lunatic's property. MANOHAR LAL v. GAURI SHANKAR, 1 A. 476=2 Ind. Jur. 354 ... 375

Act XL of 1858 (Minors).

S. 18—Mortgage by certificate-holder without sanction of Court—Indian Contract Act, S. 23.—A mortgage of the immoveable property of a minor, executed by a person holding a certificate for the administration of the estate of such minor, under Act XL of 1858, without the sanction of the Civil Court previously obtained, is void under S. 23 of the Indian Contract Act, even though the mortgage-money may have been advanced for the discharge of ancestral debts and to save ancestral property from sale in execution of a decree. CHIMMAN SINGH v. SUBRAM KUAR AND OTHERS, 2 A. 902 ... 1125

***Act X of 1859* (*Bengal Rent*).**

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Ss. 3 and 4—Act XVIII of 1873, Ss. 5 and 6—Rent in kind (Bhaoli)—Tenant at a fixed rate.—Though the quantity or value of the rent in kind delivered by a tenant may vary every year, according to the quantity of the produce, still, if it bears a fixed proportion to the total produce, it is fixed rent, and the tenant is a tenant at a fixed rate.

If, in a suit for enhancement of rent, the tenant proves that for twenty years before suit, he has been paying rent in kind at a fixed rate, he will be entitled to the presumption of law declared in S. 4, Act X of 1859 (S. 6, Act XVIII of 1873), and may demand a pottah at that rate, and the rent cannot be enhanced. HANUMAN PARSHAD v. KAULESAR PANDEY, 1 A. 301 ... 119

***Act XV of 1859* (*Patents*).**

Ss. 23 & 34—Suit for infringement of patent—Measure of damages—Ascertainment of damages before decree.—In a suit for damages for infringement of a patent, the measure of damages, where the plaintiff has been in the habit of licensing other persons to use his patent at a fixed royalty, would be the loss of such royalty sustained by him from the date of infringement.

When, in a suit for damages for infringement of a patent, the defendant pleads want of novelty, but omits to mention, in his statement, the places where the invention was publicly used prior to the date of plaintiff's petition for leave to file the specification, he cannot adduce evidence that the invention was publicly used in such places. The plaintiff is not bound, in such a case, to call upon the defendant, before trial, to supply particulars as to such places, nor can the plaintiff's omission to do so give the defendant the right to adduce such evidence.

Meaning of the words "publicly or actually used" in S. 23, Act XV of 1859, discussed by Spankie, J.

When, in such a case, the Court decides that the plaintiff is entitled to damages, it must assess the same in the first instance, so that they may become part of the decree, and must not leave them to be ascertained at the time of the execution. SHEEN AND ANOTHER v. JOHNSON, 2 A. 368. 745

***Act XXVII of 1860* (*Collections of debts on succession*).**

(1) *Certificate to collect debts—Power to borrow or charge estate of deceased person.*—Where a person, to whom a certificate has been granted under Act XXVII of 1860 to collect debts due to a deceased person, is not his heir and has no share or interest in his estate, he is not competent to contract debts even for the purpose of paying debts for which the estate may have been liable, still less to create a charge or lien on the estate. And moneys advanced to the holder of the certificate, on such charge, cannot be claimed from the heirs and the estate of the deceased, even though they may have been applied to the liquidation of his debts. MUNIA AND OTHERS v. BALAK RAM, 2 A. 513 ... 896

(2) *Ss. 5 and 6—Certificate for collection of debts—Security—Appeal.*—No appeal lies to the High Court against the order of the District Judge, requiring security from the person to whom he has granted a certificate to collect debts under Act XXVII of 1860. *Semble.*—A review of the order may be admissible. IN THE MATTER OF THE PETITION OF RUKMIN AND ANOTHER, 1 A. 287 ... 244

(3) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 686.

Act XLIII of 1860.

See APPEAL (SPECIAL APPEAL), 2 A. 112.

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***Act IX of 1861* (*Minors*).**

Ss. 1 and 6—Guardian—Fresh application.—The refusal of a previous application for the guardianship of a minor, under S. 1, Act IX of 1861, does not preclude a Court from entertaining a subsequent application for the same purpose. NEHALO v. NAWAL, 1 A. 428=2 Ind. Jur. 146 ... 311

***Act XVII of 1862* (*Repealing enactments relating to Criminal Law*).**

Ss. 1, 2, 4—General Clauses Act (I of 1868), S. 6.—Penal Code—Offence committed prior to 1st January, 1862.—A person could not be convicted of an offence committed prior to the 1st January, 1862, under Act XVII of 1862, because that Act was a repealing Act and not an Act providing for the punishment of such offences. But it is another question whether persons who have committed offences pior to 1st January, 1862, are not amenable to punishment under the Regulations. To the several repealing Acts, passed since the General Clauses Act came into operation, the provisions of S. 6 of the General Clauses Act apply, and the repeal of a Regulation subsequently to the passing of the Act does not relieve offenders from the penalties to which they were liable under the Regulations.

It is a more difficult question whether the right of reference given by S. 3 of Reg. IV of 1797 remains after the repeal of Act XVII of 1862, if that right had not accrued before the Act was repealed, and the conviction had not taken place till after the repeal of the Act. EMPRESS OF INDIA v. MULUA, 1 A. 599=2 Ind. Jur. 723 ... 460

***Act II of 1863* (*Privy Council Appeals Act*).**

Construction—Talukdar under Act I of 1869 (The Oudh Estates Act).—The words "Court of highest civil jurisdiction in any Province" in Act II of 1863, have reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases; and a Subordinate Court under the Oudh Civil Courts Act (XXXII of 1871) cannot admit an appeal to the Privy Council even where its decision is final.

A person, who has been registered as a talukdar under Act I of 1869 and has thereby acquired a talukdary right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised in the taluk for another and be liable to account accordingly. THAKOOR HURDEO BUX v. THAKOOR JAWAHIR SINGH, 3 C. 522=3 Suth. P.C.J. 427=3 Saraswati's P.C.J. 704 ... 329

***Act XIX of 1863* (*Partition of revenue paying estate*).**

Ss. 8 and 9—See RES JUDICATA, 2 A. 294.

***Act VI of 1864* (*Whipping*).**

Ss. 2, 3—Sentence of whipping—Previous conviction—Penal Code, Ss. 378, 411—Crim. Pro. Code, 1872, Ss. 504, 505—Security for good behaviour on conviction.—*Held*, that, on conviction for dishonestly receiving stolen property, the accused could not be sentenced to be whipped in addition to rigorous imprisonment, on the ground that he had been twice previously convicted of theft, as the offence of theft is not the same as that of dishonestly receiving stolen property.

Where a person was sentenced to a period of imprisonment for having dishonestly received stolen property, and also ordered to furnish security for good behaviour, *held* that the order requiring security should not have formed part of the sentence. There should have been a proceeding drawn out representing that the Magistrate was satisfied, from the evidence as to the general character adduced before him, that the accused before him was by repute an offender within the terms of S. 505, Crim. Pro. Code, and

***Act VI of 1864* (*Whipping*)—(*Concluded*).**

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therefore security would be required of him. An order also should have been recorded to the effect that, on the expiration of imprisonment, the prisoner should be brought up for the purpose of being bound over. EMPRESS OF INDIA v. PARTAB, 1 A. 666 ... 513

***Act XI of 1865* (*Mofussil Small Cause Courts*).**

(1) S. 6—See CONTRACT ACT, 2 A. 671.

(2) *Ss. 45, 51—Investiture of Small Cause Court Judges with Subordinate Judge's powers—Legality—Liability of surety.*—Although the occasional investiture of Small Cause Court Judges, by name and from time to time, with the powers of Subordinate Judges, may have been the mode of procedure contemplated by the Legislature as the one likely to be ordinarily adopted, Government cannot be said to have exceeded its power or contravened the law by permanently investing them with such powers.

In a suit against the surety, who had undertaken to secure the due performance by the principal, of his duties as clerk of the Small Cause Court, for the recovery of moneys misappropriated by the said clerk out of the proceeds of sales of moveable properties held in execution of decrees, passed by the Judge of the Small Cause Court, in the exercise of his powers as Subordinate Judge, *held* that the surety was liable for the moneys so misappropriated, as the grant and exercise of Subordinate Judge's powers was incidentally attached by law to the office of the Small Cause Court Judge, and the clerk of the Court is as much bound to perform the incidental, as the ordinary, duties of his appointment; and that it would have made no difference that, at the time of the execution of the bond, the Small Cause Court Judge was not invested with the powers of a Subordinate Judge. CROSTHWAITE v. HAMILTON, 1 A. 87 ... 90

***Act XVI of 1865* (*Revenue Courts, Oudh*).**

See BIRT TENURES, 3 Suth. P.C.J. 715=7 I.A. 17=4 Sar. P.C.J. 117=6 C. 218=6 C.L.R. 146.

***Act XX of 1865* (*Pleaders and Mukhtars*).**

Suspension of pleader for misconduct—Special leave to appeal—Expiry of period of suspension—High Court's finding on question of fact.—Where a pleader was suspended for professional misconduct, and the period of suspension had considerably expired, before application was made for special leave to appeal against his suspension, that in itself would form some ground why their Lordships should not accede to the application; but if the effect of the order of suspension had been to inflict, upon the character of the applicant, a lasting stigma, and there had been a clear miscarriage of justice shown, the fact that the period of suspension had expired would not alone have sufficed to refuse the application.

Where the High Court, acting regularly within their jurisdiction, come to the conclusion, from facts placed before them, that a pleader is guilty of professional misconduct, and suspend him from practice, and there are no materials to show that such conclusion, on a pure question of fact, is wrong, or even where there is some doubt on the subject, the Judicial Committee will refuse to grant special leave to appeal. IN THE MATTER OF F. W. QUARRY, 2 A. 511=7 I.A. 6=4 Saraswati's P.C.J. 99 ... 883

Act XXIII of 1866.

See BIRT TENURES, 3 Suth. P.C.J. 715=7 I.A. 17=4 Sar. P.C.J. 117=6 C. 218 =6 C.L.R. 146.

Act XXVI of 1866 (Oudh Sub-settlement). PAGE

(1) *Evidence.*—To entitle a person to a sub-settlement of lands under Act XXVI of 1866 (Oudh Sub-settlement), he must prove that he, or some person under whom he claims, has within the prescribed period held these lands as an under-proprietor under the talukdar or the predecessor of that talookdar. It is not sufficient for him to show that he has been a proprietor of those lands by a title adverse to the talookdar. SYUD MEER WAHID ALI v. RANEE SADHA BEBEE, 3 Suth. P.C.J. 82 ... 1

(2) "*Holding under contract,*" *Construction of.*—The terms "holding under contract" embrace any holding under arrangements from which a contract may be inferred. Under-tenures held under contract or under any arrangements from which a contract may be inferred, are within the definition of sub-proprietary rights given in the rules annexed to Act XXVI of 1866, and their holders are entitled to a sub-settlement. THE MAHARAJAH OF BULRAMPORE v. UMAN PAL SINGH AND GANESH SINGH, 3 Suth. P.C.J. 566=5 I.A. 225=3 Saraswati's P.C.J. 370=Bal. 180 ... 602

(3) Sch. II—See TALUKDAR, Bal. 105

Act I of 1868 (General Clauses).

(1) *S. 6—Execution proceedings—Act X of 1877.*—The provisions of S. 6 of the General Clauses Act operate on proceedings in execution of decrees.

Where, in execution of a decree for money, the attachment of certain moneys, deposited in Court to the credit of the judgment-debtor, was applied for and refused by the Court of first instance and also on appeal, *held*, in special appeal from the order of the appellate Court, presented after the Civil Procedure Code, 1877, came into operation, (the execution proceedings having been commenced before it came into operation), that the appeal lies under the old Civil Procedure Code by virtue of the General Clauses Act, S. 6, and also under Act X of 1877. THAKUR PRASAD v. AHSAN ALI AND ANOTHER, 1 A 668 ... 514

(2) S. 6—See CIVIL PROCEDURE CODE, 1877, 2 A. 74 and 2 A. 705; See, also, REGISTRATION ACT, VIII of 1871, 2 A. 852.

(3) See ACT XVII OF 1862, 1 A. 599=2 Ind. Jur. 723.

Act I of 1869 (Oudh Estate).

(1) *Mortgage—Redemption—Limitation in Oudh—Mortgage-deed lost*—Onus probandi.—According to Act I of 1869, a suit for redemption is not barred where the mortgage-deed fixed a term within which the mortgage might be redeemed, and such items not expiring before the 13th of Feb. 1856.

With regard to the amount of evidence required, a Court will generally take into consideration the facilities which, in particular cases, each party may naturally be supposed to have of giving evidence.

The plaintiff sued to redeem a mortgage made in the year 1840. The mortgage-deed was lost and the plaintiff-mortgagar alleged that it was a deed of mortgage for twenty years, whereas the defendant-mortgagee maintained that it was a deed of conditional sale for ten years and that the period had expired in 1856. *Held* the *onus* was on the mortgagor, *prima facie* to show when the term of the deed expired; but if the mortgagor gives evidence shifting the *onus*, then it lies on the mortgagee. RAJAH KISHEN DUTT RAM PANDAY v. NARENDAR BAHADOOR SINGH, 3 I.A. 85=3 Saraswati's P.C.J. 570 ... 94

(2) Ss. 2, 16—19.—See PRACTICE AND PROCEDURE, 3 Suth. P.C. 304=26 W.R. 55=3 I.A. 259=3 Sar. P.C.J. 611.

***Act I of 1869* (*Oudh Estate*)—(*Concluded*).** PAGE

(3) *Ss. 3, 22—Right acquired under Talukdari sunnad—Hindu Law—Woman's estate—Separate property of woman—Dayabhaga—Mitakshara.*—The positive limitations regarding successions which are contained in S. 22 of Act I of 1869, are in no way controlled by the provisions in the third section of the Act, namely, that the right acquired by virtue of talukdari sunnad should be subject to all the conditions affecting the talukdar contained in the sunnad under which the estate is held.

Woman's separate property according to the Mitakshara and according to the Dayabhaga discussed at length. BRIJ INDAR BAHADUR SINGH v. RANEE JANKI KOER, 3 Suth. P.C.J. 474=1 C.L.R. 318=5 I.A. 1=3 Saraswati's P.C.J. 763=Bal. 148 ... 399

(4) S. 22, cl. 4.—See WILL, 3 Suth. P.C.J. 458=4 I.A. 228=3 C. 626=1 C.L.R. 113=3 Sar. P.C.J. 740.

(5) Talukdar under, See ACT II OF 1863, 3 C. 522=3 Suth. P.C.J. 427=3 Sar. P.C.J. 704.

(6) See OUDH TALUKDAR, 3 Suth. P.C.J. 607=6 I.A. 161=4 Sar. P.C.J. 10=Bal. 318.

***Act XI of 1870* (*Weight and Measures*).**

See ACT X OF 1871, 3 A. 404.

***Act XXIV of 1870* (*Oudh Talookdars Relief Act*).**

Rule 8—Interest—Limitation—Jurisdiction—Appeal beyond time, when allowed—Act VIII of 1859, S. 323.—The combined effect of the Outh Talookdars Relief Act, XXIV of 1870, and of the 8th Rule made under it, being that the manager of an estate is to determine the amount due for principal and interest up to the date of his determination calculated according to the contract rate (if any), and may allow subsequent interest on the amount so determined (as upon a judgment-debt) up to the time of payment at a rate not exceeding 6 per cent., the manager in this case awarded future interest at a higher rate than 6 per cent. The Commissioner on appeal, aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by S. 10 of the Act, erroneously proceeded to act under S. 333, Act VIII of 1859, and varied the manager's order so far as it gave the rate of interest prohibited by law.

Under the exceptional legislation with which they had to deal and the exceptional circumstances of the case, their Lordships were not so clearly satisfied that the Commissioner had not this power to deal with the order of his subordinate officer as he did, as to feel themselves driven to a decision the effect of which would be to reverse an order which appeared to them. except in one particular (and as to which their Lordships modified it) just and proper, and to set up another which, if acted upon, would practically repeal the 8th rule made under Act XXIV of 1870. RAMJISDAS AND IMTIAZ ALI v. RAJAH BHAGWAN BAX AND ANOTHER, 3 Suth. P.C.J. 562=5 I.A. 197=3 Saraswati's P.C.J. 843=Bal. 174 ... 531

***Act XXVI of 1870* (*Prisons*).**

(1) *Ss. 3, 45, 54—Havalat, whether a prison—Taking food for under-trial prisoner—Penal Code, S. 442—House trespass—Crim. Pro. Code, 1872, Ss. 454, 404—Acquittal on previous charge—Subsequent charge for a different offence.—Held by* SPANKIE and OLDFIELD, JJ. (STUART, C. J., *dissenting*).—A *havalat* or lock-up in which prisoners under-trial are confined, is a prison within the meaning of that term in S. 3 of the Act.

Per Stuart, C.J.—Food is not an article within the meaning of S. 45.

***Act XXVI of 1870* (*Prisons*)—(*Concluded*).** PAGE

Per Stuart, C.J., and Oldfield, J. (Spankie, J. dissenting).—The act of conveying or attempting to convey food to a man confined in the *havalat* and under trial, does not amount either to house trespass or to an offence punishable under S. 45 of the Prisons Act.

Per Stuart, C. J.—Where a person charged with the offence of criminal trespass in having taken food to an under-trial prisoner in a *havalat* against the orders of the officer guarding it, was acquitted, *held*, that a subsequent trial for an offence under S. 45 of the Prisons Act was not barred. EMPRESS OF INDIA v. LALAI, 2 A. 301 ... 756

***Act VI of 1871* (*Bengal Civil Courts*).**

(1) S. 24—See EVIDENCE ACT, 1 A. 53 and 2 A. 625.

(2) See MAHOMEDAN LAW (DOWER), 1 A. 483=2 Ind. Jur. 389.

***Act X of 1871* (*Excise*).**

(1) *Ss. 12, 57, and 62—Illicit sale of liquor.*—Where a license for the sale of spirituous and fermented liquors by retail, expired on a certain date, and the accused did not attempt to renew it, till after he had been convicted before the Magistrate for selling spirituous liquors, *held*, that the case was distinguishable from 1 A. 630, and that he was properly convicted aa he violated S. 12 of the Act. EMPRESS OF INDIA v. DHARAM DAS, 1 A. 635 .. 476

(2) *Ss. 19, 63—Illicit possession of liquor—Ser, meaning of—Act XI of 1870.*—S. 19 of Act X of 1871 provides that the quantity of country liquor unlicensed vendors may sell, should not be more than one "*Ser.*" Regarding the weight of one "*ser*," it was held that the weight of one *ser* as given in Act XI of 1870, *viz.*, a weight of metal in the possession of the Government of India, which weight when weighed in vacuum is equal to the weight known in France as the "*Killogramme des Archives*" was not very intelligible, and the contention of the Government that a *ser* was equivalent to 80 tolas, would not supersede the customary weight of a *ser* which was 95 tolas. Therefore, when an unlicensed vendor was in pcssession of only 96 tolas of country liquor, *held* that the excess of one tola over the local weight not sufficient to warrant the presumption of the accused's guilt. EMPRESS OF INDIA v. HAIT RAM, 3 A. 404 ... 1080

(3) *Ss. 32, 57, 62—Illicit sale of liquor.*—Where a license for the sale of spirituous and fermented liquors by retail expired and the license-holder gave no notice of his intention not to renew the license, nor had the license been recalled by the Collector, but liquor having been sold for a week without the renewal of the license, the license-holder's servants were prosecuted, *held*, that they could not be convicted under the provisions of S. 32, but only under S. 57, for not paying the monthly license fee in advance. EMPRESS OF INDIA v. MAHINDRA LAL AND ANOTHER, 1 A. 638 ... 479

(4) *Ss. 57, 62, Illicit sale of liquor.*—Where the lapsing of a first license for the sale of spirituous and fermented liquors, was not noticed by the authorities, and was only brought to their knowledge by the accused going to the Collector's office ten days after, and they simply renewed the license, and accepted the whole fee, for the new period, *held*, that the accused was not guilty, as he had given no notice of his intention not to renew the license, nor had the Collector recalled it. EMPRESS OF INDIA v. SEYMOUR, 1 A. 630 ... 467

***Act XI of 1872* (*Foreign Jurisdiction and Extradition*).** PAGE

Ss. 3, 9—Offence committed by Native Indian British subject in Cyprus—Jurisdiction of British Courts—Crim. Pro. Code, 1872, Ss. 288, 297—Opinions of Division Court on preliminary question of jurisdiction—Jurisdiction of Full Bench.—Held *by the Full Bench (Stuart, C.J., dissenting).*—Cyprus is a "Native State" in referenec to native Indian subjects of Her Majesty within the meaning of Act XI of 1872. Such a person, a soldier in Her Majesty's Indian Army, while serving with his regiment in Cyprus, committed murder, and was charged with that offence at Agra, after his return with the regiment. *Held*, that the Criminal Courts of Agra had jurisdiction to try the case.

Per Stuart, C.J., contra.—Cyprus is not a foreign or a "Native State" according to the true intent and meaning of Act XI of 1872.

Per Stuart, C J., Spankie and Oldfield, JJ.—Where a Division Bench of the High Court ordered a Magistrate, who refused to try a case on the ground of want of jurisdiction, to make the enquiry, holding that he had jurisdiction, and the case came before the Full Bench, for the confirmation of the sentence of death passed on the accused by the Sessions Judge, to whom the case was committed by the Magistrate, *held*, that the Full Bench was not precluded, by the order of the Division Bench, from considering whether the conviction was by a Court of competent jurisdiction, in determining whether such sentence should be confirmed. EMPRESS OF INDIA v. SARMUKH SINGH, 2 A. 218 ... 702

***Act VIII of 1873* (*Northern India Canal*).**

See CRIMINAL PROCEDURE CODE, 1872, 1 A. 461=2 Ind. Jur. 322.

***Act XV of 1873* (*N.W.P. & Oudh Municipalities*).**

(1) *Ss. 27, 32, 38—Powers of Municipal Committee—Infringement of rights by the exercise of such rights—Relief.*—By S. 38 of the N.W.P. and Oudh Municipalities Act, the property in all public highways is vested in the committee, and by S. 27, the committee can, with the sanction of the Local Government, sell any portion of land, referred to in that section, which is not required for the purposes of the Act, and shall keep roads in repair, and may do all acts and things necessary for purposes of general utility. But there is nothing in the Act which debars the Civil Courts from entertaining suits and giving relief in respect of any civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act. FAZAL HAQ v. MAHA CHAND AND ANOTHER, 1 A. 557=2 Ind. Jur. 790 ... 436

(2) *Ss. 28 and 43—Local Government not impleaded—Objection whether can be taken for first time in special appeal—Mis-description of defendant—Notice of suit—Special appeal—Plea of want of notice when to be taken.*

Quære:—Whether a plea, that the Local Government had not been impleaded in a suit against a Municipal Committee as required by S. 28 of the Act, can be taken for the first time in special appeal?

Where, in such a case, the Magistrate was impleaded, not only as President of the Municipal Committee, but as representing the Local Government, *held*, that this was, at the most, a mis-description of the officer representing Government, a mis-description which that officer might have applied to have corrected and that the Government *was* impleaded.

Notice of suit under S. 43 of the Act is necessary, only when damages consequential on the act done by the Municipal Committee are claimed in the suit.

Act XV of 1873 (N.W.P. & Oudh Municipalities Act)—*(Concluded).* PAGE

The plea of want of notice under S. 43 of the Act cannot be taken for the first time in special appeal. THE MUNICIPAL COMMITTEE OF MORADABAD v. CHATRI SINGH, 1 A. 269 ... 223

(3) *Ss. 40, 43—Suit against Municipal Committee in name of wrong officer—Substitution of proper officer—Limitation Act (1877), S. 22.*—A suit, brought against a Municipal Committee in the name of the wrong officer, cannot, by the subsequent substitution of the proper officer as defendant, be deemed, with reference to S. 22 of the Limitation Act (1877), to have been instituted against such Committee when such substitution is made. S. 22 of the Limitation Act seems to apply to new plaintiffs and defendants personally made parties to a suit after its institution, rather than to cases where a Committee is sued through their officer, and a clerical error is corrected by the Court allowing the substitution of the proper officer as defendant in the place of the wrong one.

Semble :—The suits contemplated by S. 43 of Act XV of 1873 seem to be those claiming relief of a pecuniary character, for some act done under that enactment by the Committee or any of their officers or any other person acting under their directions, and for which damages can be recovered from them personally, and not suits against a Committee to prove the right of the plaintiff to certain property, and for compensation for such property demolished by order of the Committee. MANNI KASAUNDHAN v. CROOKE, SECRETARY TO THE MUNICIPAL COMMITTEE OF GORAKHPUR, 2 A. 296 ... 754

Act XVIII of 1873 (N.W.P. Rent).

(1) *Limitation Act, IX of 1871, S. 15—Applicability. Semble.*—Act XVIII of 1873 being a special law, the provisions of the Limitation Act, 1871, relating to disability, prosecutions of remedies in wrong Courts, etc., do not apply to suits and applications under Act XVIII of 1873. TIMAL KUARI v. ABLAKH RAI, 1 A. 254 ... 200

(2) *Jurisdiction of Civil and Revenue Courts.*—Where, in a suit by the landlord for declaration of proprietary right and possession, the tenant *(defendant)* while professing to admit the plaintiff's title as owner, pleads that he pays the revenue on the land, and denies the plaintiff's right to rent, and calls himself a tenant at a fixed rate, he virtually denies the plaintiff's title as owner and sets up his own ; the matter is one for the Civil Courts to decide. Assuming the defendant's tenancy is established, the Revenue Court will then have jurisdiction to decide upon the plaintiff's claim for rent and for ejectment of the tenant. KANAHIA v. RAM KISHEN, 2 A. 429 ... 814

(3) Ss. 5, 6—See ACT X OF 1859, 1 A. 301.

(4) S. 7—See JURISDICTION OF CIVIL COURT, 1 A. 448=2 Ind. Jur. 320.

(5) *S. 7—Meaning of.*—To enable an owner of proprietary rights in a mahal to claim the right of occupancy as an ex-proprietary tenant, under S. 7 of the N. W. P. Rent Act, there must be something more than a mere temporary transfer of his proprietary rights. These rights must have been completely lost or parted with. When, therefore, such rights are mortgaged with possession, and a suit for possession is brought by the mortgagee against the proprietor, the latter cannot plead the right of occupancy and refuse to give up possession.

But when the mortgagees in possession of the proprietary rights in a mahal purchased the same at an auction-sale, their possession, on the one hand, became possession in full proprietary right ; and on the other hand, the mortgagors, having completely lost their proprietary rights, and having been,

Act XVIII of 1873 (N.W.P. Rent)—(*Continued*). PAGE

till the auction-sale, in possession of the lands constructively, (for the possession of the mortgagee is the possession of the mortgagor) became entitled, under S. 7 of the N. W. P. Rent Act, to the right of occupancy of the sir-lands attached to the mahal, as tenant at favourable rates. And, if, in the assertion of this right, they enter the sir-land, offering to pay the proper rent due from them, they cannot be regarded as trespassers. BHAGWAN SINGH v. MURLI SINGH, 1 A. 459=2 Ind. Jur. 283 ... 370

(6) *Ss. 8 and 9—Tenants at fixed rates—Occupancy tenants—Inheritance.*—The liberty of tenants at fixed rates to deal with their right, is absolutely without limit, and inheritance follows the usual course with regard to the devolution of property, according to the law which applies to the deceased tenant; but this law, whatever it may be, is so far controlled by S. 9 of the Rent Act, that in cases of rights of occupancy, acquired under S. 8 of the Act, no collateral relative of the deceased, who did not share in the cultivation of his holding, shall be entitled to inherit. BHAGWANTI v. RUDR MAN TIWARI, 2 A. 145 ... 649

(7) *Ss. 8, 9 and 171—Right of occupancy tenant—Transferability—Sale in execution.*—By a majority of the F.B. The rights of an occupancy tenant are transferable by sale in execution of decree, but only as between persons who have become, by inheritance, co-sharers in such right.

Per Stuart, C.J. Such right is transferable by sale in execution without any limitation or restriction.

The right to enforce legal process against property cannot, under any circumstances, be taken away except by express words to that effect. ABLAKH RAI v. UDIT NARAIN RAI, 1 A. 353=1 Ind. Jur. 705 ... 278

(8) *S. 9—Transfer of right of occupancy-tenant in execution of decree.*—Section 9 of the N.W.P. Rent Act appears to have been enacted in the interest of landholders who may presumably waive the privilege it confers on them. It cannot, therefore, be interpreted as preventing a landholder from causing the sale, in execution of his own decrees, of the occupancy right of his own judgment-debtor in land belonging to himself. UMRAO BEGAM v. THE LAND MORTGAGE BANK OF INDIA, 1 A. 547 ... 431

(9) *Ss. 9, 171—Right of occupancy tenant—Transfer—Execution of decree.*—S. 9, N.W.P. Rent Act (XVIII of 1873) does not prevent the landholder from causing the sale, in execution of his own decree, of the occupancy rights of his own judgment-debtors in land belonging to himself. UMRAO BEGAM v. THE LAND MORTGAGE BANK OF INDIA, 2 A. 451 (Affirming 1 A. 547, *supra*.) ... 873

(10) Ss. 30, 95 (*c*)—See ASSIGNMENT, 2 A. 732.

(11) S. 39—See LANDLORD AND TENANT, 2 A. 428.

(12) S. 42 (*a*)—See LANDLORD AND TENANT, 2 A. 896.

(13) *S. 93—Suit for money equivalent—Rent—Revenue Court—Jurisdiction.*—A Revenue Court has jurisdiction to entertain a suit for the money equivalent of arrears of rent payable in kind, as it is a suit for arrears of rent within the meaning of S. 93 of Act XVIII of 1873. TAJUDDIN KHAN v. RAM PRASHAD BHAGHAT, 1 A. 217 ... 127

(14) *S. 93—Suit by co-sharer against Lambardar's representative for share of profits—Jurisdiction—Profits when due—Limitation—By the Division Bench.*—A suit by a co-sharer, in an undivided mahal against the representative of a deceased, lambardar for his share of the profits due from the deceased, is a suit cognizable by the Revenue, and not by the Civil, Courts.—*By a majority of*

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Act XVIII of 1873 *(N.W.P. Rent)*—*(Continued)*.

the Full Bench :—For the purpose of limitation, profits are ordinarily to be considered due as soon as there is a divisible surplus in the hands of the lambardar, after payment of Government revenue and village expenses. Where, by agreement or custom, a date is fixed for taking accounts and dividing the profits, any divisible profits, which may have accrued prior to that date, is due on that date ; and the divisible profits in respect of any arrears which may be collected after that date, are due at the time they reach the hands of the lambardar or his agent.

Per Stuart, C.J. and Spankie, J. In the absence of custom or agreement as to the date when the profits are to become due they become due on the last day of the agricultural year, as fixed by Acts XVIII and XIX of 1873. BHIKHAN KHAN v. RATAN KUAR, 1 A. 512 ... 380

(15) S. 93, cl. (*c*)—See LEASE, 2 A. 437.

(16) *S. 93, cl. (h)—Suit for profits—Interest.*—In a suit for profits, under clause (*h*), S. 93 of the Rent Act, a Revenue Court has power to award interest claimed on such profits. TOTA RAM v. SHER SINGH, 1 A. 261= 1 Ind. Jur. 171 ... 204

(17) *Ss. 93, 189 and 191—Appeal to Judge—Proprietary right—Revenue—Sub-proprietor—Settlement.*—Where, in a suit for arrears of rent below Rs. 100, the defendant denies the tenancy and sets up the independent title of sub-proprietor ; *held* that the suit was one involving a question of proprietary title (S. 189, Act XVIII of 1873) and that the decision in the suit was appealable to the Judge, though the rent was below Rs. 100. BISHESHUR SINGH v. MUSSAMMAT SUGUNDHI, 1 A. 366=1 Ind. Jur. 777 ... 275

(18) *S. 95, cl.(m)—Lease of Zamindari rights—Wrongful dispossession of lessee by lessor—Compensation—Revenue Court—Civil Court—Jurisdiction.*—Where a lessee, to whom the full Zamindari rights in certain villages had been leased by the Zamindar for a term of years at a fixed rent, was, before the expiry of the term, dispossessed by the Zamindar, who thereafter himself collected the rents from the agriculture tenants ; *held*, (By a majority of the F.B.) in the suit by the lessee for the recovery, from the Zamindar, of the rents collected by him for the unexpired period of his lease, that the suit was one for compensation for wrongful dispossession as described in cl. (*m*), S. 95 of Act XVIII of 1873, and was, therefore, under that section, cognizable only by a Revenue Court, and that the Civil Courts had no jurisdiction. ABDUL AZIZ v. WALI KHAN, 1 A. 338 ... 264

(19) *S. 95 (m) and (n)—Suit by dispossessed sub-tenant for possession and mesne-profits—Jurisdiction.*—Where, in execution of a decree obtained by a landlord against his tenant, a sub-tenant, not a party thereto, holding under the latter, is dispossessed, and on reversal of that decree, the tenant resumes possession and refuses to give it up to his sub-tenant, a suit by the latter, against the landlord and the tenant, for possession and *mesne*-profits, is cognizable by a Civil Court and not by a Revenue Court, the claim being one with respect to which an application could not have been preferred to the Collector under S. 95 of the Rent Act. KALIAN DAS v. TIKA RAM, 2 A. 137 ... 644

(20) S. 95, cls. (*m*) *and* (*n*)—See JURISDICTION OF CIVIL COURT, 2 A. 707.

(21) S. 95, cl. *n*—See RES JUDICATA, 2 A. 200.

(22) S. 106—See CIVIL PROCEDURE CODE, 1877, 2 A. 264.

(23) *S. 209—Land held by a lambardar as* "khud kasht" *at a nominal rental—Liability of co-sharer for profits.*—S. 209 of the Rent Act provides that, in any suit brought by a co-sharer against a lambardar for a share of the profits, the

Act XVIII of 1873 (N.W.P. Rent)—(*Concluded*).

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Court may award to the plaintiff not only a share of the profits actually collected, but also a sum equal to the plaintiff's share in the profits, which, through gross misconduct or negligence, the lambardar has omitted to collect. The application of this section to lands held at fixed rents is obvious; but even were it applicable to lands held by a lambardar himself as "*khud kasht*," a co-sharer cannot succeed in a suit against him for a share of the profits, unless he proves that there were profits, or that his failure to realize any was owing to gross negligence or misconduct on his part. MANGAL KHAN v. MUMTAZ ALI, 2 A. 239

(24) See ARBITRATION, 2 A. 119. ... 721

(25) See GRANT, 2 A. 545.

(26) See OCCUPANCY-RIGHT, 2 A. 735.

Act XIX of 1873 (N.W.P. Land Revenue).

(1) S. 30—See GRANT, 2 A. 545.

(2) *Ss. 43, 83 and 241, cl. (b)—Vendor and purchaser—Agreement exempting land from revenue, effect of—Cause of action—Assessment of revenue—Jurisdiction of Civil Court.*—An agreement between the vendor and purchaser of a portion of an estate paying revenue to Government, that the latter should pay to Government the proportionate revenue due on the portion of the estate retained by the former, cannot be enforced against the representatives in title of the purchaser, and beyond the period of Revenue settlement then current, in the absence of proof that it was intended to have such extended operation.

Per Spankie, J. When at a fresh settlement, the purchaser or his representative in title moves the Settlement authorities to settle directly with the vendor or his representative for his portion of the estate, this gives the latter a cause of action to sue for the enforcement of the agreement.

A decision of the Sudder Court, upholding such an agreement, though it may have been regarded by the Settlement authorities as binding on the parties to such decision during the currency of the then settlement, could not prevent such authorities from settling with the vendor or his representative, who was the proprietor of the estate.

A suit for a declaration of liability for revenue as between the parties only, without prejudice to the Government Revenue, is not barred by S. 241, cl. (*b*), of Act XIX of 1873, and is cognizable by the Civil Courts.

Per Oldfield, J. The Civil Courts cannot relieve a proprietor from liability to pay revenue on his estate (Ss. 43 and 83, Act XIX of 1873). HIRA LAL v. GANESH PRASAD, 2 A. 415

(3) —*Ss. 61, 65, 257.—Pre-emption, varieties of.*—Wajib-ul-arz, *evidentiary value of.*—The *Wajib-ul-arz* or administration paper forms part of the record-of-rights of a mahal, which is prepared under the provisions of S. 61 and following sections of the Land Revenue Act and, with reference to the provisions of S. 65 and the rules framed under S. 257, it is a public record, *inter alia* of customs and rights affecting the share-holders of the mahal and including such as relate to pre-emption. ... 806

The right of pre-emption may be founded on Muhammadan law, or as is more generally the case, where it affects the Hindus, on long-established custom having the force of law, or on special contract between the share-holders; and the *Wajib-ul-arz* may record the practice of pre-emption as based on any of these grounds; and the entry may be evidence either of custom or of the contract.

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***Act XIX of 1873 (N.W.P. Land Revenue)*—(*Continued*).**

A *Wajib-ul-arz* prepared and attested in the form and manner prescribed by the Board of Revenue, is *prima facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom; and, when it records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the entry, and, in consequence, were assenting parties to the contract of which it is evidence, and it will be for those repudiating the contract to rebut this presumption. ISRI SINGH v. GANGA, 2 A. 876 ... 1104

(4) *Ss. 62, 91, 94, 241—Record-of-rights—Jurisdiction—Civil and Revenue Courts.*—Under S. 241 of the Act, it is provided that no Civil Court shall exercise jurisdiction in "the matter of the formation of the record-of-right;" but the matter of the formation of a record is clearly not the same thing as the question of the rights which its entries record. The Civil Court may not alter or amend the record, or give directions in respect of it because these matters are under Ss. 62 and 94 of the Act, peculiarly within the jurisdiction of the Revenue Court. It will thus be seen that Civil Courts are not debarred from entertaining and deciding questions of rights between parties, merely because those questions may have been made the subject of entries in the record, and because the decision of the Civil Court may show that they are wrong and need correction. *Held*, therefore, that a suit will lie for a declaration of plaintiff's right to make collection of rent and to defray therefrom certain village and other expenses, though, with reference to these matters, there was, in the record-of-rights, an entry adverse to the plaintiff. SUNDER AND OTHERS v. KHUMAN SINGH, 1 A. 613 ... 471

(5) *S. 66—Cess leviable according to village custom—Remarriage of widows—Maintainability of suit—Requisites of valid custom—Entry of cess—not conclusive evidence of custom—Cesses leviable on marriage—Inapplicability of English analogies.*—A Civil Court cannot enforce a cess leviable according to village custom on the re-marriage of widows of a particular sect, when such cess is not recorded in the settlement record, under the general or special sanction of the Local Government.

Among the conditions essential for establishing a custom are that it is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character. The mere entry of a customary cess by a settlement officer may be important evidence of custom, but it is not conclusive proof of it.

Per Stuart, C.J.—That public policy favours marriage and that a custom, which allows the levy of a cess on marriages, is opposed to such policy, are considerations derivable from English law and are inapplicable to cases in this country where Zamindars sometimes claim such cesses on the strength of villlage custom. LALA v. HIRA SINGH, 2 A. 49 ... 576

(6) S. 66—See REG. VII OF 1822, 1 A. 373.

(7) Ss. 79, 241 (*h*)—See ASSIGNMENT, 2 A. 732.

(8) *Ss. 113, 114—Partition.*—The orders made appealable under S. 114 of the Land Revenue Act, are those passed under S. 113 on objections preferred under S.111 before partition is ordered, and involving questions of title or proprietary right arising out of such objections. Orders, passed subsequent to partition and relating to details as to the distribution of the lands partitioned, are not appealable. SHIBBAN LAL v. TILOKE CHAND, 2 A. 619 ... 948

Act XIX of 1873 (N.W.P. Land Revenue)—*(Concluded).* PAGE

(9) *Ss. 113, 114—Determination of title by Collector*—Res judicata.—Where an objection to a partition raises questions of title or proprietary right, it is only when proceedings are recorded by the Collector or Assistant Collector under S. 113 of the Land Revenue Act, declaring the rights of the parties after going into the merits, that the order passed in such proceedings is an order of the nature of a decision of a Court of Civil Judicature under S. 114 of the Act, which may be open to appeal, but cannot be contested in a regular suit. Therefore, when the questions of title raised on an objection are not gone into, the order passed under S. 119 cannot have the force of the decision of a Civil Court and such questions can again be raised in a civil suit. ASHGAR ALI SHAH v. JHANDA MAL, 2 A. 839 ... 1078

(10) See ACT XXXV OF 1858, *supra*, 1 A. 476=2 Ind. Jur. 354.

(11) See ARBITRATION, 2 A. 119.

Act XII of 1879 (Registration and Limitation Amendment).

See CIVIL PROCEDURE CODE, 1877, 2 A. 785.

Adjournment.

See PRACTICE AND PROCEDURE, 3 Suth. P.C. 304=26 W.R. 55=3 I.A. 259 =3 Sar. P.C.J. 611.

Adultery.

See CRIMINAL PROCEDURE CODE, 1872, 2 A. 339.

Adverse possession.

See LANDLORD AND TENANT, 2 A. 517=4 Ind. Jur. 650; LIMITATION ACT, 1871, 1 A. 655.

Agreement.

(1) *Consideration.*—Where, by an agreement duly registered, the settlor agrees that, in consideration of the recognition by his brothers of his rights in certain property, he will not sell, transfer, or hypothecate such property, and that, should he desire to dispose of it, he would convey it to them for a certain price, *held* that the agreement was binding and enforceable. LAKHMI CHAND v. TORI LAL, 1 A. 618 ... 474

(2) Without consideration—See CONTRACT ACT, 1 A 309 and 3 A. 221.

(3) Not to appeal—See CONTRACT ACT, 1 A. 267.

(4) Uncertain—See CONTRACT ACT, 1 A. 275.

(5) With penal clause—See STAMP ACT I OF 1873, 2 A. 654=5 Ind. Jur. 264.

(6) See RELEASE, 2 A. 554=5 Ind. Jur. 92.

Ajmere Courts Reg. I of 1877.

Ss. 17, 18, 21, 36 & 37—Reference to High Court by Chief Commissioner of Ajmere and Mairwara—Reference to Chief Commissioner by Commissioner of Ajmere—Appeal from Commissioner's decree passed in accordance with Chief Commissioner's judgment—A question, arising before the admission of a civil appeal in the Court of the Chief Commissioner of Ajmere and Mairwara, as to whether the appeal lies to him or to the Privy Council, is a question "in the trial of an appeal" within the meaning of S. 21 of Reg. I of 1877, and could be referred by him to the High Court. *Per* SPANKIE, J. *contra*.

Where the Commissioner of Ajmere refers under S. 36, Reg. I of 1877, to the Chief Commissioner, a question of the nature mentioned in S. 17 and on

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***Ajmere Courts Reg. I of 1877*—(*Concluded*).**

receipt of his opinion, passes a decision in accordance with it, the appeal from such decision lies to the Privy Council and not to the Chief Commissioner. THAKUR OF MASUDA v. THE WIDOWS OF THE THAKUR OF NANDWARA, 2 A. 819 ... 1061

Allowance.

Allowance charged on land, enforceable against transferee.—An allowance, charged on immoveable property with a covenant not to alienate the land without stipulating for payment of such allowance, can be claimed from any transferee who is in possession of it, irrespective of any agreement between such transferee and his transferor. ABADI BEGAM v. ASARAM, 2 A. 162 ... 647

Appeal (General).

(1) Addition of parties in, see PARTIES, 1 A. 453

(2) *Order returning plaint after it was admitted and posted for evidence—Suit for redemption—Jurisdiction.*—An order returning a plaint for presentation to the proper Court, on the ground that the property in suit was beyond the pecuniary jurisdiction of the Court in which it was presented, is appealable under the C.P.C. (1859), and the appellate Court's order thereon is also appealable to the High Court under the C.P.C. (1877).

Where the subject-matter of the suit is, not only whether the property has been redeemed by payment out of the usufruct, but also whether the property and the right to redeem belongs to the plaintiff, the question of jurisdiction depends on the value of the property and not on the amount of the mortgage. KALLIAN DAS *v.* NAWAL SINGH, 1 A. 620 ... 475

(3) *Dismissal of appeal for default—Appeal from such order.*—There is no appeal from an order under S. 556, C.P.C., dismissing an appeal for default. NAND RAM *v.* MUHAMMAD BAKHSH, 2 A. 616 ... 947

(4) *Judgment—Decree.*—Where, in dismissing a suit, the Court ordered "that the plaintiff's claim be dismissed *in the present form*," *held* that the defendant, who contended that the suit should be dismissed absolutely, had a right to appeal against it, and that his appeal would be, not against the decision, but against the decree with which he is dissatisfied. BAM GHOLAM v. SHEO TAHAL, 1 A. 266 ... 210

(5) *Bond specially registered—Execution of decree obtained thereon—Appeal against order in execution.*—Orders, passed in the execution of decrees, obtained under S. 53 of Act XX of 1866 on bonds specially registered under S. 52 of the Act, are appealable. WILAYAT-UN-NISSA v. NAJIB-UN-NISSA, 1 A. 583=2 Ind. Jur. 792 ... 456

(6) Against joint-decree by some of the defendants on ground common to all—
See CONTRIBUTION, 1 A. 455.

(7) *Limitation.*—Where a suit against two defendants is dismissed as against the first and decreed against the second defendant, and an application for review against the first defendant is also dismissed, and on an application for review by the second defendant in which the first defendant is unnecessarily made a party, the suit is dismissed, the plaintiff cannot, in an appeal from the decree on review dismissing his suit, implead the first defendant, as against whom the appeal from the first decree was barred by limitation. MOTI BIBI v. BIKANU, 2 A. 772 ... 1037

(8) *When presented—Memorandum of appeal insufficiently stamped—Limitation —C.P.C., 1877, S 54 (b).*—For the purposes of limitation. an appeal is presented when the memorandum of appeal is presented to the proper officer of the Court, and not when, after being returned as insufficiently stamped, it is represented properly stamped.

***Appeal* (*General*)—(*Concluded*).**

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An appellate Court returning a memorandum of appeal as being insufficiently stamped, must fix a time within which the deficiency must be supplied. SHEO PARTAB NARAIN SINGH v. SHEO GHOLAM SINGH, 2 A. 875 ... 1104

(9) Admission of, after time—See LIMITATION ACT, IX of 1871, 1 A. 34; 1 A. 250.

(10) See ACT XXVII OF 1860, 1 A. 287.

(11) See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.

(12) See ACT XXIV OF 1870, 3 Suth. P.C.J. 562=5 I.A. 197=3 Sar. P.C.J. 843 =Bal. 174.

(13) See ACT XVIII OF 1873, 1 A. 366=1 Ind. Jur. 777.

(14) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 156; 1 A. 181; 1 A. 260; 1 A. 363=1 Ind. Jur. 818; 1 A. 374=1 Ind. Jur. 779 and 2 A. 67 =5 I.A. 233=3 Sar. P.C.J. 879.

(15) See CIVIL PROCEDURE CODE, 1877, 1 A. 748; 2 A. 74; 2 A. 91; 2 A. 352 =4 Ind. Jur. 468; 2 A. 497=4 Ind. Jur. 644 and 2 A. 785.

(16) See CRIMINAL PROCEDURE CODE, 1872, 2 A. 53.

(17) See LETTERS PATENT, 1 A. 31.

(18) See LIMITATION, 2 A. 192.

(19) See LIMITATION ACT, 1877, 1 A. 644.

***Appeal* (*Second Appeal*).**

(1) See CIVIL PROCEDURE CODE, 1877, 2 A. 884.

(2) Objection to declaratory decree in, See DECLARATORY DECREE, 2 A. 134.

(3) See HAQ-I-CHAHARAM, 2 A. 905.

(4) See ACT XV OF 1873, 1 A. 269.

***Appeal* (*Special*).**

(1) *Objection in Special Appeal taken for first time at hearing—Arbitrator's procedure—Power of arbitrator to administer oath other than in prescribed form.*—Where, in a suit decreed on an award, an objection vitally affecting the arbitrators' procedure was for the first time urged at the hearing, not having been preferred in the lower Court and even in the memorandum of special appeal, *held*, that the Court could not ignore it.

An arbitrator has no power to administer an oath other than in the prescribed form. WALI-UL-LA v. GHULAM ALI, 1 A. 535=2 Ind. Jur. 468 ... 424

(2) *Suit of a nature cognizable by a Small Cause Court—Act XXIII of 1861, S. 27 —Act XLIII of 1860, S. 1.* Under S. 1 of Act XLIII of 1860 and S. 27 of Act XXIII of 1861, a special appeal is prohibited in suits of the nature triable by Courts of Small Causes, instituted prior to the passing of the former Act. *Held*, accordingly, that there was no special appeal from an order, made on regular appeal after the passing of Act XXIII of 1861, in execution of a decree in such suit instituted before Act XLIII of 1860 came into force. BHICHUK SINGH v. NAGESHAR NATH, 2 A. 112 ... 632

***Appeal* (*to Privy Council*).**

(1) *Preliminary objection—Practice.*—An objection that an appeal has come before the Privy Council without proper authority should be taken at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved which is uselessly incurred, if, when the objection is ultimately taken, the Judicial Committee feel obliged to yield to it.

But it is clearly competent to the Judicial Committee to hear it at any stage of the appeal; and it has not been unusual to entertain it when the appeal is called on, and before the argument upon the merits has been commenced.

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***Appeal (to Privy Council)*—(*Concluded*).**

Where on the calling of an appeal and before the entering into the merits of the case, a valid objection was taken by the respondent, and the appellant, thereupon, made an application to the Privy Council to grant him special leave to appeal, *nunc pro tunc*, *held* that the Judicial Committee had discretion to grant such special leave.

Special leave to appeal *nunc pro tunc* was refused in this case where one of the principal question was that the proper amount was not paid into Court under a compromise the alleged deficiency being Rs. 7 only. Leave to appeal refused in the present case on the ground that the rights of the appellants might be ascertained and enforced more satisfactorily in some other proceedings than by their Lordship under the irregular appeal sent up by the Court in India. GAJADHUR PERSHAD v. THE TWO WIDOWS OF IMAM ALI BEG, 15 B.L.R. 221=3 Suth. P.C.J. 148=2 I.A. 205=3 Saraswati's P.C.J. 495. ... 8

(2) Application for leave to, See CIVIL PROCEDURE CODE, 1877, 2 A. 65=3 Ind. Jur. 419.

(3) See CIVIL PROCEDURE CODE, 1877, 2 A. 604.

(4) See PRIVY COUNCIL, 1 A. 688=2 C.L.R. 193=5 I.A. 87=3 Suth. P.C.J. 529 =3 Sar. P.C.J. 807.

Appellate Court.

(1) *Powers of.*—An appellate Court must confine its decision to the points put in issue by the parties before it. It cannot, of its own motion, raise points in favour of a respondent who remains *ex parte*. DURGA PRASAD v. KHAIRATI, 1 A. 545=2 Ind. Jur. 680 ... 429

(2) Powers of, See CIVIL PROCEDURE CODE, 1877, 2 A. 487=4 Ind. Jur. 641.

(3) Modification of claim before, See CLAIM, 3 Suth. P.C.J. 567=6 I.A. 1=4 C. 839=3 Sar. P.C.J. 873.

(4) See PARTIES, 2 A. 107.

(5) See EVIDENCE, 1 A. 725.

(6) See CRIMINAL PROCEDURE CODE, 1872, 1 A. 680=2 Ind. Jur. 864.

(7) See CIVIL PROCEDURE CODE, 1877, 2 A. 744.

Arbitration.

(1) *Act XVIII of 1873 (N.W.P. Rent Act)—Act XIX of 1873 (N.W.P. Land Rev. Act.*—The general law, which allows parties to suits, if they are so minded, before issue joined, to refer the matter in dispute to arbitration, and after issue joined, with the leave of the Court, applies also to suits under Act XVIII of 1873, which does not prohibit such reference. GOSHAIN GIRDHARIJI v. DURGA DEVI, 2 A. 119 ... 638

(2) *Agreement between debtors and creditor—Validity—Contract Act (IX of 1872), S. 65—Applicability.*—Where a debtor and his creditors agree to refer to arbitration the disputes between them regarding the payment of his debts and an award is passed compounding such debts and assigning all his property for ths benefit of his creditors, every one of the creditors, who signs the award and receives a dividend in pursuance of it, is bound by it and cannot sue to recover debts compounded under the award, on the ground that several of the creditors had not signed the award, or that some of them had sued the debtor and recovered debts in spite of the award. Under the above circumstances, a clause in the award directing that the debtor should dispose of his property for the benefit of his creditors, and that if he misappropriated any of his property, he should be personally liable for the

Arbitration—(*Concluded*).

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loss sustained by the creditors, could not give them a right to rescind the award and fall back on their old debts, but could only enable them to proceed personally against the debtor in pursuance of the award.

It is only when an agreement discovered to be void, or contract becomes void, that a person who has received any advantage under it can make compensation for it to the person from whom he received it. In the above case, therefore, the contract not being or having become void, the creditors, who had received dividends under it cannot claim to credit them towards their debts and claim the balance. KHETA MAL v. CHUNI LAL, 2 A. 173. 672

(3) *Suit for filing of award—C.P.C., 1877, Ss. 2, 526 and 588.*—There is no appeal from an order directing the filing of an award, (made on a private reference to arbitration), passed in a suit for filing such award where such order is not followed by a judgment and decree. For, such an order is neither a decree, nor one of those orders made appealable under S. 288 of the C.P.C. RAMADHIN v. MAHESH, 2 A. 471=4 Ind. Jur. 585 ... 861

(4) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 156.

(5) See 26 W.R. 10=3 Suth. P.C.J. 342=3 I.A. 209=3 Sar. P.C.J. 663=Bal. 86; 2 A. 181 (**F.B.**).

Arbitrator.

See APPEAL (SPECIAL APPEAL), 1 A. 535=2 Ind. Jur. 468.

Arrest.

Pending appeal, See CRIMINAL PROCEDURE CODE, 1872, 2 A. 340.

Assessment.

(1) See OFFICER, 3 Suth. P.C.J. 41.

(2) See PRE-EMPTION, 1 A. 709.

Assessors.

Omission to take opinion, See CRIMINAL PROCEDURE CODE, 1872, 1 A. 610.

Assignment.

of land for service—Act XVIII of 1873 (N.W.P. Rent Act), Ss. 30, 95 (c)—Act XIX of 1873 (N.W.P. Land Revenue Act), Ss. 79, 241 (h)—Reg. XIX of 1793, S. 1—Rent-free grant.—An assignment of land, free of rent, to be held and enjoyed by the assignee so long as he should perform certain services, is not a rent-free or revenue-free-grant within the meaning of Reg. XIX of 1793, S. 30, Act XVIII of 1873 and S. 79 of Act XIX of 1873; and a suit for the possession of such land, on the ground that the services, for the performance of which it was assigned, are no longer performed, is cognizable by a Civil Court, and is not a claim to resume a rent-fee grant or to assess rent on land, in respect of which an application might be made to the Revenue Court under Ss. 30 and 95 (*c*) of Act XVIII of 1873, or Ss. 79 and 241 (*h*) of Act XIX of 1878. PURAN MAL v. PADMA, 2 A. 732 ... 1032

Attaching creditor.

(1) *Right of prior, to sale proceeds as against holder of decree charging lands—Suit for money received by the defendant for the plaintiff's use—Limitation—Act IX of 1871, Sch. II, Arts. 15, 26, 61 and 118.—Held* by a Division Bench that the attaching creditor is not entitled to the sale proceeds, as against the holder of a decree charging the lands attached, on the ground of the priority of his attachment, if the charge had been created prior to the attachment. Where, in such a case, the Court had wrongly ordered the holder of the decree charging the lands to refund to the attaching creditor

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Attaching creditor—(*Concluded*).

the sale-proceeds paid to him, and he brought a suit to recover the money by the establishment of his prior right to the same, and to cancel the order of the Court compelling him to refund the money, as it was made without jurisdiction;

Held, by a majority of the F.B.—The suit was one for money received by defendant for the plaintiff's use, and was, therefore, governed by Sch. II, Art. 60 of the Limitation Act.

Per Stuart, C.J. and *Spankie, J.*—The suit is one for which no period of limitation was provided elsewhere than in cl. 118, Sch. II and was, therefore, governed by that clause. RAM KISHAN v. BHAWANI DAS, 1 A. 333 ... 261

Attachment.

(1) *In execution—Effect thereon of order striking execution-proceeding off the file.*—Whether an attachment in execution-proceedings subsists or is removed by an order striking the execution-proceedings off the file, must be decided with reference to what appears to have been the object and intention of the order. When, therefore, certain properties were attached in execution of a decree, and the proceedings struck off the file, and afterwards an application was made again to attach the property, and granted, *held* that the first attachment was not subsisting and that a private sale of the property before the second attachment was not void. ZAIB-UN-NISSA v. JAIRAM GIR, 1 A. 616 ... 473

(2) See CIVIL PROCEDURE CODE, 1859, 2 A. 58.

(3) See CIVIL PROCEDURE CODE, 1877, 2 A. 752.

(4) See MORTGAGE (USUFRUCTUARY), 2 A. 455=4 Ind. Jur. 583.

Attestation.

Effect of, See MORTGAGOR ond MORTGAGEE, 1 A. 303=1 Ind. Jur. 385.

Auction-purchaser.

See MONEY-DECREE, 1 A. 240.

See EXECUTION OF DECREE, 1 A. 568.

Auction-sale.

See PARTIES, 2 A. 107

Award.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 156 and 26 W.R. 10 =3 Suth. P.C.J. 342=3 I.A. 209=3 Sar. P.C.J. 663=Bal. 86.

(2) See ARBITRATION, 2 A. 471=4 Ind. Jur. 585

(3) See EVIDENCE ACT, 2 A. 809.

Bail.

Power of Sessions Court to admit a convicted person to bail. See CRIMINAL PROCEDURE CODE, 1872, 1 A. 151.

Banns.

Publishing the. See PENAL CODE, 1 A. 316=1 Ind. Jur. 560.

Bigamy.

Attempt to commit. See PENAL CODE, 1 A. 316=1 Ind. Jur. 560.

Bill of exchange.

(1) *Eidence Act, I of 1872, S. 92.*—The drawer of a bill of exchange cannot be allowed to set up an oral agreement that contradicts or operates in defeasance of its terms. Where, therefore, a Bank discounted bills drawn by a consignor of goods on his consignee against his consignments, and, having been

Bill of exchange – (*Concluded*).

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unable to recover from the consignee who had accepted the bills, sued the consignor, the latter was not allowed to set up an oral agreement that the Railway-receipts for the consignment, sent through the Bank, were not to be delivered to the consignee before payment. COHEN v. THE BANK OF BENGAL, 2 A. 593=5 Ind. Jur. 151 ... 936

'Birt' tenures.

Act XVI of 1865—Act XIII of 1866—Birteah, suit by—Limitation.—A suit by a Birteah, in respect of his tenure, is cognizable under Act XVI of 1865 and Act XIII of 1866, notwithstanding that he may not have been in possession in 1855. SIR MAHARAJAH DRIG BIJAI SINGH v. GOPAL DATT PANDAY, 6 C. 218=3 Suth. P.C.J. 715=7 I.A. 17=4 Saraswathi's P.C.J. 117=6 C.L.R. 146 ... 898

Bond.

(1) *Obligee altering endorsement of payment—Effect.—Held*, that the ruling in *Sheodin* v. *Ganeshi Lal*, (N.W.P., S.D.A. Rep. 1859—(73) did not apply to a case where endorsements of payments in satisfaction of the bond and not the terms of the bond itself, were found to have been altered by the obligee. In the present case the bond itself was admitted and the defendant confessed his liability for a certain amount. The lower appellate Court was, therefore, wrong in dismissing the suit *in toto*. KALLU MAL v. KALLU, 1 A.W.N. 119 ... 1035

(2) See MORTGAGE (SIMPLE MORTGAGE), 1 A. 611.

(3) See POST DIEM INTEREST, 1 A. 603=2 Ind. Jur. 725.

Bribery.

See PENAL CODE, 1 A. 530=2 Ind. Jur. 466.

British Courts.

Jurisdiction of. See ACT XI OF 1872, 2 A. 218.

British Indian Courts.

Jurisdiction of. See CROWN, 2 A. 1.

Burden of proof.

(1) See ACT I OF 1869, 3 I.A. 85=3 Sar. P.C.J. 570.

(2) See EXECUTION OF DECREE, Bal. 430=5 C.L.R. 308.

(3) SEE REDEMPTION, 1 A. 194.

Cancellation of document.

Suit for value of subject-matter in dispute.—In a suit for the cancellation of a bond for a certain amount of money, which, the plaintiffs alleged, was executed by them under a wrong impression that it was for a lower amount with less interest, and in which they admit their liability to pay such lower amount and pay it into Court, the value of the subject-matter in dispute is the difference between such lower amount with less interest and the amount of the bond with the interest as stipulated for therein. KALI CHARAN RAI v. AJUDHIA RAI, 2 A 148 ... 654

Cause of action.

(1) *First and second mortgage—Dispossession of second mortgagee—Limitation.*—There were two mortgages on the same property, the condition in each being that, on failure to repay the amount within a fixed time, the mortgagee should be put in possession; the second mortgagee obtained a decree on his

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***Cause of action*—(*Concluded*).**

mortgage, and, in execution of it, took possession; the first mortgagee then sued on his mortgage, obtained a decree, and in execution of it ousted the second mortgagee; and, finally. the heirs of the mortgagor discharged the debt of the first mortgagee and resumed possession. *Held*, in a suit by the second mortgagee against the heirs of the mortgagor for possession of the lands, that the cause of action for the plaintiff arose, not on the date of his dispossession by the first mortgagee, who had a better title, but on the date when the heirs of the mortgagor, after discharge of the first mortgage, entered into possession of the land. When the first mortgage was paid off, the title of the plaintiff, which was always a good title against the mortgagor, was a valid title against every one, and when his title became a valid and good title, the heirs of the mortgagors had no right to enter upon the possession of their land. *Held*, also, that the plaintiff could not claim interest on the mortgage amount for the period during which he was dispossessed, as this was a suit for possession of the mortgage property and not for the mortgage amount. NARAIN SINGH v. SHIMBHOO SINGH, 1 A. 325=4 I.A. 15=3 Suth. P.C.J. 357=3 Saraswati's P.C.J. 673 ... 250

(2) See ACT XIX OF 1873, 2 A. 415.

(3) Joinder of, between same parties, See CESS, 1 A. 444.

(4) See CHEQUE, 2 A. 754.

(5) See CIVIL PROCEDURE CODE, 1859, 1 A. 543.

(6) See CIVIL PROCEDURE CODE, 1877, 2 A. 884.

(7) See FRAUD, 1 A. 403.

(8) See LIMITATION ACT, 1871, 2 A. 857.

(9) See LIMITATION ACT, 1877, 2 A. 322=4 Ind. Jur. 461.

(10) See MORTGAGE (USUFRUCTUARY), 2 A. 193.

(11) Misjoinder of, See SPECIFIC RELIEF ACT, 1 A. 555.

Certificate.

to collect debts. See ACT XXVII OF 1860, 2 A. 513.

Certificate of sale.

See REGISTRATION, 2 A. 392.

Cess.

(1) *Suits for Zamindari cesses, not Small Cause suits—Joinder of causes of action between same parties.*—Suits for *huq-i-chaharam*, or other Zemindari cesses, do not fall within any of the classes of suits cognizable by Small Cause Courts. The cesses are dues customarily payable. A claim for such a cess is not a claim for money dues on contract, nor for personal property or the value thereof, nor for damages.

Several causes of action for money between the same parties may be joined together. NANKU v. THE BOARD OF REVENUE FOR THE N.W.P., IN THE CAPACITY OF THE COURT OF WARDS, FOR THE MINOR RAJA OF KANTIT, 1 A. 444 ... 345

(2) See ACT XIX OF 1873, 2 A. 49.

(3) See CLAIM, 1 A. 440.

Cession.

See CROWN, 2 A. 1.

Charge.

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(1) *Against immoveable property—Subsequent lease—Auction-purchaser's rights.*—When the holder of a simple mortgage bond obtains only a money decree on the bond, in execution of which the property hypothecated in the bond is attached, brought to sale and purchased by him, and the debt is completely discharged, he cannot afterwards sue to enforce his lien on the collateral security for his debt, which no longer exists. *Semble.* Even if the debt had not been fully satisfied, he could not enforce the lien so as to avoid a lease granted subsequent to the bond. BALWANT SINGH v. GOKARAN PRASAD, 1 A. 433=2 Ind. Jur. 177. ... 267

(2) *Promise not to alienate property.*—An undertaking by a judgment-creditor, in a petition to the Court executing a decree against him, stating generally that he would not alienate his property until the debts are paid, does not amount to a charge on his property. BHUPAL v. JAG RAM, 2 A. 449 ... 860

(3) *Suit for money charged upon immoveable property—Jurisdiction—First and second mortgages—Sales in execution of decrees enforcing mortgages—Priority between auction-purchasers.*—In a suit for money charged upon immoveable property by enforcement of the charge, the question of jurisdiction must be determined with reference to the amount of the bond, and not the value of the property hypothecated.

Of two auction-purchasers, purchasing the same property, sold simultaneously in execution of two mortgage-decrees, the one, who purchases in execution of the decree enforcing the earlier mortgage, has a prior right to possession over the other. JANKI DAS v. BADRI NATH, 2 A. 698 ... 991

(4) See REGISTRATION ACT, VIII OF 1871, 1 A. 274 & 2 A. 96=3 Ind. Jur. 470.

Cheque.

Suit on lost cheque—Cause of action—Parties to suit—C.P.C., 1877, S. 61.—When a cheque is lost by a payee or indorsee, the refusal of the drawer or the indorser to renew the cheque or refund its amount to the payee or indorsee, gives the latter a cause of action against the former. Where the indorsee sues the indorser for renewal of a lost cheque, the drawer also must be impleaded, as the cheque cannot be renewed without his co-operation. BALDEO PRASAD v. GRISH CHANDAR BHOSE, 2 A. 754 ... 1008

Chose in action.

See PRO-NOTE, 1 A. 732.

Civil Procedure Code (Act VIII of 1859).

(1) *S. 2—'Res judicata'.*—When a plaintiff claims an estate, and the defendant, being in possession, resists it, he is bound to resist it upon all the grounds that it is possible to him, according to his knowledge, then, to bring forward; if he fails to do so, he is estopped from asserting any of them thereafter. Where, therefore, in a former suit for possession brought by the defendants against the plaintiff, the latter unsuccessfully pleaded his title as auction purchaser, but did not set up the right of pre-emption with respect to the property, which had already accrued to him, *held* that the subsequent suit, based on such right of pre-emption, was *res judicata*. BALDEO SAHAI v. BATESHAR SINGH, 1 A. 75 ... 59

(2) *S. 2—'Res judicata.'*—See, also, JADULAL v. RAM GHOLAM, 1 A. 316 ... 256

(3) *Res judicata.*—Where, in a former suit between the same parties, the whole question of the plaintiff's title to the plaint property as against the defendant was laid open by the pleadings and decided against him, *held*, in a subsequent suit for the same relief brought by the plaintiff in a different capacity, but a capacity that had already accrued at the time of the former suit, and was also inconsistent with his capacity in the first suit,—that the suit was *res judicata*. RADHIA v. BENI, 1 A. 560 ... 438

Civil Procedure Code (Act VIII of 1859)—(Continued). PAGE

(4) S. 2—See HINDU LAW (GIFT), 1 A. 734.

(5) S. 2—See LIS PENDENS, 1 A. 588.

(6) *Ss. 2, 139—Res judicata.*—If, in a suit in which a number of issues are framed on the pleadings, the findings on some of the issues are enough to dispose of the suit, the Court is not bound to refrain from determining the other issues, nor can its adjudication on them be treated as a nullity. And its findings on such issues will be *res judicata* and cannot be re-opened in a subsequent suit between the same parties or their representatives. MAN SINGH v. NARAYAN DAS, 1 A. 480=2 Ind. Jur. 387 ... 374

(7) *S. 5—"Dwelling place," meaning of—Act XXIII of 1861, S. 4.*—A man's family residence, the fixed and permanent home of his wife and family, and to which he has always the intention of returning, will constitute his dwelling place within the meaning of Act VIII of 1859, S. 5 and Act XXIII of 1861, S. 4, for the purpose of jurisdiction. FATIMA BEGAM v. SAKINA BEGAM, 1 A. 51. ... 48

(8) *S. 6—Miscellaneous proceedings—Act XXIII of 1861—Execution of decree—Transfer.*—Under S. 6 of Act VIII of 1859, and S. 38 of Act XXIII of 1861, a District Judge can transfer, to his own file, execution proceedings pending in a Court subordinate to him. GAYA PARSHAD v. BHUP SINGH, 1 A. 180. 140

(9) *S. 7.*—The bar, under sec. 7 of Act VIII of 1859, applies to cases in which the plaintiff omits to seek relief in respect of a portion of a claim, and not to cases in which, though he may be entitled to claim more than one kind of relief, he seeks, for the time, one remedy only. Where the purchaser of certain lands, who was in a position to have sued for possession, sued at first only for a declaration of his title under the sale, *held*, in a subsequent suit by him for possession, that he was not barred. TULSI RAM v. GANGA RAM, 1 A. 252 ... 199

(10) *S. 7—Subsequent cause of action consequent on discovery of fraud.*—Where plaintiff sued for and obtained a decree for a declaration of his right to a share in a mortgage-debt, *held*, that S. 7, C.P.C., was no bar to a subsequent suit by him for the recovery of his share of the amount due under the mortgage, afterwards discovered to have been fraudulently received by the same defendant prior to the first suit. LACHMAN SINGH v. SANWAL SINGH, 1 A. 543 ... 429

(11) *S. 7—Relinquishment of part of claim—Simultaneous institution.*—Where two suits are simultaneously instituted, even if the claims in both of them arose out of the same cause of action and should have been included in one and the same suit, the determination of one of them is no bar to the entertainment of the other; for, in such a case, there is no relinquishment of a claim, and no question of entertainment of a suit *after* such relinquishment or omission, or *after* the institution and determination of the other suit. KALESHAR PRASAD *v.* JAGAN NATH, 1 A. 650 ... 506

(12) *S. 7—Dismissal of declaratory suit—Subsequent suit for possession.*—The dismissal of a declaratory suit on the ground that the plaintiff could sue for possession, does not bar a subsequent suit for possession. DARBO v. KESHO RAI, 2 A. 356 ... 838

(13) *Ss. 7 and 97—Suit—Omission of part of claim—Withdrawal of suit—Fresh suit—Addition of portion of claim omitted.*—Where, in the first suit, a portion of the claim was omitted, and the suit withdrawn with permission to bring a fresh suit, which should include the portion omitted in the first suit, *held* that the additional portion of the claim included in the fresh suit brought, is not barred under S. 7, Act VIII of 1859. ILAHI BAKSH v. IMAM BAKSH, 1 A. 324=1 Ind. Jur. 561 ... 260

Civil Procedure Code (Act VIII of 1859)—(*Continued*). PAGE

(14) S. 13—See COURT-FEE, 2 A. 241

(15) S. 110—See COURT-FEE, 2 A. 318.

(16) *S. 119*—Ex parte *judgment—Appeal.*—S. 119, C.P.C. (1859), precludes an appeal from a judgment passed *ex parte* against a defendant. who has not appeared *at all*, but not in the case of a defendant, who has once appeared, but who fails to appear on a day to which the case has been adjourned. ZAIN-UL-ABDIN KHAN v. AHMAD RAZA KHAN, 2 A. 67=5 I.A. 233=3 Saraswati's P.C.J. 879 ... 610

(17) *S. 189—Contents of decree—C.P.C. (1877), S. 206.*—Where, in a suit for money and enforcement of the lien on the property hypothecated in a bond, the decree was for the "claim as brought," without any specification as to the relief sought by the plaintiff for the enforcement of the lien, *held*, that this was only a money-decree and not one enforcing the lien. It is not for the Court to construe the relief granted by a decree by reference to the particulars of the claim set forth in it. These are required to be set forth in the decree, but it is also obligatory to set out clearly the relief granted or other determination of the suit. HARSUKH v. MEGHRAJ, 2 A. 345 ... 800

(18) *S. 194—Decree directing payment by instalments—C.P.C. (1877), S. 210—Discretion.*—That the defendant is "hard-pressed" is no sufficient reason for a Court directing payment of a decree by instalments extending over a long period, and reducing the ordinary rate of interest. *Quære*—Whether a "decree for money," within the meaning of S. 194, C.P.C. (1859), and S. 210, C.P.C. (1877), is merely one for payment of money, or also included one in which a sale is ordered of immoveable property hypothecated. BINDA PRASAD v. MADHO PRASAD, 2 A. 129 ... 636

(19) *S. 200—Decree for performance of particular act—Execution of decree.*—When a decree directs the performance of, or abstinence from, a certain act, there must be clear evidence of disobedience by the person so directed, before the decree can be executed against him. When in a decree for restitution of conjugal rights, the plaintiff's mother-in-law, who had been impleaded as a defendant, was directed to refrain from preventing the plaintiff's wife from returning to him, *held*, in an execution petition for attaching the property of the mother-in-law, that her action in permitting her daughter, who was of age, to reside in her home after decree, did not constitute such interference, on her part, with the return of her daughter as would justify execution against her. AJNASI KUAR v. SURAJ PRASAD, 1 A. 501 ... 396

(20) *Ss. 201, 205, 206, 216, 236—Rights of decree-holder—Possessor of right bound to adopt course prescribed by law for enforcing it.*—Under the C.P.C., 1859, as well as the English Law, a judgment for moneys due on a debt does not vest in a judgment-creditor any portion of the property of his judgment-debtor. So, a judgment-creditor cannot entertain a suit for the unsatisfied balance of his decree against a person alleged to have received the assets of his judgment-debtor after the latter's death.

When the Legislature has prescribed a particular mode of enforcing a right by a decree, the possessor of that right is bound to follow the procedure prescribed and no other. The proper mode of enforcing a decree is that pointed out by the C.P.C., *viz.*, by execution and attachment and sale or by execution and attachment and the appointment of a Receiver under S. 243 (Act VIII of 1859) to collect the property. MIRZA MAHOMED AGA ALI KHAN BAHADOOR v. THE WIDOW OF BALMAKUND, 26 W.R. 82=3 Suth. P.C.J. 330=3 I.A. 241=3 Saraswati's P.C.J. 648 ... 195

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(21) *S. 208—Execution of decree by heir—Certificate to collect debts—Act XXVII of 1860.*—A certificate under Act XXVII of 1860 to collect debts due to a deceased person, is not indispensably necessary to enable an heir to apply, under S. 208 of the C.P.C. (1859), for the execution of a decree held by the deceased. A person, who has not obtained a certificate, may apply under that section. It will, of course, be open to the Court, in the exercise of the discretion vested in it, if there is any doubt that the person applying for execution is entitled by inheritance to the rights decreed, to refuse the application until a certificate has been obtained. KAKAM ALI v. HALIMA, 1 A. 686 ... 535

(22) Ss. 212, 285—See LIMITATION ACT, IX OF 1871, 1 A. 525.

(23) S. 230—See CIVIL PROCEDURE CODE, 1877, No. 46, 2 A. 94.

(24) Ss. 235, 252—See DECREE, 1 A. 348.

(25) *Ss. 239, 240—Attachment of land—Private alienation after attachment.*—Under S. 240 of the C.P.C. (1859), a private alienation of property, made after its attachment had been duly intimated and made known in the manner prescribed by the Act, is declared null and void. Where, therefore, the attachment is not so made known, a private alienation, made after such attachment, is not null and void. NUR AHMED v. ALTAF ALI, 2 A. 58 ... 600

(26) S. 246—See LIMITATION ACT, IX OF 1871, 1 A. 355.

(27) *S. 246—Effect of an order under.*—When an inquiry has been duly held under S. 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code (namely, by a suit brought within one year from the date of the order), it is as final and conclusive on all persons, who are parties to it, as any other final order or decree of a Court of Justice. Until it has been overruled in a regular suit, brought in virtue of the permission expressly given by the Code, no Court is at liberty afterwards to go behind the order, and enquire whether the Court which disallowed the objection had correctly appreciated the evidence as to possession, or had come to the conclusion as to possession erroneously. In other words, the effect of the order cannot be affected by the propriety or otherwise of the decision at which the Court, which investigated the claim, arrived as to the fact of possession. And as the Code declares that, in the suit brought to contest the order, the claimant must prove his *right*, it follows that the order, if not set aside, is conclusive as to the right. And lastly, such an order is binding on the successful party, whether he is a plaintiff or defendant in the suit; so that what he cannot assert as plaintiff he cannot plead as a defendant. BADRI PRASAD v. MUHAMMAD YUSUF, 1 A. 381 ... 294

(28) *S. 246—Effect of an order under limitation*—The finality and conclusiveness of an order under S. 246, C.P.C., passed on a claim preferred to property attached in execution of a decree cannot be affected by the circumstance that, owing to the decree being otherwise satisfied after the order, the property attached has not been brought to sale. Where, under the above circumstances, the unsuccessful claimant, more than a year after the order, brought a suit against the parties to the decree for the establishment of his proprietary right to the property attached, *held* that the suit was barred by limitation. JEONI v. BHAGWAN SAHAI, 1 A. 541=2 Ind. Jur. 680 ... 428

(29) S. 246—See COURT FEES ACT, 1870, 2 A. 63.

(30) S. 246—See MORTGAGE (USUFRUCTUARY), 2 A. 455=4 Ind. Jur. 583.

(31) *S. 248—Khalisa Mahal or Revenue paying land—Execution—Sale by Collector—Irregularities in publication of Court sale.*—Land granted "revenue free" for a few years, after which it would be "revenue paying,"

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must, even when it is "revenue free," be considered as revenue-paying land for the purposes of S. 240 of the C.P.C. Execution sales of such lands should, therefore, be conducted by the Collector and not by the Civil Courts. Where it appeared that the place where the sale was to take place was not described with sufficient distinctness, and the proclamation was not made on the spot; *held*, that these were irregularities that rendered the Court-sale invalid. MAJOR-GENERAL SHOWERS v. SETH GOBIND DASS, 1 A. 400=2 Ind. Jur. 66 ... 324

(32) *S. 254—Sale in execution—Defaulting purchaser—Appeal—High Court—Appellate Civil jurisdiction—Division Court—Letters Patent, cl. 10.*—An appeal lies from an order passed on an application, under S. 254 of Act VIII of 1859, to make a defaulting purchaser liable for the loss occasioned by a re-sale. And an appeal to the Full Bench, under cl. 10 of the Letters Patent, is not confined to the point on which the Judges of the Division Bench differ. RAM DIAL v. RAM DAS, 1 A. 181 ... 140

(33) Ss. 256, 257, 258—See CIVIL PROCEDURE CODE, 1877, 2 A. 780.

(34) *Ss. 256 and 259—Act XXIII of 1861, Ss. 11 and 35—Auction sale—Order cancelling sale—Suit to set aside sale—Appeal.*—The finality and the validity of an order under Ss. 256 and 259 of Act VIII of 1859 depends on its compliance with the terms of those sections. Where, therefore, an auction-sale of landed property was set aside, under S. 257, on the sole objection of the judgment-debtor that the price realized was low, there being no allegation or proof of material irregularity in publishing or conducting the sale, in other words, no objection permissible by S. 256 having been made by the judgment-debtor, *held*, that the Court had failed to do the duty imposed on it by law of confirming the sale, and exceeded its jurisdiction by cancelling the sale. Under the above circumstances, a suit will lie by the auction purchaser to cancel the order of the Court cancelling the sale. SUKHAI v. DARYAI, 1 A. 374=1 Ind. Jur. 779 ... 285

(35) *S. 260—Execution of decree—Certified purchaser.*—Where a judgment-creditor sued for a declaration that the certified purchaser of property in execution of his decree was merely a trustee for the judgment-debtor, that the purchase in his name was made with the intention of defeating or delaying him in the execution of his decree, and that he was at liberty to apply for execution against the property as the property of his judgment-debtor; *held* that S. 260, Act VIII of 1859, was in no way a bar to the suit. PURAN MAL v. ALIKHAN, 1 A. 235 ... 184

(36) *S. 260—Certified purchaser.*—In a suit by the certified purchaser at an execution sale, to establish his right to, and for possession of, the property purchased by him, the defendant is not precluded, by S. 260 of Act VIII of 1859, from contesting the suit on the ground that he was the actual purchaser of the property. S. 260 declares that "any suit brought against the certified purchaser—shall be dismissed." The section should be construed literally and applied strictly. JAN MUHAMMAD v. ILAHI BAKSH, 1 A. 290 ... 249

(37) *S. 273—Act XX of 1866, S. 52—Act VIII of 1871, Ss. 53, 54 and 55—Appeal—Execution—Procedure—Repeal.*—Orders in execution under Ss. 53, 54 and 55 of Act XX of 1866 are not appealable. Though this Act has been repealed by Act VIII of 1871, the procedure under it has been saved by Ss. 53, 54 and 55 of the latter Act. RAMANAND v. THE BANK OF BENGAL, 1 A. 377 ... 287

(38) *Ss. 285 and 348—Act XIV of 1859—Limitation—Act IX of 1871—Compromise under decree—Instalment—Payment under compromise—Proceedings under a barred decree.*—The receipt of instalments by a decree-holder, out of

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Court, in pursuance of a compromise made between him and his judgment-debtor and sanctioned by the Court, is not a proceeding to enforce or keep in force a decree. Nor can a condition in a compromise that on default being made in a certain number of instalments, the decree should be executed in full, prevent limitation from running. Proceedings taken under a barred decree cannot serve to bring subsequent applications within time. STOWELL, MANAGER, UNCOVENANTED SERVICE BANK, LIMITED v. BILLINGS, 1 A. 350 ... 273

(39) *S. 308—Pauper suit—Institution of suit—Presentation of plaint—Limitation.*—An application under S. 299 of the C.P.C., to sue *in forma pauperis*, can be deemed the plaint in the suit, when it is granted, and relates back to the date on which it was presented. But when it is virtually withdrawn and court-fee stamps required for the plaint are put in, the suit must be held to have been instituted on the date when the plaint-stamps were put in. And if this date be beyond the period of limitation prescribed, the suit will be barred. SKINNER v. ORDE, 1 A. 230 ... 157

(40) *Ss. 323 and 324—Arbitration.*—Where there is no illegality apparent on the face of an award, a Court cannot remit it for re-consideration by the arbitrator, nor can it set aside the award and proceed to determine the suit itself. NANAK CHAND v. RAM NARAYAN, 2 A. 181 ... 676

(41) *Ss. 326, 327—"Sufficient cause."—Consultation with expert—Waiver of objection—Chances of arbitration, submission to—General rule of Privy Council as to dealing with form of pleadings.*—According to the true construction of Act VIII of 1859, the earlier sections are not incorporated into S. 327, as they are expressly incorporated into S. 326, and the words "sufficient cause" should be taken to comprehend any substantial objection which appears on the face of the award ; or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in England. The mere fact of the arbitrators consulting an expert was not a valid objection to their award.

Where it was objected that the award was invalid because the Will referred to the arbitrators referred to another Will not produced by the plaintiff, *held*, that the defendant could not object to the validity of the award, as notwithstanding the knowledge of the suppression he did submit to take his chances of the arbitration. The term "award" as used in the plaint in this case must be taken to include the whole document which is scheduled to the plaint, *i.e.*, the formal judgment as well as the decree.

The general principle of their Lordships is that of not dealing very strictly with the form of the pleadings if they find that a material point was substantially raised. CHOWDHURY MUNTAZA HOSSEIN v. MUSSUMAT BIBI BECHUNISSA, 26 W.R. 10=3 Suth. P.C.J. 342=3 I.A. 209=3 Saraswati's P.C.J. 663=Bal. 86 ... 210

(42) *S. 327—Arbitration—Award—Appeal.*—Where, in an application under S. 327 of Act VIII of 1859, to file and enforce an award, made on a reference to arbitration without the intervention of a Court, the Court directed that the award should be filed, but did not make a decree enforcing the award under the provisions of Ch. VI of Act VIII of 1859 ; *Held*, that the order of the Court did not amount to a decree and was not appealable.

Per Spankie, J.—S. 327 of the C.P.C. (1859) applies only to those cases where the reference to arbitration is admitted, and not to cases where it is denied that the reference or the award was made. In such cases, the enforcement of the award must be by suit. HUSSAINI BIBI v. MOHSIN KHAN, 1 A. 156. 116

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(43) *S. 336—Appeal—Institution—Memorandum of appeal.* In returning a memorandum of appeal, under S. 336, Act VIII of 1859, for being corrected, the Court should fix a time within which it should be re-presented. In a case where the Court omitted to fix the time, and the memorandum of appeal was re-presented a few days after, *held*, that (for purposes of limitation) the appeal must be taken to have been instituted on the day when it was first presented. JAGAN NATH v. LALMAN, 1 A. 260 ... 203

(44) S. 338—See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 178.

(45) S. 350—See RELEASE, 2 A. 554=5 Ind. Jur. 92.

(46) *S. 354—Remand—Memorandum of objections.*—A party, who has failed to file a memorandum of objections, within the time fixed by the appellate Court, under S. 354 of Act VIII of 1859, cannot afterwards claim, as a matter of right, to urge objections. But he can do so with the leave of the Court, which can also extend the time for filing objections. RATAN SINGH v. WAZIR, 1 A. 165 ... 124

(47) *Ss. 376 and 378—Review of judgment—Appeal.*—Though the order granting a review of judgment is final and unappealable, objections to it can be urged in an appeal against the decision passed on review. Where a Court of appeal granted a review of judgment on the grounds.—(*a*) that the appellate Court had failed to inspect certain very material documents that it had summarily discredited, and (*b*) that it had misappreciated the evidence, *held* that the order granting the review was within the discretion vested in the Court by law. ABDUL RAHIM v. RACHA RAI, 1 A. 363=1 Ind. Jur. 818 ... 276

(48) *S. 377—Review of judgment—Limitation.*—An application for review of judgment cannot be granted after the proper time on grounds which should have been, but were not, urged at the hearing of suit, unless just and reasonable cause were shown to the satisfaction of the Court for not preferring it within the time allowed by law. MADHO DAS v. RUKMAN SEVAN SING, 2 A. 287 ... 712

(49) See ACT XXIV OF 1870, 3 Suth. P.C.J. 562=5 I.A. 197=3 Sar. P.C.J. 843 =Bal. 174.

(50) See CIVIL PROCEDURE CODE, 1877, 2 A. 299=4 Ind. Jur. 357.

(51) See EXECUTION OF DECREE, 1 A. 212.

(52) See STATUTES 24 & 25 VIC., C. 104, HIGH COURT'S ACT, 1 A. 296.

Civil Procedure Code (Act XXIII of 1861).

(1) S. 4—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 51.

(2) Ss. 5 & 7—See COURT FEE, 2 A. 318.

(3) *S. 11—Barred suit—Excess payment made by mistake in execution of decree—Jurisdiction to entertain such suit.—Per Stuart, C.J.*—A suit will lie to recover an excess payment made by mistake in execution of a decree, and is not barred by S. 11 of Act XXIII of 1861, the question in such a suit being a matter outside the decree and not relating to its execution. *Per Pearson, J.* —Contra.

Such a suit, being one as for damages within the meaning of S. 6 of Act XI of 1865, is cognizable by a Small Cause Court, and not by a Civil Court. AGRA SAVINGS BANK, LIMITED v. SRI RAM MITTER, 1 A. 388=2 Ind. Jur. 23... 299

(4) Ss. 11 and 35—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 374 =1 Ind. Jur. 779.

(5) *S. 14—Pre-emption—Co-sharer—Stranger—Pattidari Estate—Suit for possession by disallowed auction-purchaser—Maintainability.*—With respect to the right of pre-emption, the co-sharers of one patti in a pattidari estate,

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are not "Strangers" with reference to co-sharers in another patti of the same estate, within the meaning of S. 14, Act XXIII of 1861; and the section gives no preferential right of pre-emption among themselves, between co-sharers in the same patti and sharers in other pattis, who come under the denomination of members of the co-parcenary.

Where, in an execution sale of share in a pattidari estate, an auction-purchaser's claim to pre-emption is disallowed, under S. 14, Act XXIII of 1861, he cannot maintain a suit for possession against the successful pre-emptor; he can only sue for a declaration that the latter has no right of pre-emption against him and that the sale to him is invalid. He cannot obtain possession until the sale to him has been confirmed and made absolute,—a remedy to be sought in the Court which executed the decree. FARZAND ALI v. ALIMULLAH, 1 A. 272 ... 225

(6) *S. 14—Pre-emption.*—The right of pre-emption cannot be preferred at a sale in execution of a decree of a Revenue Court. The provisions of S. 14 of Act XXIII of 1861 are, therefore, inapplicable in the case of lands sold in execution of decrees of Revenue Courts. NARAIN SINGH v. MUHAMMAD FARUK, 1 A. 277 = 1 Ind. Jur. 269 ... 228

(7) S. 27—See APPEAL (SPECIAL APPEAL), 2 A. 112.

(8) *S. 38—Miscellaneous proceedings.—Act VIII of 1859, S. 338—Stay of execution pending appeal.*—The expression, "Miscellaneous proceedings," in S. 38 of Act XXIII of 1861, embraces all proceedings, not being regular suits or appeals, for which no regular procedure is expressly provided; and, in that sense, it embraces proceedings in execution of decree.

Pending the determination of a miscellaneous regular appeal to the appellate Court, against the order of the Court of first instance, refusing to postpone a sale in execution of a decree, the appellate Court has power, under S. 338 of Act 1859, to stay execution. IN THE MATTER OF THE PETITION OF HARSHANKAR PARSHAD, 1 A. 178 ... 138

(9) S. 38—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), No. 8, 1 A. 180.

Civil Procedure Code, 1877.

(1) *S. 2—Execution of decree—Appeal from order—Cross-decrees—Setting off.*—An order in execution proceedings, disallowing the objections of the judgment-debtor to execution being taken out by a transferee of the decree-holder, is appealable, being the final order in a judicial proceeding, and, therefore, a decree within the meaning of S. 2 of the C.P.C. (1877).

The amount of a decree, held by a judgment-debtor against the judgment-creditor alone, cannot be set off against a decree held by the latter along with other persons, which did not specify the separate interests of each of them. MURLI DHAR v. PARSOTAM DAS, 2 A. 91 ... 612

(2) *Ss. 2, 540 - Decree—Judgment—Appeal—Reference to judgment and record.*—Where, in a suit for possession based on title, the defendants deny the plaintiff's title and set up their own, and the Court, finding against the plaintiff, and also that the defendants have a limited right only as lessees under an unexpired lease, dismisses the suit in these terms:—"Ordered that the plaintiff's claim, as it stands at present, be dismissed,"—the defendants are entitled, under S. 540 of the C.P.C. (1877), to appeal from such decree.—*By the Full Bench, Straight, J., dissenting.*

Per Stuart, C.J.—When a decretal order is not self-explanatory, it would be necessary, in order to its being intelligible, to read it with the judgment and the record. LACHMAN SINGH v. MOHAN, 2 A. 497 = 4 Ind. Jur. 644 ... 887

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(3) Ss. 2, 566, 588—See ARBITRATION, 2 A. 471=4 Ind. Jur. 585.

(4) *Ss. 2, 584—Execution of decree—Appeal from order in execution—C.P.C. (1859)—Act I of 1868 (General Clauses Act), S. 6.*—*Per* Pearson, J.—An order of a District Judge, passed on appeal from an order in execution proceedings amounts to a decree within the meaning of S. 2, C.P.C. (1877), and is, therefore, appealable under S. 584 of the C.P.C., (1877), as well as under the C.P.C. (1859) though repealed, with reference to S. 6 of the General Clauses Act. *Per* Stuart, C.J., *contra*. UDA BEGAM v. IMAM-UD-DIN, 2 A. 74 ... 583

(5) *S. 13—'Res-judicata'—'Obiter dictum.'*—An issue which is directly and substantially raised between the parties to a suit, and has been determined, cannot be re-opened whatever the form of decree may show. In a suit for the recovery of a money-bond and of an over-payment made to the defendant, the latter preferred a counter-claim, and thus opened up the dealings and accounts between the parties. The suit as brought was dismissed, the Court finding in favour of the counter-claim. *Held*, in a subsequent suit for the recovery of the bond on payment of the counter-claim found due, that the defendant cannot claim to re-open the accounts. *Held*, also, that the remarks of a Division Bench of the High Court in the previous suit (the finding on the accounts having become final) to the effect that when the matter comes up again, the accounts between the parties must be taken again, were mere *obiter dicta* and cannot enable the defendant to re-open the accounts. MOHAN LAL v. RAM DIAL, 2 A. 843 ... 1083

(6) *S. 32—Dismissal or addition of parties—Revenue Court, power of—Act XVIII 1873 (N.W.P. Rent Act), S. 106.*—Although the provisions of S. 32 of the C.P.C. (1877), have not been declared applicable by the N.W.P. Rent Act to the procedure of Revenue Courts, still a Revenue Court, whether of first instance or of appeal, does not act illegally in allowing an amendment of the plaint; and the addition of parties, where the same is required for the ends of justice, is consonant to judicial practice, and not repugnant to the provisions of the Rent Act. SHIB GOPAL v. BALDEO SAHAI, 2 A. 264 ... 729

(7) *S. 32—Addition of parties.*—No party should be added either as plaintiff or defendant in a suit, unless he has, in either of such capacities, an identity or community of interest with that party in the litigation on whose side he is to be ranged, in the questions directly arising out of and incident to the original cause of action. Where, therefore, two persons claiming adversely to one another as heirs of the same person, deceased, filed two suits against the same defendant, and each of them was, on his application, made a defendant in the other suit, *held* that, as the priority of rights of these plaintiffs *inter se* was not in issue in either suit and the presence of the added defendants was not necessary to effectually and completely adjudicate upon and settle all the questions involved in the suits, such addition of parties was improper. NARAINI KUAR v. DURJAN KUAR, 2 A. 738 ... 981

(8) *Ss. 32, 582—Addition of parties—Powers of appellate Court—Limitation Act 1877, S. 22.*—Although an appellate Court has, under Ss. 32 and 582 of the C.P.C., the power of adding parties in appeal, yet it cannot, with reference to S. 22 of the Limitation Act, grant, to any of the parties, a relief which is barred by limitation. Therefore, when a suit has been dismissed as against one of two defendants by the Court of first instance and the unsuccessful plaintiff has not appealed against that part of the decree, the addition, as a party in appeal, of the defendant against whom the suit has been dismissed, does not empower the appellate Court to pass against him a decree which the Court of first instance declined to

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pass and in the decision of which Court the plaintiff chose to acquiesce; much less so, when the appeal, as against the defendant so added, is barred by limitation. RANJIT SINGH v. SHEO PRASAD RAM, 2 A. 487=4 Ind. Jur. 641 ... 870

(9) *Ss. 32, 588—Addition of parties—Act XII of 1879, S. 90 (z).*—Under S. 588 of the C.P.C., 1877, as amended by Act XII of 1879, orders under S. 32 striking out or adding the name of any person as plaintiff or defendant are appealable; but an order refusing an application by a person to be made a defendant is not appealable. KARMAN BIBI v. MISRI LAL, 2 A. 904 ... 1126

(10) *S. 43—Bond for money with collateral security—Omission of claim.*—An obligation and a collateral security for its performance constitute one cause of action, and a plaintiff cannot, in respect of it, sue first to enforce the obligation, and afterwards to enforce the security. GUMANI v. RAM PADARATH LAL, 2 A. 838 ... 1078

(11) *S. 43—Lease of mortgaged property by usufructuary mortgagee to mortgagor —Hypothecation of same property as security for rent—Suit for rent in Revenue Court—Suit for enforcing of lien in Civil Court.*—Where a mortgagor to whom the mortgaged property has been leased by the mortgagee, hypothecates such property to the latter as security for the rent payable by him, the decision of the Revenue Courts in a suit for rent brought by the mortgagee would not bar a suit by him in the Civil Court for the enforcement of the hypothecation; for, in the suit for rent, the parties stand merely in the relation of landlord and tenant, and the enforcement of the lien could only be sought in the Civil Court. BANDA HASAN v. ABADI BEGAM, 4 A. 180 ... 1109

(12) *Ss. 53 and 562—Amendment of plaint—Material alteration.*—Where a suit for the restoration, to its original condition, of a pond which the defendants were alleged to be wrongfully filling up, was allowed to be amended so as to become a claim for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and to the use of the water by way of easement, *held*, that the alteration was a material one. An appellate Court cannot order or allow a plaint to be amended, and cannot remand a case under S. 562 of the C.P.C., for the purpose of such amendment. FARZAND ALI v. YUSUF ALI, 2 A. 669=5 Ind. Jur. 263 ... 984

(13) *S. 53—Amendment of plaint—Limitation—Indistinct or vague document—Oral evidence—Indian Evidence Act, Ss. 92, 95.*—The date of amendment of a plaint will not affect the question of limitation of a suit; limitation is determined with reference to the date of institution of a suit, and a suit is instituted when a plaint is presented to the proper officer, and its return for amendment and subsequent presentation and acceptance by the Court, will not constitute a fresh institution of the suit.

Where a mortgage bond does not indicate by name the property mortgaged, evidence may be adduced to prove what property was mortgaged. RAM LAL v. HARRISON, 2 A. 832 ... 1069

(14) S. 53—See CONTRACT ACT, No. 11, 2 A. 671.

(15) S. 54 (*b*), See APPEAL (GENERAL), No. 8, 2 A. 875.

(16) *S. 57 (c).—Return of plaint*—Though S. 57 of the C.P.C., 1877, contemplates a return of the plaint, should an error as to jurisdiction be patent, when it is first presented, there is nothing in the language of the section which forbids the return of the plaint at a latter stage in the case, when the Court finds it has no jurisdiction. ABDUL SAMAD v. RAJINDRO KISHOR SINGH, 2 A. 357=1 Ind. Jur. 469 ... 839

(17) S. 61—See CHEQUE, 2 A. 754.

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(18) S. 99—See COURT FEE, 2 A. 318.

(19) *S. 108, 588—Application to set aside* exparte *decree—Order rejecting the same—Appeal.*—There is no appeal from an order under S. 108, C.P.C., 1877 rejecting an application to set aside an *ex parte* decree, as it is neither a decree nor one of those orders made appealable under S. 588 of the Code. GULAB SINGH v LACHMAN DAS, 1 A. 748 ... 541

(20) *S. 111—Mortgage—Claim for compensation—Set off.*—In a suit for money on a usufructuary mortgage, the defendant cannot set off the compensation claimed by him on account of waste committed by the plaintiff mortgagee. RAGU NATH DAS v. ASHRAF HUSAIN, 2 A. 252 ... 693

(21) *S. 206—Contents of decree.*—S. 206 of the C.P.C., 1877, requires, among other things, that a decree "shall specify clearly the relief granted or the determination of the suit." *Held*, accordingly, in a suit on a hypothecation bond, in which the property hypothecated was detailed and the property itself impleaded as a defendant, that a "Decree for plaintiff in favour of his claim and costs against defendant" was to be regarded as a simple money-decree, and not as one for the enforcement of the lien. THAMMAN SINGH v. GANGA RAM, 2 A. 342 ... 798

(22) S. 206—See CIVIL PROCEDURE CODE, 1859, No. 17, 2 A. 345.

(23) *S. 209—Cross-suits—Attachment of amount claimed before decree passed —Cross-decrees.*—Where there are cross-suits for money between two parties against each other, the attachment by a third party of what might be found due on the smaller claim, can have no operation or effect so as to prevent the decree (when it is passed) for the smaller amount from being absorbed in the one for the larger amount, and so as to prevent the decree-holder in the latter case from setting off the amount of the smaller decree under S. 209, C.P.C., 1859. BUJHAWAN LAL v. SUKHRAJ RAI, 2 A. 866 ... 1096

(24) S. 210—See CIVIL PROCEDURE CODE, 1859, No. 18, 2 A. 129.

(25) *S. 210—Decree on hypothecation bond—Payment by instalments.*—The provisions of S. 210, C.P.C., 1877, are not applicable to a suit for the recovery of a bond-debt by the sale of the property hypothecated therein. To direct payment of the decree amount by instalments in such a case would be to set aside and override the contract on the basis of which the plaintiff sues. HARDEO DAS v. HUKAM SINGH, 2 A. 320=4 Ind. Jur. 415 ... 775

(26) *S. 210—Applicability of—Suit on hypothecation bond—Decree payable within a fixed time.*—There is no authority, in the C.P.C., for a Court to make an order directing the amount of a decree to be paid within a fixed period. It would seem that the provisions, of S. 210 of the C.P.C., 1877, are not applicable in a suit for the recovery of a bond-debt by the sale of the hypothecated property. BACHCHU v. MADAD ALI, 2 A. 649 ... 969

(27) *Ss. 211, 561—Mesne profits—Procedure on hearing of appeal.*—In a suit for mesne profits, where the defendants themselves occupied and cultivated the lands in suit, the most reasonable and fitting mode of assessing such profits would be to ascertain and determine what would be a fair rent for the lands, if they had been let to an ordinary tenant and had not been cultivated by the defendants themselves. Where both the parties appeal from the decree of the Court of first instance, and both their appeals are dismissed, and one of them only appeals to the High Court, the other cannot, in such appeal, take objections to the decree of the lower appellate Court dismissing his appeal. GANGA PRASAD v. GAJADHAR PRASAD, 2 A. 651 ... 971

(28) *S. 214—Suit for pre-emption—Deposit of purchase-money—Appellate Court, powers of.*—An Appellate Court disposing of an appeal in a suit for pre-emption can of its own motion fix by its decree a time for the deposit of purchase-money, even though the time fixed by the lower Court may have

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expired without any deposit having been made; and such action of the Court does not *contravene* the provisions of S. 214 of the C.P.C. PERSHADI LAL v. RAM DIAL, 2 A. 744 ... 999

(29) *Ss. 228, 232—Execution of decree—Assignment of decree—Powers of Court in executing transmitted decree.*—When a decree is transferred to a Court for execution, and subsequently transferred by assignment, the assignee's application for execution must be made to the Court which passed the decree, and not to the Court to which the decree has been sent for execution. KADIR BAKHSH v. ILAHI BAKHSH, 2 A. 283=4 Ind. Jur. 358 ... 740

(30) *S. 230, cl. 3—Execution of decree—Meaning of "the last preceding application."*—The words "the last preceding application" in the above clause mean an application under S. 230, C.P.C., 1877, and not an application under C.P.C., 1859. Where, therefore, an application for execution under the C.P.C., 1877, was disallowed as barred, owing to want of due diligence on the part of the decree-holder to procure complete satisfaction of the decree on the last preceding application under the C.P.C., 1859, *held*, that such order was wrong. RAM KISHEN v. SEDHU, 2 A. 275=4 Ind. Jur. 357 ... 736

(31) *S. 230, cl. 3—Execution of decree.*—The concluding clause of S. 230 of the C.P.C., 1877, refers to the question of limitation, and not to that of due diligence. Therefore, an application for execution under S. 230 could not be disallowed, on the ground that a previous application, under the same section, made in the previous year, had not been prosecuted with due diligence. SOHAN LAL v. KARIM BAKHSH, 2 A. 281=4 Ind. Jur. 357 ... 740

(32) *Ss. 230, 232—Execution of decree—Due diligence.*—Under S. 230 of the C.P.C., it is only when an application to execute a decree has been made under it *and granted*, that no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that due diligence was used in connection with the previous application. Therefore, when, during the pendency of an application for execution of a decree, made by the original decree-holder, the assignee of the decree applies to be allowed to execute it, and notice is ordered under S. 232 of the C.P.C., but, the process fee not having been paid, the application is dismissed, a subsequent application by the assignee to be allowed to execute the decree cannot be rejected, because his previous application had not been granted. SADIK ALI KHAN v. MUHAMMAD HUSAIN KHAN, 2 A. 384 ... 776

(33) *S. 244—Execution of decree—Excess money collected in execution—Separate suit.*—Excess money unduly collected, as due under a decree, is recoverable by application to the Court executing the decree and not by separate suit. PARTAB SINGH v. BENI RAM, 2 A. 61=3 Ind. Jur. 321 ... 593

(34) *Ss. 253, 610—Appeal to Privy Council—Security for costs of respondent—Execution of Privy Council decree against surety.*—Under Ss. 253 and 610 of the C.P.C., an order or decree of the Privy Council can be executed against sureties who, on behalf of the opposite party, have given security, either for costs or for the whole decree-amount that might become due from such party

—*By the majority of the F. B.*

Per Spankie, J., and Straight, J—contra—The words of S. 610 seem simply to provide for the enforcement of decrees or orders of the Privy Council, according to the same method as original decrees are executed by the Court passing them, but they create no liability and establish no specific responsibility, in the surety, such as is created by S. 253. BANS BAHADUR SINGH v. MUGHLA BEGAM, 2 A. 604 ... 939

(35) *Ss. 266, 267—Execution of decree—Effect of attachment of money decree.*—Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree (S. 266 of the C.P.C., 1877), yet it is

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apparent from the provisions of S. 273 that the sale of a money decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale.

The penultimate clause of Ss. 273 applies to decrees other than money-decrees. The provisions of the first clause of S. 273 are applicable where two decrees for money are being executed by the same Court, though they may not have been passed by the same Court. SULTAN KUAR v. GULZARI LAL, 2 A. 290 =4 Ind. Jur. 359. ... 735

(36) *Ss. 278, 283—Attachment in execution—Objection by judgment-debtor—Release from attachment—Decree-holder's remedy—Suit to establish right.*—Where property attached in execution of a decree is released, on the objection of the judgment-debtor to the effect that it was in his possession, not as his own property, but as superintendent of an endowment, the decree-holder's remedy is not by way of appeal against the order releasing the property, but by means of a suit under S. 283 of the C.P.C., to establish his right to proceed against such property. For, though the objection was made by the judgment-debtor, it was one to be dealt with under Ss. 278 and 279, etc., of the C.P.C. SANKAR DIAL v. AMIR HAIDAR, 2 A. 752 ... 1007

(37) *S. 310—Sale in execution of decree—Pre-emption.*—In the case of a share of undivided immoveable property sold in execution of a decree, a co-sharer entitled to pre-emption in respect of it, cannot acquire such right as against a stranger bidding for it, unless he also bids for it, and for the same price as such stranger; mere assertion of his title, and payment of earnest money and of the balance of the purchase money within fifteen days, will not do. Nor can he, under such circumstances, maintain a suit for pre-emption against the purchaser. TEJ SINGH v. GOBIND SINGH, 2 A. 850 ... 1058

(38) *S. 311—Execution of decree—Sale of immoveable property—Application to set aside under S. 311, C.P.C., 1877—Auction-purchaser made party thereto—Right of appeal.*—Though an application to set aside a sale, under S. 311, C.P.C., is confined to the decree-holder and the person whose immoveable property has been sold, still an auction-purchaser, who has been made a party to the proceedings under Ss. 32 and 647 of the Code, has a right, when the sale is set aside, to appeal against such order, S. 588 (*m*). GOPAL SINGH v. DULAL KUAR, 2 A. 352=4 Ind. Jur. 468 ... 836

(39) *Ss. 311, 588 (m)—Execution of decree—Application to set aside sale of immoveable property—Auction-purchaser, party to proceeding—Appeal.*—Although, under S. 311 of the C.P.C., an auction-purchaser may not apply to have a sale set aside, he may be made a party to such proceedings on an application made under that section by the decree-holder or a person whose moveable property has been sold; and, if an order is made against him, he can appeal under S. 588 (*m*), C.P.C., 1877. KANTHI RAM v. BANKEY LAL, 2 A. 396 ... 782

(40) *S. 311—Execution sale—Persons competent to set aside sale.*—Under S. 311, C.P.C., the persons who can prefer objections are the decree-holder and any person whose immoveable property has been sold. A stranger is not entitled to come in under that section to set aside a sale. AHMADUDDIN KHAN v. SHEORAJ SINGH, 3 A.W.N. 7 ... 1114

(41) *Ss. 311, 312—Sale in execution of decree—Review of order.*—Where, owing to an order for postponement of an execution-sale not being communicated in time to the officer conducting it, such sale is effected, and is also confirmed by the Court, such Court does not act improperly or *ultra vires* in reviewing the order of confirmation and setting aside the sale as illegal. For, the order for sale having been withdrawn, the sale was made without authority. MIAN JAN v. MAN SINGH, 2 A. 686 ... 985

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(42) *Ss. 32, 315—Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—C.P.C., 1859, Ss. 256, 257, 258—Warranty of title.*—Where a sale in execution of a decree is set aside, not on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, but at the instance of a third party who has succeeded in establishing his title to it, and there is no question of fraud on the part of the decree-holder, the auction-purchaser cannot sue the decree-holder for recovery of purchase-money.

The provisions of S. 315, C.P.C., 1877, having no retrospective effect, cannot apply to a sale which has taken place before the Act came into operation. In the case of such a sale, therefore, the auction-purchaser cannot apply under that section for the refund of purchase-money.

Under S. 315, C P.C., the proper remedy for the auction-purchaser is by an application in the execution department and not by separate suit. (*Per* STRAIGHT, J.)

No warranty of title is ordinarily given by the judgment-creditor in judicial sales held under the C.P.C. HIRA LAL v. KARIM-UN-NISA, 2 A. 780 ... 1047

(43) *Ss. 312, 588 (m)—Execution of decree—Sale of immoveable property—Order setting aside sale—Appeal—Act XII of 1879, Ss. 90 (16), and 102—General Clauses Act (I of 1868), S. 6.*—Under S. 6 of the General Clauses Act (I of 1868), the repeal of any Act cannot affect any proceeding commenced before the repealing Act came into operation. Therefore, an appeal allowed by S. 588 (*m*) of the C.P.C., 1877, but disallowed by the repealing Act (XII of 1879) would not be affected by such repeal, if it had been commenced before the repeal. DURGA PRASAD v. RAM CHARAN, 2 A. 785 ... 1050

(44) *S. 315—Sale in execution of decree—C.P.C., 1859—Application by dispossessed auction-purchaser under S. 315, C.P.C., 1877, for refund of purchase-money.*—Where immoveable property was sold in execution of a decree under the C.P.C., 1859, which did not allow an application by an auction-purchaser for refund of purchase-money, and the auction-purchaser was dispossessed of the same on the ground that the judgment-debtor had no saleable interest in it, an application by him for such refund was held maintainable under S. 315 of the C.P.C., 1877, which had then come into force. IN THE MATTER OF THE PETITION OF MULO, 2 A. 299=4 Ind. Jur. 359 ... 755

(45) *S. 326—Decree charging immoveable property—Execution.*—Where a decree directs the sale of immoveable property in pursuance of a contract specifically affecting the same, S. 326 of C.P.C., 1877, is not applicable so as to enable the Court to stay or postpone the sale of such property, or to authorize the Collector to make arrangements for the satisfaction of the decree. BHAGWAN PRASAD v. SHEOSAHAI, 2 A. 856 ... 1090

(46) *S. 332—Possession of mortgagee—C.P.C., 1859, S. 230—Repealing of old law—Effect of procedure under new law—Proof in such proceedings.*—The possession of the mortgagee under the mortgage is "possession on his own account" within the meaning of S. 230 of the C.P.C., 1859 and S. 332 of the C.P.C., 1877; he is therefore entitled, when dispossessed in execution of a decree against the mortgagor, to which he is not a party, to be restored to possession under S. 332 of the C.P.C., 1877. A person, dispossessed under the above circumstances, after the C.P.C. (1877) came into force, in pursuance of an order passed under the old Code, is entitled to be restored to possession under the provisions of the new Code; and he need not, in seeking to be restored to possession, prove his title; it is enough if he proves his possession. SHAFI-UD-DIN v. LOCHAN SINGH, 2 A. 94 ... 614

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(47) *Ss. 407, 588—Application to sue in* forma pauperis—*Order rejecting the same —Appeal.*—There is no appeal from an order rejecting an application under S. 407, C.P.C. (Act X of 1877) for permission to sue as a pauper. It does not embody the result of the decision of the suit, which it merely refuses to entertain in the manner in which it is sought be instituted. Nor is it, though undoubtedly the result of a judicial proceeding, one of those enumerated in S. 588 of the C.P.C., as appealable. COLLIS v. MANOHAR DAS, 1 A. 745 ... 539

(48) *S. 542—Second appeal—Objection raised at hearing—Cause of action—Conditional sale—Pre-emption—Agreement for pre-emption subsequent to date of conditional sale.—Per* PEARSON and STRAIGHT, JJ.; SPANKIE, J, *dissenting*: The High Court can under S. 542 of the C.P.C., 1877, entertain and consider at the hearing of a second appeal, the question whether the plaintiff has any cause of action to sue (this being a question of law), though such question has not been raised by the defendant either in the Courts below or in the memorandum of second appeal. The cause of action for a suit for pre-emption, for property the subject of a conditional sale, arises on the date of such conditional sale, and not when the sale becomes absolute.

A clause in a *Wajib-ul-arz* containing an agreement for pre-emption can refer only to future and not to past transactions. Therefore, a claim for pre-emption, in the case of property transferred by a deed of conditional sale, is not maintainable when such claim is based on a *Wajib-ul-arz* that came into existence subsequent to such conditional sale. LACHMAN PRASAD v. BAHADUR SINGH, 2 A. 884 ... 1110

(49) *S. 549—Security for costs from appellant—Extention of time for furnishing security.*—Security for costs called for from an appellant must be furnished within the time fixed by the Court; if not so furnished, it is imperative on the Court to reject the appeal. If an application for extension of time be made before the expiry of the time fixed, the Court may extend the time; it cannot do so afterwards. HAIDRI BAI v. THE EAST INDIAN RAILWAY COMPANY, 1 A. 687 ... 535

(50) *Ss. 560, 584, 588 (v)—Decree passed* ex parte *in first appeal—Refusal to re-hear appeal—Appeal from such decree.*—S. 560 of the C.P.C., is not mandatory, but permissive and discretionary. A person, against whom a decree is passed *ex parte* in first appeal, is not bound to apply for a re-hearing under that section. Nor does his failure to appeal, under S. 588 (*v*), from an order refusing a re-hearing, preclude him from appealing, under S. 584, against the *ex parte* decree itself. RAMJAS v. BAIJ NATH, 2 A. 567 ... 932

(51) *S. 561—"The date fixed for the hearing"—Time for filing objections.*—In S. 561, C.P.C., the words "the date fixed for the hearing" refer to the date fixed for the hearing under S. 552 of the Code and that alone, and not to any other date to which the hearing may be adjourned. And the objections which a respondent may urge with reference to a decree under appeal, must be filed not less than seven days before such date fixed for the hearing. DEO KISHEN v. MAHESHAR SAHAI, 4 A. 248 ... 970

(52) *S. 561—Notice of objection by respondents—Limitation.*—The notice of objections referred to in S. 561, C.P.C., must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties. MISR DEO KISHEN v. MAHESHAR SAHAI, 2 A.W.N. 82 ... 1124

(53) *Ss. 566, 567, 578—Remand—Objections to finding—Appellate Court, powers of—Error or irregularity.*—Even in the absence of objections from the parties, the Court is not bound to accept the finding blindly, without examining

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the evidence on which it was founded and satisfying itself that it was correct and fit to be accepted.

Even assuming that an appellate Court acts irregularly in not accepting the findings returned by the lower Court on remand, the irregularity is one which does not affect either the merits of the case or the jurisdiction of the Court, and is cured by S. 578 of the C.P.C. AKBARI BEGAM v. WILAYAT ALI. 2 A. 908 ... 1128

(54) S. 578, See RELEASE, 2 A. 554=5 Ind. Jur. 92.

(55) *S. 578—Plaint insufficiently stamped—Failure to supply deficiency—Dismissal of suit.*—The fact that a plaintiff has paid too small a Court-fee on his plaint, and that he, as respondent, failed or refused to supply the deficiency when called upon to do so, is only an error or irregularity which does not affect the merits of the case, (S. 578 of the C.P.C.), and does not justify the appellate Court in dismissing his suit without going into the merits. MEHDI HUSAIN v. MADAR BAKSH, 2 A. 889 ... 1113

(56) *Ss. 594, 595, 596—Interlocutory order—Application for leave to appeal to Privy Council.*—No leave could or ought to be granted by the High Court for appealing to the Privy Council from an interlocutory order, for instance, an order of the High Court cancelling, on the ground of want of jurisdiction, a District Judge's order in execution proceedings, transferred to his own file from that of a subordinate Judge, and remitting the case for the disposal of the execution petition on the merits, with a direction that the record of the case should be returned to the Subordinate Judge. PALAK DHARI RAI v. RADHAPRASAD SINGH, 2 A. 65=3 Ind. Jur. 419 ... 609

(57) See HIGH COURT, 1 A. 726.

Claim.

(1) *to cesses by Zemindars—How to be enquired into—Evidence of custom—Custom to be definite.*—Where Zemindars claim from their tenants various kinds of cesses on the ground of custom: (*a*) the existence of the custom as to each cess must be tried as a separate issue; (*b*) parol evidence given, generally, as to the existence of the custom must be tested by ascertaining the grounds on which the opinion of each witness is based. The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts, that the custom had been enforced. A custom, to be good, must be definite. LUCHMAN RAI v. AKBAR KHAN, 1 A. 440 ... 327

(2) *Modification of claim before appellate Court—Mortgagee in possession prior to confiscation of Oudh estate—Dispossession on re-settlement with talookdar—Claim to sub-settlement.*—It is competent to the Courts to allow a plaintiff to modify his original claim for the direct settlement of a superior proprietary right in an estate into one for a sub-settlement of a sub-proprietary right. Where, at the date of Lord Canning's confiscation proclamation of 1858, an estate in Oudh was in the plaintiff's possession as mortgagee with "*birt zemindari* rights" under a conditional deed of sale and was subsequently, the plaintiff being dispossessed, re-settled with the defendant as talukdar, it was held, in a suit by the plaintiff in 1870 for possession as mortgagee, that the mortgage created only a subordinate zemindari interest and that the plaintiff's claim to a sub-settlement was valid.

Quære:—(*a*) Whether the sub-settlement might not be supported even if the interest created by the mortgage was not strictly sub-proprietary? (*b*) Whether, under Act XXVI of 1866, the defendant, as talukdar, was entitled

Claim—(*Concluded*). PAGE

to malikana? GOURI SHUNKER v. THE MAHARAJAH OF BULRAMPORE, 3 Suth. P.C.J. 567=6 I.A. 1=4 C. 839=3 Saraswaty's P.C.J. 873 ... 603

(3) Relinquishment of part of, See CIVIL PROCEDURE CODE, 1859, No. 11, 1 A. 650.

(4) For mesne profits against trespasser, See MESNE PROFITS, 1 A. 518=2 Ind. Jur. 500.

Compensation.

(1) See ACT XVIII OF 1873, No. 18, 1 A. 338.

(2) See CIVIL PROCEDURE CODE, 1877, No. 20, 2 A. 252.

Conditional decree.

In redemption suit, See INTEREST, 1 A. 344.

Confession.

See EVIDENCE ACT, 1 A. 664 and 1 A. 675.

Confiscation.

(1) See CLAIM, 3 Suth. P.C.J. 537=6 I.A. 1=4 C. 839=3 Sar. P.C.J. 873.

(2) And release of property from Government, See LIMITATION, 3 Sar. P.C.J. 865=4 C. 727=6 I.A. 76.

Consequential relief.

See COURT FEES ACT (VII OF 1870), 1 A. 360=1 Ind. Jur. 851.

Consideration.

(1) See AGREEMENT, 1 A. 618.

(2) Immoral, See CONTRACT ACT, No. 5, 1 A. 478=2 Ind. Jur. 356; and 1 A. 309.

Construction (of acts).

See ACT II OF 1863, 3 C. 522=3 Suth. P.C.J. 427=3 Sar. P.C.J. 704.

———(***of decree***).

See MONEY-DECREE, 3 A. 216.

———(***of statutes.***)

(1) See REGISTRATION ACT (VIII OF 1871), 1 A. 465=3 Suth. P.C.J. 438=4 I.A. 166=3 Sar. P.C.J. 438.

(2) See PRE-EMPTION, 1 A. 311.

Constructive trust.

See LIMITATION, 2 A. 361.

Contract.

Formal agreement—Condition precedent.—When two parties have come to a final agreement, it would by itself be binding upon them, even though they contemplate reducing the terms of such agreement to a written contract; and the absence of such a written contract would not affect the binding character of the agreement, unless, by mutual consent of the parties, a condition precedent has been imposed to the effect that there should be no binding agreement until a written contract should have been executed. WHYMPER & CO. v. BUCKLE & CO., 3 A. 469 ... 823

Contract Act (IX of 1872).

(1) *S. 2 (d)—Agreement without consideration.*—Where the plaintiff had voluntarily expended a money for establishing a market to please the district authorities, and not at the request of the defendants (shop-keepers) or for their benefit, an agreement by the defendants to pay the plaintiff, in consideration of such expenditure, a certain commission on articles sold through their agency in such market, is one that does not come within the terms of S. 2 (*d*) of the Contract Act, and is void for want of consideration. DURGA PRASAD v. BALDEO, 3 A. 221 ... 1054

***Contract Act* (*IX of 1872*)—(*Continued*).** PAGE

(2) *Ss. 2 (d), 25—Consideration—Agreement without consideration—Void agreement.*—Where the acceptor of two hundies, maturing on the 12th June and the 15th June 1874, gave the holder, on the 21st May 1874 (the drawer having become insolvent), a mortgage of certain immoveable properties as collateral security for the payment of the amount of the hundies, so long as it shall remain unpaid, *held*, in a suit on the mortgage bond, the hundies having been dishonoured, that the contract of mortgage was void under the provisions of S. 25 of the Contract Act, as there was no consideration for it. To constitute a consideration as defined in the Act, there must be an act, abstinence or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found, there was none of these things and, therefore, there was no consideration for the mortgage. MANNA LAL v. THE BANK OF BENGAL, 1 A. 309 ... 238

(3) *S. 23—Government ferry—Lease—Regulation VI of 1873—Illegal contract.*—A partnership entered into with another person, by a lessee of a Government ferry, who has covenanted not to underlet or assign the lease without the leave or license of the Magistrate who granted it, is not void or voidable as between the partners, by reason of the covenant not to underlet or assign the lease. GAURI SHANKAR v. MUMTAZ ALI KHAN, 2 A. 411 ... 791

(4) S. 23, See ACT XL OF 1858, 2 A. 902.

(5) *Ss. 23, 25—Immoral consideration—Void agreement—Profits from estate necessary.*—A registered agreement given by a man to his concubine, settling on her an annuity charged on real estate (before the Indian Contract Act was passed) as a provision which he was bound in honour to make, was held to be neither void for want of consideration, nor for an immoral consideration (future co-habitation being negatived). In such a case, it is necessary to prove that profits have accrued from the estate charged or other property of the deceased paramour before the concubine could recover from his heir. MANKUAR v. JASODHA KUAR, 1 A. 478=2 Ind. Jur. 356 ... 377

(6) S. 24, See CRIMINAL PROCEDURE CODE, 1872, No. 40, 1 A. 751.

(7) *S. 28—Agreement not to appeal—Void agreement.*—An agreement not to appeal against a decree, in consideration of time being given to satisfy it, is not a void agreement, and is not prohibited by S. 28 of the Indian Contract Act. It is a reasonable compromise, for which there is consideration on both sides, and is prohibited neither by the language, nor by the spirit, of the Indian Contract Act. And Courts are bound by the rules of justice, equity and good conscience to give effect to it. ANANT DAS v. ASHBURNER & CO., 1 A. 267 ... 222

(8) *S. 29—Uncertain agreement—Evidence Act, I of 1872, S. 93—Ambiguous or defective document.—Semble*: A bond for the re-payment of money, in which the executants charge "all their property" as collateral security for such re-payment, is void for uncertainty so far as concerns the charge on immoveable property, under S. 29 of the Indian Contract Act. And where a document is, on the face of it, defective or ambiguous, no evidence can be given to make it certain. DEOJIT v. PITAMBAR, 1 A. 275 ... 227

(9) S. 65—Applicability, See ARBITRATION, 2 A. 173.

(10) *S. 72—Person to whom money is paid by mistake, liability of.*—Money paid under a mistake induced by the fraud, though of a third party, may be recovered, provided there has been no laches and no neglect of the usual precautions on the part of the plaintiff. In such a case, neither the payment over to the fraudulent third party, nor the circumstance that the third

Contract Act (IX of 1872)—(Concluded). PAGE

party was also a servant of the plaintiff and obtained facilities for the commission of the fraud, in the course of his employment, affords a valid defence. SHUGAN CHAND v. THE GOVERNMENT, NORTH-WESTERN PROVINCES, 1 A. 79 ... 73

(11) *S. 72—Suit for money paid by mistake—Act XI of 1865. S. 6—C.P.C., 1877, S. 53—Amendment of plaint.*—A suit for the recovery of money over-paid to a creditor by mistake is a suit for damages, within the meaning of S. 6 of Act XI of 1865, falling under S. 72 of the Contract Act, and is cognizable by a Small Cause Court.

It would seem that a plaint once returned for amendment, under S. 53 of the C.P.C., and amended, accordingly, cannot be again returned for amendment. BADUR-UN-NISA v. MUHAMMAD JAN, 2 A. 671 ... 1010

(12) Ss. 127, 111 (*c*)—See SURETY, 1 A. 487 = 2 Ind. Jur. 420.

Contribution.

(1) *Suit for—Pattidar—Jurisdiction—Civil Court.*—A suit for contribution, by a Pattidar, to recover from his co-pattidars the excess revenue paid by him on account of their shares, is a claim cognizable by a Civil Court. RAM DIAL v. GULAB SINGH, 1 A. 26 ... 54

(2) *Suit for ———, —Joint decree—Maintainability—Appeal against joint decree by some of the defendants on grounds common to all.*—When the purchaser of a share of a mortgaged estate, who had paid off the whole mortgage amount in order to save the property from foreclosure, sued all the other sharers jointly for their share of the amount paid by him ; *held*, that the suit should be dismissed ; but that he can claim from each of them a contribution proportionate to his interest in the property.

In an appeal against a joint decree by some only of the defendants on grounds common to all of them, the whole decree may be reversed. HIRA CHAND v. ABDAL, 1 A. 455 ... 368

(3) *Sale of share of mortgage-property towards mortgage-decree—Suit for accounts and redemption of such share.*—The share of one only of several joint mortgagors can be sold in execution of a decree on the mortgage ; and any claim by the owner of such share, that it must be made liable only to the extent of his share of the debt, must be urged, if at all, in the execution proceedings, and not by a separate suit for the ascertainment of the amount due by him and for redemption of his share.

Where, under such circumstances, owing to other shares in the mortgaged property having been sold and purchased by the mortgagee in execution of other decrees, against the owners of such shares, the plaintiff's share alone of the mortgaged property, together with some other property of a third party also comprised in the mortgage, was purchased by the mortgagee in execution of his mortgage-decree ; *held*, that a suit was not maintainable by plaintiff for the ascertainment of the amount due by him under the mortgage and for redemption of his share on payment of such amount. *Held*, also, that, if any excess amount had been realised by the sale of the plaintiff's share over and above the sum ascertained to be due by him, he was entitled to recover a contribution of his portion of such excess by the sale of the third party's property purchased by the mortgagee. BHAGIRATH v. NAUBAT SINGH, 2 A. 115 ... 634

(4) *Discharge of mortgage amount—Claim to contribution.*—Where property subject to a mortgage is sold to two persons in shares, and only one of them is impleaded with the mortgagor in a suit brought by the mortgagee on the

Contribution—(*Concluded*). PAGE

mortgage, and has to pay off the whole amount of the mortgage-decree in order to save his share from being sold, he can claim from the other sharer a contribution proportionate to his share; and his right is not affected by the circumstance that the mortgagee, by having omitted to implead the other sharer in his suit, may not be able to proceed against his share on the basis of the same bond. JAGAT NARAIN v. QUTUB HUSAIN, 2 A. 807 ... 1072

Contributory negligence.

Master's liability for fraud of servant.—In a suit against Government for breach of contract, whether express or implied, the plea, that the Government is not liable for the fraud or dishonesty of its servants outside the scope of their employment, is not sustainable, when such fraud or dishonesty is carried out and effectuated after the liability of Government to the plaintiff has been once undertaken and acknowledged, though the fraud may have had its inception before such acknowledgment. Nor can the plea of contributory negligence be successfully urged, when such negligence is induced by its own servants on the occasion of the plaintiff seeking their service within the scope of their duties. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. SHEO SINGH RAI, 2 A. 756 ... 1014

Conveyance.

of immoveable property—Construction—Descriptive words.—Where the language of a conveyance is comprehensive enough to include not only an estate or taluka sold. but also the lands appertaining to it by means of alluvion, and the intention to convey such appurtenant lands is otherwise apparent, the mere mention, in the conveyance, of the jama of the estate or taluk alone, and the omission of that of the alluvial lands, cannot be held to exclude the latter from the operation of the conveyance. In such a case, the entry of the jama is merely descriptive. The same principle applies to a sale contract, a plaint, and to a decree. GANPATJI v. SAADAT ALI, 2 A. 787 ... 1051

Co-sharer.

(1) Wajib-ul-arz—*Absconding co-sharers—Co-sharer taking possession of relinquished property—Trustee—Purchaser for value without notice—Representative of co-sharer—Limitation Act, 1871, S. 10.*—A clause in the administration paper of a village, stating in general terms that absconders from the village can receive back their property on their return, can neither be availed of by, nor affect the rights of, persons not parties to it. A co-sharer, taking possession of an absconder's property under such circumstances, cannot be held to be a trustee for such absconder, unless there is evidence that he accepted the trust. And a vague statement in the administration-paper that absconders shall get back their property on their return, cannot be evidence of such acceptance.

A purchaser from a co-sharer, in good faith for value and without notice of any trust, is not a representative of such co-sharer, who is a trustee, within the meaning of S. 10 of the Limitation Act, 1871; and a suit against him for possession of immoveable property so purchased by him, will be barred after twelve years. PIAREY LAL v. SALIGA, 2 A. 394 ... 781

(2) See ACT XVIII OF 1873, No. 14, 1 A. 512.

(3) See CIVIL PROCEDURE CODE, ACT XXIII OF 1861, No. 5, 1 A. 272.

(4) See LAMBARDAR, 1 A. 135.

Costs.

(1) Security for, See CIVIL PROCEDURE CODE, 1877, 1 A. 687 and 2 A. 604.

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(2) See EXECUTION OF DECREE, 1 A. 568.

(3) Allowance for, of collection, etc., See MESNE PROFITS, 1 A. 518=2 Ind. Jur. 500.

(4) See SURETY, 2 A. 582.

Court-fee.

(1) *Sale-proceeds realized in execution against pauper plaintiff—Preferential right of Collector to amount of Court-fee.*—In an application for execution by the defendant against an unsuccessful pauper plaintiff, his property was attached, and subsequently, on the application of the Collector, the Court executing the decree ordered that the property should be sold in satisfaction of the Collector's claim for Court-fees and of the demand of the defendant for costs, and that the Collector should be first paid out of the sale-proceeds. The sale-proceeds being insufficient to meet both these demands, the Court passed another order, under which the Collector and the defendant were to be paid out of the sale-proceeds rateably. *Held*, in a suit by the Collector to contest the order and to recover from the defendant, in the pauper suit, the amount paid to him out of the sale-proceeds, that he was entitled to recover, as the Crown was entitled to be paid first, out of the proceeds of such sale, the amount of the Court-fee the plaintiff in the pauper suit would have had to pay, if he had not been allowed to sue as a pauper. GULZARI LAL v. THE COLLECTOR OF BAREILLY, 1 A. 596=2 Ind. Jur. 722. 459

(2) *Execution of decree—Distribution of sale proceeds—Claim for Court-fees—Prerogative of the Crown.*—When the same property is attached and sold, at the instance of the Collector for recovery of Court-fees in a pauper suit, and at the instance of a lien-holder, the former is entitled, as representing the Crown, to be paid first, out of the sale proceeds, the amount of Court-fees due in connection with the pauper suit. The principle that the Government takes precedence of all other creditors is not liable to an exception in the case of lien-holders. THE COLLECTOR OF MORADABAD v. MUHAMMAD DAIM KHAN, 2 A. 196 ... 684

(3) *Pauper petition—Payment of Court-fees by petitioner—Institution of suit—Limitation—Transfer of suits from one Sudder Court's jurisdiction to another—C.P.C., 1859, S. 13.*—When a person, being a pauper, petitions to sue *in forma pauperis* and afterwards, pending enquiry into his pauperism, obtains funds and pays the Court-fees required for his suit, and his petition is, on such payment, numbered and registered as a plaint, his suit must be deemed to have been instituted from the date when he filed his pauper petition, and not when he paid the Court-fees; and limitation for the suit runs against him only up to the former date.

Although S. 13 of the C.P.C., 1859, empowers a Sudder Court to give authority to a subordinate Court, with the concurrence of another Sudder Court to proceed with a suit for immoveable property, situate in districts within the jurisdiction of both, there is no power given by the act authorising a Sudder Court to transfer a suit brought in a Court subordinate to it to a Court subordinate to another Sudder Court.

Quære.—Have two Sudder Courts acting in concurrence power to make such a transfer? STUART SKINNER *alias* NAWAB MIRZA v. WILLIAM ORDE, 2 A. 241=4 Saraswati's P.C.J. 31=6 I.A. 126=4 C.L.R. 331=3 Suth. P.C.J. 627 ... 685

(4) *Failure to pay Court-fee for summons to additional defendants—Dismissal of suit—C.P.C., 1859, S. 110—Act XXIII of 1861, Ss. 5 and 7—C.P.C., 1877, S. 99.*—The irregular dismissal of a suit, as against the defendants, by an order purporting to be made under S. 110 of the C.P.C., 1859, on a day

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previous to the hearing, on the ground of the failure of the plaintiff to deposit the *talabana* required for summoning certain persons proposed to be made additional defendants in the suit, could not preclude the plaintiff from instituting a fresh suit. GULAB DAI v. JIWAN RAM, 2 A. 318 ... 773

***Court Fees Act* (*VII of 1870*).**

(1) *Ss. 3 (c), 12 and Sch. II, Art. 17 (iii)—Suit for declaratory decree—Consequential relief—Decision of questions relating to valuation—Appeal.*—S. 12 of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee. But when the question is whether the appellants were right in paying a fee, and under what class of cases their suit or appeal falls for the purposes of the Court Fees Act, this prohibition has no application, and the appeal is maintainable.

The plaint in a suit by a person, whose claim to attached property has been disallowed under S. 246 of the C.P.C., 1859, to establish or to declare his right to such property, may be brought on a stamp of Rs. 10, and need not be stamped according to the market or other value of the property. CHUNIA v. RAM DIAL, 1 A. 360=1 Ind. Jur. 851 ... 274

(2) *S. 7 (iii), Sch. II, Art. 17—Suit for declaration of right—Suit to set aside order under S. 246, C.P.C., disallowing claim to property attached—Consequential relief.*—A suit for a declaration of plaintiff's proprietary right to certain moveable property in his possession, which has been attached in execution of a decree, and for setting aside the order of the Court disallowing his claim thereto, can be brought on a stamp of 20 Rupees, and need not be stamped according to the value of the property attached. GULZARIMAL v. JADAUV RAI, 2 A. 63 ... 600

(3) S. 7 (iv), Sch. II, Art. 17 (iii), See DECLARATORY DECREE, 2 A. 869.

(4) *S. 17—Meaning of expression "distinct subjects."*—The expression "Distinct subjects" in S. 17 of the Court Fees Act means distinct causes of action or distinct kinds of relief. CHAMAILI RANI v. RAM DAS, 1 A. 552=2 Ind. Jur. 836 ... 433

(5) *S. 17—Distinct subjects.*—The words, "distinct subjects," in S. 17 of the Court-Fees Act, 1870, mean "distinct and separate claims or causes of action" in single and separate suits, which for the purpose of jurisdiction or convenience of procedure, may be united in one suit. MUL CHAND v. SHIB CHARAN LAL, 2 A. 676 ... 1098

(6) *Ss. 17, 28, 11, 7, cls. (i) and (ii)—Distinct subjects—Document improperly stamped—Power of High Court to levy deficient Court-fees.*—A suit for possession of a house, for house-rent up to the date of suit and for future house-rent, embraces "distinct subjects" within the meaning of S. 17 of the Court Fees Act, 1870, and the plaint and the memorandum of appeal in it are chargeable with the aggregate amount of the fees, to which separate suits for the different causes of action brought separately would be liable.

Where a document has been received in the lower Courts without being properly stamped, and the deficiency is detected in the High Court, that Court can, under S. 28 of the Court Fees Act, direct that it should be properly stamped.

A claim for future rent is governed by S. 11 of the Act and not by cls. I and II of S. 7. (SPANKIE, J.)

A claim for future profits is governed by S. 7, cl. 1, and S. 11 of the Act. (OLDFIELD, J.) CHEDI LAL v. KIRATH CHAND, 2 A. 682 ... 978

Court of Wards.

See ACT XXXV OF 1858, 1 A. 476=2 Ind. Jur. 354.

Court sale.

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See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 400=2 Ind. Jur. 66.

Creditors and Debtors.

Agreement between, See ARBITRATION, 2 A. 173.

Criminal Procedure Code, Act X of 1872.

(1) *Ss. 4, 296—" Sessions case," meaning of—Ss. 457, 380, I.P.C.—Held by the Full Bench (Spankie and Oldfield, JJ., dissenting)* :--A " Sessions case " in S. 296, means a case exclusively triable by a Sessions Court.

Where a Magistrate discharged an accused person under S. 457, I.P.C., and the Sessions Judge ordered the commitment of the accused to the Sessions Court on a charge under Ss. 457 and 380, I.P.C., *held*, that the Judge's order to commit the case to the Sessions Court was illegal, as the case was a Magistrate's case, and not one triable by the Court of Sessions only. THE EMPRESS OF INDIA v. KANCHAN SINGH, 1 A. 413 ... 350

(2) *Ss. 4, 297—Judicial proceedings—High Court's powers of revision.*—Where, on the acquittal of the petitioners on a charge of murder, and during the pendency of an appeal from the acquittal, they were arrested and brought before the Magistrate who ordered the detention of the petitioners in custody, until the decision of the case in appeal,

Held, by Turner, C.J., that the proceeding of the Magistrate was not a judicial proceeding and the High Court had, therefore, no power under S. 297, to set aside the order.

Held, by Pearson, J., that the Magistrate's order, whether a judicial proceeding or not, was not such a proceeding within the terms of the definition contained in S. 4, and that the High Court could not, therefore, interfere with the order.

Held, by Spankie and Oldfield, JJ., that the Magistrate's proceeding should be held to be a judicial proceeding and the High Court had, under S. 297, the power to interfere. QUEEN v. GHOLAM ISMAIL, 1 A. 1 ... 35

(3) *Ss. 36, 270, 271—Confirmation by Sessions Judge of conviction by Deputy Commissioner—Appeal.*—Where a conviction passed by a Deputy Commissioner, acting under S. 36, Crim. Pro. Code, is confirmed by a Commissioner, having the powers of a Sessions Judge, to whom the former is subordinate, it is doubtful whether an appeal lies to the High Court. In accordance with the practice of the Allahabad High Court, such an appeal was admitted. EMPRESS OF INDIA v. NADUA, 2 A. 53 ... 580

(4) *Ss. 37, 468—Subordinate Magistrates of District, to whom subordinate for purpose of S. 468.—Held* by the Full Bench (*Oldfield, J., dissenting*).—The Court of a subordinate Magistrate is subordinate to the Court of the Magistrate of the District in the matter to which S. 468 relates. Therefore, a Sessions Judge is not competent to order the prosecution of a person for giving false evidence, when the Magistrate of the first class, before whom the offence has been committed, has refused the sanction. Such powers vest in the Magistrate of the District. IN THE MATTER OF THE PETITION OF GUR DAYAL, 2 A. 205 ... 694

(5) *Ss. 44, 296—Discharge of accused person—Sessions Judge suggesting a revival of proceedings—Commitment—Penal Code, Ss. 363, 417, 420.*—Where, on the acquittal of an accused person charged under S. 417, I.P.C., the Sessions Judge forwarded the record to the District Magistrate, and suggested that he should direct the Subordinate Court to inquire into any offence, which the evidence on the record showed to have been committed, other than that in respect of which he was discharged, and the Magistrate committed the accused to the Sessions upon charges under Ss. 363, 420, I.P.C., *held* that, as there was no "direction to commit," that is to say, to send the discharged

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person at once to the Sessions Court without further enquiry, the Sessions Judge's suggestions were not contrary to S. 296, Crim. Pro. Code, and the commitment could not be impeached. EMPRESS OF INDIA v. BHUP SINGH, 2 A. 570 ... 934

(6) *Ss. 149, 272—Person under arrest pending appeal—Admissibility of his evidence against persons concerned in the same offence.—Per Stuart, C.J.*— Where a person accused of an offence was discharged by the Sessions Judge and was re-arrested by the Magistrate pending an appeal from the acquittal to the High Court, and before the appeal was admitted, *held*, that the re-arrest was lawful and absolutely necessary in the interests of justice, and his statement, after his re-arrest, and pending his appeal, was admissible in the trial of another person who was arrested subsequently to the arrest of the former as being concerned in the same offence.

Per Spankie, J.—Assuming that the re-apprehension after an acquittal and on the same charge was unlawful, his statement and evidence although admissible, was not such evidence, as the Court would place much reliance upon. If his re-arrest was lawful, he was in the position of an accused person and the Magistrate should not have examined him as a witness in the trial of the other accused. EMPRESS OF INDIA v. KARIM BAKHSH, 2 A. 386 ... 777

(7) *S. 188—Charge of adultery—Compounding of offence—Penal Code, S. 497.*— Where, after the conviction by a Sessions Judge of a person charged with adultery, and during the pendency of the appeal in the High Court, the complainant who had taken his wife back to live with him, had asked the High Court to be allowed to compound the offence, *held*, that the sanction for compounding could not be given at that stage of the proceeding. EMPRESS OF INDIA v. THOMPSON, 2 A. 339 ... 817

(8) *Ss. 214, 221—Enquiry by Magistrate of case triable by Court of Sessions—Annulling conviction—Commitment on same evidence.*—Where, on appeal, the Sessions Judge annulled the conviction and sentence passed upon a person charged with an offence exclusively triable by a Court of Session, the subsequent committal of the accused to the Sessions was not vitiated, because the Magistrate committed him on the evidence given before him at the trial, inasmuch as the mere conviction and sentence were set aside and not the proceedings held at the trial. EMPRESS OF INDIA v. ILAHI BAKHSH, 2 A. 910 ... 1129

(9) *S. 215—Discharge, without examining all prosecution witnesses.*—An accused person shall not be discharged unless the Magistrate has examined all the witnesses named for the prosecution. EMPRESS OF INDIA v. KASHI, 2 A 447=4 Ind. Jur. 582 ... 854

(10) Ss. 218, 351, See PENAL CODE, 2 A. 253.

(11) *Ss. 228, 233—Summary trial—Record in appealable cases—Defective record—Duty of appellate Court.*—A Sessions Judge should not quash a conviction in a summary trial, on the ground that the substance of the evidence was not embodied in the Magistrate's judgment. If the Judge found it impossible to dispose of the appeal because of such defect, he should have required that officer to repair the defect in his judgment, by recording a judgment in which the substance of the evidence should be fully embodied and, if necessary, re-examining the witnesses for that purpose, or to have ordered a re-trial with that view. EMPRESS OF INDIA v. KARAN SINGH, 1 A. 680=2 Ind. Jur. 864. 526

(12) *S. 249—Scope—Evidence Act, Ss. 30 and 33—Sessions trial—Evidence given at preliminary enquiry, admissibility of—Statement by co-accused.*—S. 249 is intended to provide for the contingency that may arise, when a witness,

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who is produced before the Court of sessions, holds back information and evidence and tells a different story to that which he gave in the preliminary enquiry before the Magistrate.

It is only in extreme cases, of expense or delay that the personal attendance of a witness should be dispensed with, and his evidence given in the preliminary enquiry referred to.

The statement by an accused, being jointly tried with others, should not be taken into consideration against such other persons, if the person making the statement entirely deprecates any guilty knowledge and seeks to clear himself at the expense of his co-prisoners. EMPRESS OF INDIA v. MULU, 2 A. 646=5 Ind. Jur. 263 ... 967

(13) *Ss. 272, 297—Arrest pending appeal.*—After the admission of an appeal from acquittal by the High Court, the Court can order the arrest of the accused pending the appeal. EMPRESS OF INDIA v. MANGU, 2 A. 340 ... 850

(14) *Ss. 272, 297—High Court's powers of revision—Private prosecutor, right of, to move it, on acquittal.*—It is competent for a private prosecutor to apply to the High Court, in the case of an acquittal, to exercise its powers of revision. IN THE MATTER OF THE PETITION OF SUKHO v. DURGA PRASAD, 2 A. 448 ... 855

(15) *Ss. 283, 300—Omission to take the opinion of the assessors.*—The omission to take the opinion of the assessors, in a sessions case tried with their aid, is, although a serious irregularity, not a ground for the revisional interference of the High Court, if it has not affected the conduct of the prosecution or prejudiced the prisoner in his defence. IN THE MATTER OF THE PETITION OF NARAIN DAS, 1 A. 610 ... 470

(16) Ss. 288, 297, See ACT XI OF 1872, 2 A. 218.

(17) *S. 296—Reference to High Court by Sessions Court.*—A Judge should not suspend the conclusion of a trial which had already been commenced, and in which the assessors have given their opinion, for the purpose of making a reference to the High Court on a question of law that has arisen in the course of it. EMPRESS OF INDIA v. BHUP SINCH, 2 A. 771 ... 1034

(18) *S. 297—Judgment of acquittal—Revisional powers of the High Court.—Per Oldfield, J.*—The mere fact, that an accused person has been acquitted on trial, will not operate to take away the general powers of revision of the High Court, when there has been a material error in any judicial proceeding in the case.

Per Pearson, J.—An acquittal does not preclude revision under S. 297, Cr. P. C., 1872.

Per Turner, J.—Where there has been an acquittal on the merits, and where an accused person has been acquitted, because the Court by which he has been tried holds the evidence insufficient to prove his guilt beyond reasonable doubt, the High Court cannot interfere as a Court of revision. But where the acquittal has been brought about by such material error in the proceeding as makes the proceeding bad in law, it is competent for the High Court to interfere.

Per Spankie, J.—There is no appeal allowed by law to a private prosecutor from an order of acquittal, and there is no power given to the High Court to revise an order of acquittal on the facts found on the evidence. Unless there is something that could be considered to be a material error in law, all interference under the first paragraph of S. 297 is barred.

Per Stuart, C.J.—A private prosecutor, who can show, on the face of his petition, a proper case for revision of a judgment of acquittal, is entitled to have it entertained under S. 297, and to an order on it for a new trial. IN THE MATTER OF HARDEO, 1 A. 139 ... 106

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(19) *S. 297—Separate offences—Offences of fabricating false evidence and voluntarily assisting in disposing of stolen property—Penal Code, Ss. 192, 193, 414.*—Where the accused voluntarily assisted in concealing, or disposing of, or making away with stolen property, and was also found to have concealed it in the field of an enemy of his, with a view that it might be found there and that he might be apprehended and charged with theft, *held*, that the Magistrate acted properly in convicting and punishing the prisoner for the two separate offences of fabricating false evidence under S. 192, I.P.C., and of voluntarily assisting in disposing of stolen property, under S. 414, I.P.C. EMPRESS OF INDIA v. RAMESHAR RAI, 1 A. 379=1 Ind. Jur. 743 ... 301

(20) *S. 297—High Court—Powers of revision.*—The High Court is not precluded from the exercise of the powers of revision in a case where there has been a conviction on evidence which has received no sifting, and which in many respects is so transparently false that, if it had been at all tested, its falsehood could not have escaped notice. EMPRESS OF INDIA v. MURLI, 2 A. 336 ... 815

(21) *S. 297—Revisional powers of the High Court—Penal Code, Ss. 299, 304, 321, 323—Murder—Intention.*—The High Court exercised its revisional powers by taking judicial notice of a letter from the Government enquiring "whether in the opinion of the High Court the judgment of the Magistrate was legal and equitable" and by disposing of it under S. 297, Crim. Pro. Code.

Where a person, irritated by the lazy and inefficient manner in which the punkha cooly was managing the punkha, gave him some blows, and the cooly died of the injuries he had received, *held*, that as the evidence in the case showed that the blows were not heavy or severe, and that the spleen of the deceased was in a very diseased condition, the accused could not have had in view the cooly's death as a probable or even possible consequence of his acts, and that he was guilty only of hurt under S. 323, I.P.C. EMPRESS OF INDIA v. FOX, 2 A. 522 ... 929

(22) *S. 309—Effect of the section on S. 65, I.P.C.—Act VIII of 1873, Canal Act.*—The provisions to S. 309, Crim. Pro. Code, do not extend the period of imprisonment that may be awarded under the provisions of S. 65, I.P.C. They only regulate the proceedings of Magistrates whose powers are limited. S. 309, Crim. Pro. Code, makes Ss. 64 and 65 of the Indian Penal Code applicable, not only to offences punishable under that Code, but to offences punishable under any law in force for the time being, and, therefore, applicable to offences punishable under the Canal Act, VIII of 1873. EMPRESS OF INDIA v. DARBA, 1 A. 461=2 Ind. Jur. 322 ... 371

(23) *S. 314—Conviction for several offences—Term of imprisonment.*—S. 314 limiting the Magistrate's powers of punishment for several offences to twice the amount which he is, by his ordinary jurisdiction, competent to inflict, applies to "one trial" for more offences than one.

In a case, where there is not one indictment containing different counts on the same facts, but separate and distinct cases in regard to the facts themselves, the evidence and the procedure, *held*, that the trials constituted separate trials, notwithstanding the fact the judgments in the several cases were delivered on one and the same day, and the Magistrate's power of punishment was not limited to twice the amount, which he was, by his ordinary jurisdiction, competent to inflict. IN THE MATTER OF DAULATIA AND ANOTHER, 3 A. 305 1040

(24) *Ss. 314, 452, 454, 455—Trial for more offences than one—Conviction—Penal Code, S. 71.*—Where, in the course of one and the same transaction, an accused person appears to have perpetrated several acts, directed to one

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end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although, for purposes of trial, it may be convenient to vary the form of charge, and to designate not only the principal but also the subsidiary crimes alleged to have been committed, yet in the interest of simplicity and convenience, it is best to concentrate the conviction and sentence on the gravest offence proved. Such a course was adopted in a case where the accused was charged under Ss. 380, 457, I.P.C., with one and the same offence, and was sentenced to three years' rigorous imprisonment on the charge under S. 457, I.P.C., and was acquitted of the offence under S. 380. EMPRESS OF INDIA v. AJUDHIA, 2 A. 644=5 Ind. Jur. 262 ... 966

(25) *Ss. 344, 345, 347—Pardon to accused person—Evidence—Evidence Act, S. 24.*—Tender of pardon to a person concerned along with others in an offence, not exclusively triable by a Court of Sessions, and his examination as a witness, are both illegal. And his statement would be irrelevant and inadmissible with reference to S. 344, Crim. Pro. Code, and S. 24, Evidence Act. EMPRESS OF INDIA v. ASGHAR ALI, 2 A. 260=4 Ind. Jur. 250 ... 727

(26) *S. 390—Power of Sessions Court to admit a convicted person to bail.*—The Court of Sessions is not competent to make an order, under S. 390, directing the admission of a convicted person to bail, as a convicted person is not an accused person within the meaning of that section. QUEEN v. THAKUR PARSHAD, 1 A. 151 ... 103

(27) *Ss. 418, 397, 297, 416—Discharge of person accused of receiving stolen property—Disposal of such property—High Court's powers of revision—Proclamation under S. 416—Judicial proceeding.*—A Magistrate discharging a person accused of receiving stolen property, on the ground that the evidence was not sufficient, can make such order as he thinks proper for the disposal of the property produced before him, if he believes that the property was stolen. Before seeking the aid of the revisional powers of the High Court, recourse should be had, in respect to applications under S. 418, to the ordinary channel of relief, *e.g.*, by way of appeal to the Sessions Court, if such relief is allowed by the law.

Quære:—Whether the issue by the Magistrate of a proclamation under S. 416 of Act X of 1872 is a "judicial proceeding" within the meaning of S. 297 of that Act. EMPRESS OF INDIA v. NILAMBAR BABU, 2 A. 276 ... 737

(28) *Ss. 435, 436, 467 to 471—Offence under S. 193, Penal Code, whether an offence in contempt of Court—Jurisdiction of Magistrates.*—*Held*, by the Full Bench (*Stuart, C.J., dissenting*):—An offence under S. 193, Penal Code, committed before a Court, is not only an offence against public justice, but also a contempt of the Court's authority. Therefore, a Magistrate cannot try himself, by reason of the provisions of S. 473, Crim. Pro. Code, a charge under S. 193, Penal Code, if the false evidence has been given in his own Court. EMPRESS OF INDIA v. KASHMIRI LAL, 1 A. 625 ... 383

(29) Ss. 454, 460—See ACT XXVI OF 1870, 2 A. 301.

(30) S. 456—See PENAL CODE, 2 A. 101.

(31) *Ss. 467, 468, 469, 471—Trial for offences against public justice—Jurisdiction.*—The Magistrate before whom an offence under S. 193 is committed is himself competent to try the case. QUEEN v. GUR BAKSH, 1 A. 193 ... 146

(32) *Ss. 468, 469—Sanction to prosecute—Jurisdiction of superior Courts.*—A sanction, given by any one of the Courts empowered under the Code, cannot be disturbed by a superior Court. But where the sanction is refused by one of these Courts, the refusal does not deprive the other Courts of the discretion given to them. BARKAT-ULLAH KHAN v. RENNIE, 1 A. 17 ... 43

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(33) *Ss. 468, 469 and 470—Revenue Courts, whether Civil Courts—Sanction to prosecute—Sanction, when can be applied for.*—*Held* by the Full Bench (*Spankie, J., doubting*):—A Revenue Court is a Civil Court within the meaning and intent of Ss. 468, 469, Cr. P.C.

A refusal by a Court of Revenue to give sanction to a prosecution under a mistaken view of the law, and under an impression that sanction was unnecessary would not constitute a sanction. The words "at any time" in S. 470 mean at any time during the trial, seeing that it is for the purpose of such trial, the sanction is required, and without it the trial could not proceed, and that after conviction and sentence, there is nothing to follow for which sanction may be asked. EMPRESS OF INDIA v. SABSUKH, 2 A. 533=5 Ind. Jur. 49 ... 908

(34) *Ss. 468, 471, 472, 473—Offences against public justice—Jurisdiction.*—S. 473 is not intended to include offences, which under the Penal Code are classed as offences against public justice, in contradistinction to offences in contempt of the Court's authority. But a Magistrate, before whom an offence under S. 196, I.P.C., has been committed, may not, under S. 271, himself try the accused for that offence. QUEEN v. KULTARAM SINGH, 1 A. 129 ... 100

(35) *Ss. 468, 471, 473—Trial for offences against public justice—Jurisdiction.*—The only case where a Criminal Court cannot itself try an offence committed before it, is that described in S. 473, Crim. Pro. Code, which relates exclusively to contempts of Court. A charge under S. 193, I.P.C., not being in contempt of Court, the Magistrate before whom the offence was committed may himself try the case. QUEEN v. JAGAT MAL, 1 A. 162 ... 121

(36) Ss. 471, 473—See PENAL CODE, 2 A. 405.

(37) *Ss. 472 and 297—Powers of commitment of Court of Sessions—Revisional powers of High Court.*—Where a Sessions Judge directed the commitment to the sessions of a person, under S. 472, Crim. Pro. Code, for trial on charges under Ss. 193, 195, 211, I.P.C., *held*, that the order of commitment was not bad merely because it included the charge under S. 193, I.P.C., an offence not exclusively triable by a Court of Sessions.

Held by Stuart, C.J. (Spankie, J., doubting).—The High Court has power under S. 297 to set aside the commitment made by a Sessions Judge under S. 472, before the trial. EMPRESS OF INDIA v. LACHMAN SINGH, 2 A. 398 ... 783

(38) *S. 489—Security to keep the peace on conviction for criminal intimidation—Penal Code, Ss. 503, 506.*—Upon a mere conviction under Ss. 503, 506, I.P.C., the accused person cannot be called upon under S. 489, Crim. Pro. Code, to find recognizances to keep the peace. EMPRESS OF INDIA v. RAGHUBAR, 2 A. 351 ... 835

(39) Ss. 504, 505—See ACT VI OF 1864 (WHIPPING), 1 A. 666.

(40) *S. 506—Security for good behaviour—Suit for money deposited by accused with surety—Unlawful consideration—Void agreement—Contract Act (IX of 1872), Ss. 23, 24.*—Where a person, called upon under the provisions of the Cr. P.C., to furnish security for his good behaviour, deposits the amount of the security with his proposed surety who thereupon stands surety for the former, the depositor cannot recover the amount from the surety even after the period fixed in the bail bond had expired without any act being done by the person bound over so as to entail the forfeiture of the bond; for it is obvious that, under the circumstances, the consideration for the agreement is unlawful, the responsibility undertaken by the surety being only nominal and calculated to defeat the object of the law in requiring security for good behaviour. FATEH SINGH v. SANWAL SINGH, 1 A. 751 ... 543

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(41) *S. 506—Security for good behaviour.*—S. 506 solely relates to the calling upon persons of habitually dishonest lives and in that sense "desperate and dangerous," to find security for good behaviour as a protection to the public against a repetition of crimes by them, in which the safety of property is menaced, and not the security of person alone is jeopardised. A person merely guilty of acts of violence could not be ordered to furnish security for good behaviour. EMPRESS OF INDIA v. NAWAB, 2 A. 835 ... 1077

(42) S. 521—See ENCROACHMENT, 1 A. 249.

Criminal Trespass.

See PENAL CODE, 2 A. 465.

Cross-decrees.

See CIVIL PROCEDURE CODE, 1877, 2 A. 91.

Cross suits.

See CIVIL PROCEDURE CODE, 1877, 2 A. 866.

Crown.

(1) *British territory in India—Power of the Crown to cede—Form or manner of grant of cession—Jurisdiction of British Indian Courts over ceded territory*—The Crown is competent to cede territory in its Indian dominions, to a foreign prince or a feudatory chief, without the intervention of Parliament. The prerogative of the Crown is exercised with the advice and through the agency of the responsible ministers of the Crown. Where it is shown that a cession of territory was effected by the Government of India, that it was accepted by the Secretary of State, as fulfilling instructions conveyed to the Government of India, and that it was approved by Her Majesty's Government, there is sufficient evidence of a cession by the Crown of such territory.

Whether there has been a cession in sovereignty is a question of fact to be decided, not merely by the form or language of the documents, by which the grant or cession was made, but also by a consideration of other facts and circumstances, tending to show the nature and effect of such grant or cession.

The Courts of British India have no jurisdiction over property in ceded territory; they cannot, therefore, order the sale of lands situated in such territory. LACHMI NARAIN v. RAJA PARTAB SINGH, 2 A. 1 ... 544

(2) Prerogative of, See COURT-FEE, 2 A. 196.

Custom.

(1) *Construction*—A custom is a rule which, in a particular family or in a particular district, has, from long usage, obtained the force of law. It must be ancient, certain, reasonable, and, being in derogation of the general rules of law, must be construed strictly. HURPURSHAD v. SHEO DYAL, 3 Suth. P.C.J. 304=26 W.R. 55=3 I.A. 259=3 Saraswati's P.C.J. 611 ... 160

(2) Evidence of—to be definite, See CLAIM, 1 A. 440.

(3) Requisites of valid, See ACT XIX OF 1873, 2 A. 49.

(4) See EVIDENCE ACT, 5 C. 744=6 C.L.R. 593=4 Sar. P.C.J. 93=7 I.A. 63=3 Suth. P.C.J. 704.

(5) See PRE-EMPTION, 1 A. 563 and 1 A. 567.

Cyprus.

Offence committed by Native Indian British subjects in, See ACT XI OF 1872, 2 A. 218.

Damages.

(1) *Bond for money—Interest* post diem.—Where a bond for the re-payment of money, within a certain time, does not contain any stipulation as to interest after the time fixed, such interest should be treated as damages,

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and, in the absence of *laches* or unreasonable delay on the part of the plaintiff in bringing his suit, could be awarded on the basis of the rate stipulated for in the bond. JUALA PRASAD v. KHUMAN SINGH, 2 A. 617=5 Ind. Jur. 154 ... 948.

(2) See, also, ACT XV OF 1859, 2 A. 368.

(3) Suit for, See LIMITATION ACT, 1877, 2 A. 354.

Death.

See EVIDENCE ACT, 1 A. 53.

Debt.

See LIMITATION, 1 A. 683.

Declaration.

(1) Suit for, of right, See COURT FEES ACT, 1870, 2 A. 63.

(2) Suit for, that a legally invalid document is not genuine, See DOCUMENT, 1 A. 622.

Declaratory decree.

(1) *Objection to—in second appeal.*—In a suit merely for a declaration of right, where the first appellate Court orders the plaintiff to pay up the full amount of Court-fees as for a suit for possession (without, however, the suit being amended) and eventually gives him a declaratory decree, an objection by the defendant to the maintainability of a merely declaratory suit, cannot be allowed in special appeal. SARASUTI v. MANNU, 2 A. 134. 623

(2) *Consequential relief—Court-Fees Act, S. 7, cl. 4, Sch. II, Art. 17,* (iii)—Under the Court-Fees Act, the valuation of the relief sought rests with the plaintiff, and not with the Court. In a suit for a declaration of right to certain property and for the removal of an attachment of such property in execution of a decree, in which possession is not sought, the value of the relief claimed is not the market value of the property, and as, in such a suit, the declaration of the right claimed necessarily carries with it the consequential relief sought, the value of such relief is merely nominal. OSTOCHE *v.* HARIDAS, 2 A. 869 ... 1100.

(3) Suit for, See COURT FEES ACT (VII OF 1870), 1 A. 368=1 Ind. Jur. 851.

(4) See HINDU LAW (REVERSIONER), 1 A. 371=1 Ind. Jur. 742.

(5) See PRIVY COUNCIL, 1 A. 688=2 C.L.R. 193=5 I.A. 87=3 Suth. P.C.J. 529 =3 Sar. P.C.J. 807.

Declaratory suit.

Consequential relief—Suit to establish right to attached property—C.P.C., 1877, S. 283—Court-Fees Act, 1870, S. 7, cl. 4 (c) and Sch. II, Art. 17, III.—A suit, under S. 283 of the C.P.C., by a plaintiff in possession of immoveable property, attached in execution of a decree, for a declaration of his right thereto and "for protection of such property from sale" is one claiming consequential relief; the plaint or memorandum of appeal in such a suit must, therefore, be stamped under S. 7, cl. 4 (*c*) and not under Sch. II, Art. 17, III of the Court-fees Act. RAM PRASAD v. SUKH DAI, 2 A. 720 ... 1012.

Decree.

(1) *Sale of decree charging land—Sale of immoveable property—Procedure—C.P.C., Act VIII of 1859, Ss. 235, 252.*—The sale, in execution proceedings, of a decree charging lands for its satisfaction, held by the judgment-debtor, is a sale of an interest in immoveable property.

Sales in execution proceedings, of decrees charging lands, are governed by the provisions of the C.P.C., relating to sales of immoveable property. MUSAMMAT BHAWANI KUAR v. GULAB RAI, 1 A. 348=1 Ind. Jur. 704 ... 272.

Decree—*(Concluded)*. PAGE

(2) Directing payment by instalments—Discretion, See CIVIL PROCEDURE CODE, 1859, 2 A. 129.

(3) Proceedings under, barred, See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 350.

(4) Contents of, See CIVIL PROCEDURE CODE, 1877, 2 A. 342 and 2 A. 345.

(5) Several claims in one suit—Final, of appellate Court, See LIMITATION, 1 A. 508.

(6) Conditional, in pre-emption suit, See PRE-EMPTION, 1 A. 291 and 1 A. 293 = 1 Ind. Jur. 410.

(7) See APPEAL, 1 A. 266.

(8) See EXECUTION OF DECREE, 1 A. 456 = 2 Ind. Jur. 260.

(9) See LIMITATION, 2 A. 443 = 4 Ind. Jur. 580.

(10) See LIMITATION ACT, 1871, 1 A. 510 = 2 Ind. Jur. 499.

(11) See MONEY-DECREE, 1 A. 446.

(12) See PRE-EMPTION, 1 A. 132.

(13) See SMALL CAUSE COURT, 1 A. 624.

Decree-holder.

Rights of, See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 26 W.R. 82 = 3 Suth. P.C.J. 330 = 3 I.A. 241 = 3 Sar. P.C.J. 648.

Document.

Legally invalid document—Suit for declaration that it is not genuine—Reasonable apprehension of injury.—Where a document is not legally valid or admissible for the purposes for which it is apprehended that it may be used, a suit will not lie for a declaration that it is not genuine, as there cannot be said to be a reasonable apprehension of injury from the document. SHIB LAL v. HIRA LAL, 1 A. 622 ... 476

Dwelling place.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 51.

Encroachment.

Public thoroughfare —Suit to remove encroachment—Maintainability—Cr.P.C., Act X of 1872, S. 521.—A suit to remove an encroachment on a public road or thoroughfare cannot be maintained without an allegation of special injury. KARIM BAKSH v. BUDDHA, 1 A. 249 ... 193

Equity of redemption.

See REDEMPTION, 3 Suth. P.C.J. 637 = 6 I.A. 145 = 4 Sar. P.C.J. 17 = 5 C.L.R. 213.

Estoppel.

(1) Bona fide *purchaser of Government paper—Transfer—Seals of native ladies of rank.*—A purchaser, however, *bona fide*, of Government papers transferred to him by endorsement purporting to bear the seals of a native lady of rank to whom the notes were made payable, but which seals were put on after her death, can gain no title by such unauthorised use of the seal. Where a plaintiff is aware of the sale of the notes under such circumstances by his brother, he, even in the absence of direct proof, may be presumed to have acquiesced in what was done by his brother in the disposal of the notes, and therefore is, equally with him, precluded from impeaching the sale. MIRZA AHMED ABBAS KHAN v. SAH MUTHRA DASS, 3 Suth. P.C.J. 175 ... 17

(2) See TALUKDARS, Bal. 105.

Estoppels in pais. PAGE

Equitable estoppels—Acquiescence—What constitutes.—The equitable doctrine of laches and acquiescence is applicable to suits, for which a period of limitation is prescribed by the Limitation Act. Mere delay does not constitute acquiescence. There must be, on the one side, conduct or language inducing a reasonable belief that a right is foregone, and on the other, good faith and ignorance of facts. UDA BEGAM v. IMAM-UD-DIN, 1 A. 82 ... 74

Estoppel (by plea).

See FRAUD, 1 A. 403.

Evidence.

(1) *Reception in evidence of unstamped pro-note—Irregularity not affecting the merits—Appellate Court's powers.*—The reception in evidence of an unstamped pro-note is an irregularity not affecting the merits. Such an irregularity does not justify an appellate Court in reversing the decree of the Court of first instance. AFZAL-UN-NISSA v. TEJ BAN, 1 A. 725 ... 518

(2) See ACT XXVI OF 1866, 3 Suth. P.C.J. 82.

(3) See CRIMINAL PROCEDURE CODE, 1872, 2 A. 386.

(4) See EXECUTION OF DECREE, Bal. 430=5 C.L.R. 308.

(5) See PRACTICE AND PROCEDURE, 3 Suth. P.C. 304=26W.R. 55=3 I.A. 259=3 Sar. P.C.J. 611.

Evidence Act.

(1) S. 24, See CRIMINAL PROCEDURE CODE, 1872, 2 A. 260=4 Ind. Jur. 250.

(2) *S. 30—Confession by one of several co-accused.*—Although the law allows a Court to consider statements made by accused persons when dealing with the case against other accused persons, who are tried with them, a conviction based on such evidence only, without corroboration on a material point, is not proper. EMPRESS OF INDIA v. BHAWANI, 1 A. 664; and 1 A. 675 ... 512, 519

(3) *S. 30—Evidence of co-accused, admissibility of.*—The test which S. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with another person or persons against whom it is tendered. To use a popular phrase, the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush. EMPRESS OF INDIA v. GANRAJ, 2 A. 444=4 Ind. Jur. 581 ... 853

(4) Ss. 30, 33, See CRIMINAL PRODEDURE CODE, 1872, 2 A. 645=5 Ind.Jur. 263.

(5) *Ss. 35, 48—Proof of special custom—Village administration-papers, admissibility of.*—On the question of the existence of a special custom in the Bahrulia clan in Oudh excluding daughters from inheritance, the *wajib-ul-arz* or village administration papers, directed to be made by Reg. VII of 1822 and ascertaining and recording usages of the kind of the custom in question, were properly received in evidence under S. 35 of the Evidence Act, though they had been prepared by the Settlement Officer's subordinates and not by himself as required by the Regulation.

Semble. Even if such papers were to be treated only as the recorded opinions of those likely to know the custom, they would be admissible in evidence under S. 48 of the Act. RANI LEKRAJ KUAR v. BABOO MAHPAL SINGH, 5 C. 744=3 Suth. P.C.J. 704=7 I.A. 63=6 C.L.R. 593=4 Saraswati's P.C.J. 93 ... 878

Evidence Act—(*Continued*). PAGE

(6) S. 92, See BILL OF EXCHANGE, 2 A. 598=5 Ind. Jur. 157.

(7) Ss. 92, 95—See CIVIL PROCEDURE CODE, 1877, 2 A. 832.

(8) S. 93, See CONTRACT ACT, 1 A. 275.

(9) *S. 108—Hindu Law—Missing person—Presumption of death—Act VI of 1871, S. 24.*—It is only when the devolution or succession to the property of a missing Hindu (or Mahomedan) is in question, that the Hindu and Mahomedan Law of presumptions as to the death of a missing person may have to be applied with reference to S. 24, Act VI of 1871. But, when a suit is by a reversioner for a declaration or for the avoidance of an alienation of property in the possession of the present heir, the provisions of S. 108 of Act I of 1872 will apply. PARAMESHAR RAI v. BISHESWAR SINGH, 1 A. 53 ... 65

(10) *S. 108—Mahomedan Law—Missing person—Bengal Civil Courts Act, S. 24.*—In a suit, between Mahomedans, to enforce a right of inheritance, the Mahomedan Law must form the rule of decision (Bengal Civil Courts Act, S. 24). The question, whether a missing person is alive or dead, arising in such a suit, must be decided with reference to the principles of Mahomedan Law on the subject, and the Evidence Act has no application.

Per Stuart, C.J.—Under the Mahomedan law, inheritance to the property or share of a missing person cannot open, but must remain in abeyance, until ninety years have elapsed since his birth, or until his death is proved.

Per PEARSON, J., and SPANKIE, J.—Where a person is missing, at the time when he has a right to inherit, his heir cannot hold his share either as heir or as trustee. HASAN ALI v. MAHRBAN, 2 A. 625 ... 951

(11) S. 110, See REDEMPTION, 1 A. 194.

(12) *S. 115—Estoppel—Award—Hindu Law—Disqualified heir—Inheritance.*—S. 115 of the Evidence Act embodies the rule of English law on the subject of estoppel. "The doctrine of estoppel is based on a fraudulent purpose and fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. There must be deception and change of conduct in consequence."

A person who is not a party to an award, is not bound by it, and cannot claim any benefit under it. An award which is manifestly against the law cannot deprive a person of his legal rights nor confer on him rights which the law does not give him. An award which decides a right of inheritance in favour of a person disqualified under Hindu Law, as against another person assenting to such award, cannot be construed into a gift by the latter to the former, for there could be no gift of property which is decided *not* to belong to the donor. A person, not a party to an award, cannot be said to be represented in it, by his brother who has been adopted into another family. GANGA SAHAI v. HIRA SINGH, 2 A. 809 ... 1073

Execution of decree.

(1) *Irregularity—Sale—Continued execution of earlier reversed decree even after later final decree to same effect passed—Not an irregularity prejudicing judgment-debtor—C.P.C., Act VIII of 1859, S. 257.*—An irregularity in execution proceedings, which did not prejudice the judgment-debtor, does not vitiate a sale.

Where execution was taken out on an earlier decree in appeal (which was afterwards reversed) and continued even after a final appellate decree was passed, *held*, the irregularity was one which did not prejudice the judgment-debtor. *Held*, also, that a suit by the judgment-debtor to set aside a sale under the above circumstances, on the ground of nullity, was not maintainable with reference to Act VIII of 1859, S. 259. GHAZI v. KADIR BAKSH, 1 A. 212. 122

Execution of Decree—(*Continued*). PAGE

(2) *Sale in execution of decree—Right of auction-purchaser to recover purchase-money on sale being set aside—Fraud on the part of decree-holder—Fraud on the part of auction-purchaser—Minor—Claim for costs of suit.*—In execution of a personal decree for money, a decree-holder fraudulently brought to sale the property of a minor. The minor brought a suit to set aside the sale and recovered possession of the property from the auction-purchaser. The latter sued the decree-holder for recovery of the purchase-money with interest, and the costs incurred by him in defending the suit brought by the minor. It was found that the auction-purchaser was neither a party to, nor aware of, the fraud on the part of the decree-holder; but it was also found that he has aware that he was purchasing the property of a minor, and that he did not ascertain whether the sale was warranted by the terms of the decree.

Held, by a majority of the Full Bench, that this knowledge and this omission on his part did not disentitle him to recover the purchase-money from the decree-holder. *Held*, also, that he could not recover the costs incurred in defending the suit brought by the minor, as he ought not to have defended it, at any rate without obtaining a guarantee from the decree-holder for the costs to be incurred.

Per Stuart, C.J.—That under the circumstances, the auction-purchaser was guilty of fraud, at the least, of negligence in purchasing with notice that the property belonged to a minor, and in failing to ascertain whether the terms of the decree warranted its sale, and that, therefore, he could not recover. MAKUNDI LAL v. KAUNSILA, 1 A. 568 ... 444

(3) *Sale of immoveable property in—Decree-holders with liens—Right of priority.*—Where immoveable property is sold in execution of decrees declaring a lien upon it, the decree-holders have a right to be paid out of the sale proceeds, in the order of the priority of their claims, provided they have, before the order for distribution, taken out execution of their decrees against the judgment-debtor. MANIK SINGH v. PARAS RAM, 1 A. 727 ... 525

(4) *Sale in—Warranty of title.*—In execution sales of rights and interests in immoveable property, the extent and nature of the interest of the judgment-debtor, as described in the revenue registers, are notified at the time of sale, but the descriptions so given are neither intended by the decree-holder or the officer conducting the sale, nor taken by the auction-purchasers, to convey any warranty of the correctness of the description of such interest or any warranty of the extent and nature of such interest. Where, therefore, in such a case, the sons of the judgment-debtor obtained a decree against the auction-purchaser for the recovery of their interests in the property sold, he could not, in the absence of fraud or misrepresentation on the part of the decree-holder, or anything to show that an express or implied warranty of title was given by him, maintain a suit against the decree-holder for the refund of the purchase-money proportionate to the interests in the property recovered from him. RAM NARAIN SINGH v. MAHTAB BIBI, 2 A. 828 ... 1066

(5) Sale in, See LIS PENDENS, 1 A. 588.

(6) *Insolvency—Decree, right of purchaser under, to recover property deposited with creditors—Evidence—Burden of proof.*—A member of a firm of Native Bankers which had become insolvent, with a view to protect his property from the general body of his creditors, deposited, in March 1870, property to the value of Rs. 30,000 with the appellants, another firm of Bankers to whom he owed Rs. 1,500. The respondent who had a decree against him brought

Execution of Decree—(*Continued*). PAGE

this property to sale in execution of his decree and purchased it. In a suit by the respondent for recovery of the property from the appellants who denied the deposit, held (affirming the decision of the High Court,) that the respondent was entitled to recover the property. DWARKA DOSS v. RAI SITA RAM, Bal. 308=5 C.L.R. 430 ... 793

(7) *Execution of wrong decree—Acquiescence—Validity.*—In execution of a decree, the judgment-debtor's property was attached. Claims preferred to this property led to a suit by the judgment-creditor against the claimant and the judgment-debtor, which was decreed with costs. The judgment-debtor was declared not liable for costs. The amount due under the first decree having been partly satisfied by the judgment-debtor's heirs in execution proceedings taken under the second decree, *held*, that the balance of the first decree could not be recovered from them in execution of the second decree, and that no acquiescence in former illegal proceedings could render the illegal execution valid. BINDA PRASAD v. AHMAD ALI, 1 A. 368=1 Ind. Jur. 741 ... 283

(8) *Rival final decrees—High Court's decree—Privy Council's decree—Execution.*—Where there were two cross-suits for possession of the whole of an estate and one-third of the estate respectively, and the suit for the whole estate was finally decreed by the High Court, and the plaintiff put in possession, and the suit for the one-third share finally decreed for the opposite party by the Privy Council; *held*, in an application for execution by the holder of the one-third share, that the decree of the Privy Council can be executed, notwithstanding that it involved the disturbance of possession obtained by the claimant of the whole estate under the High Court's decree, which had become final. The decree of the Privy Council in this case was later in date, and the claimant of the whole estate, should, if he desired to be secured in possession, have pleaded the deceee of the High Court in the cross suit, when the appeal in connection with the one-third share was before the Privy Council. UDAI SINGH v. BHARAT SINGH, 1 A. 456=2 Ind. Jur. 260 ... 369

(9) *Limitation.*—An application to transfer a decree for execution from one Court to another is an application to keep the decree in force. COLLINS v. MAULA BAKHSH, 2 A. 284 ... 741

(10) *Proceeding to keep decree alive—Limitation—Act XIV of 1859, S. 20.*—An order of a Court striking an execution petition off the file, for default of prosecution, is not a proceeding to keep the decree alive. RAGHU RAM v. DANNU LAL, 2 A. 285 ... 742

(11) *Payable by instalments—Limitation—Act IX of 1871, Sch. II, Art. 167.—Clause making whole amount realizable in case of default—Effect of waiver.*—An application for execution of a decree, payable by instalments, is within time, if made within three years from the time when the instalment sought to be realized became due. In such a case, it is immaterial whether previous instalments have been paid or not. A clause in the decree, making the whole amount realizable on default of payment of any instalment, may be waived, and such waiver does not operate so as to deprive the decree-holder of the right to execute for the instalments. KANCHAN SINGH v. SHEOPRASAD, 2 A. 291 ... 743

(12) See ACT XVIII OF 1873, No. 9, 1 A. 547.

(13) See APPEAL (GENERAL), 1 A. 583=2 Ind. Jur. 792.

(14) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 180; 1 A. 235; 1 A. 501; 1 A. 686.

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(15) See CIVIL PROCEDURE CODE, 1877, 2 A. 74 ; 2 A. 61=3 Ind. Jur. 321 ; 2 A. 91 ; 2 A. 281=4 Ind. Jur. 357 ; 2 A. 283=4 Ind. Jur. 358 ; 2 A. 384 ; 2 A. 396 ; 2 A. 352=4 Ind. Jur. 468 ; 2 A. 604 ; 2 A. 686 ; 2 A. 780 ; 2 A. 705 ; 2 A. 850 ; and 2 A. 290=4 Ind. Jur. 359.

(16) See COURT-FEE, 2 A. 196.

(17) See LIMITATION, 1 A. 675.

(18) See LIMITATION ACT, IX OF 1871, 1 A. 231 ; 1 A. 355 ; 1 A. 525 ; 1 A. 586.

(19) See LIMITATION ACT, 1877, 2 A. 763=5 Ind. Jur. 269.

Execution proceedings.

See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.

Factum valet.

See HINDU LAW (SELF-ACQUISITION), 1 A. 394.

False charge.

(1) What constitutes, See PENAL CODE, 1 A. 497=2 Ind. Jur. 463.

(2) See PENAL CODE, 1 A. 527.

False evidence.

Fabricating, See PENAL CODE, 2 A. 105.

Fraud.

(1) *Claim to relief from effects of*—"In pari delicto potior est conditio possidentis." —*Cause of action in such a case—Estoppel by plea in another suit—Limitation in suits for declaration or for cancelment of a bond—Limitation as against a trustee.*—The doctrine that *in pari delicto potior est conditio possidentis*, or that the Court, finding a man embarrassed by a deceit to which he was himself a party, will not interfere to relieve him from its consequences, cannot be applied in this country without qualification. Where a party to a fraudulent agreement entered into for the purpose of defeating the claims of third parties, wants to be relieved from its effects by showing its real character, the claims of justice, equity, and good conscience will be satisfied by safeguarding the interests of third parties, who have prejudicially altered their position on the faith of the agreement. And no harm is done by allowing the real character of the agreement to be proved as between the parties to it or their representatives. Where, therefore, for the purpose of defeating the claims of third parties, a person created, in favour of another, evidence of a fictitious title,—by way of a conditional sale, foreclosure proceedings, a judgment collusively allowed to be passed thereon, and execution proceedings terminating in the delivery of possession of the property mortgaged,—whereby he effectively defrauded one of his creditors, he was nevertheless allowed, in a suit between himself and the other party to the agreement, to prove its real character, and to claim back possession from the other party.

In such a case, the cause of action against the party to the fictitious agreement who has obtained possession, arises when he disavows its real character and seriously maintains his possession.

In such a suit, neither of the parties is estopped, as between themselves, by the pleas which they, or either of them, had raised, in a suit brought against them by a third party for the declaration of the real character of the agreement.

Where the only relief claimed is a declaration or cancelment of a document, the period of limitation will be that provided for such suits ; but where such relief is only ancillary, and possession of immoveable property is claimed, the twelve years' rule will apply.

Fraud—(*Concluded*). PAGE

Limitation will begin to run against a trustee, when he disavows the trust and sets up an independent title. PARAM SINGH v. LALJI MAL, 1 A. 403. 319

(2) See EXECUTION OF DECREE, 1 A. 568.

(3) See MORTGAGOR AND MORTGAGEE, 1 A. 303=1 Ind. Jur. 385.

Good faith.

See ACT XVIII OF 1850, 1 A. 280.

Government ferry.

See CONTRACT ACT, 2 A. 411.

Government paper.

Bona fide purchase of—See ESTOPPEL, 3 Suth. P.C.J. 175.

Grant.

(1) *By the father—Confirming grant by the son.*—Where the appellant's father granted a pottah of a certain village mortgaged to him, in favour of the respondent, promising, in the event of the mortgagor redeeming the same, to make over to him in lieu thereof other villages yielding an equal revenue, and subsequently the appellant confirmed that grant but making no reference to the provision in the earlier grant as to substitution : *held*, that the appellant was bound by his father's agreement to make over to the respondent villages yielding a revenue equal to that of the village granted to him, when the latter village was redeemed by the mortgagor. RAJAH BIJAI BAHADUR SINGH v. BABOO BHYRON BUX SINGH, 3 Suth. P.C.J. 690=Bal. 335 ... 317

(2) *of land rent-free and revenue-free—Reg. XIX of 1793, S. 10—Reg. XLI of 1795, S. 10—Act XVIII of 1873 (N.W.P. Rent Act), S. 30—Act XIX of 1873 (N.W.P. Land Revenue Act), S. 79—Suit for possession of land granted rent-free and revenue-free—Jurisdiction of Civil Court.*—A grant of land rent-free and revenue-free is null and void and liable to resumption, with reference to the above quoted laws and regulations. A suit for the possession of land, granted rent-free and revenue-free, or as it is called "Krishnarpan" land, is cognizable by the Civil Courts. JAGA NATH PANDAY v. PRAG SINGH, 2 A. 545 ... 916

(3) See PRACTICE AND PROCEDURE, 3 Suth. P.C.J. 304=26 W.R. 55=3 I.A. 252=3 Sar. P.C.J. 611.

Grantee.

from Government, See TITLE, 3 Suth. P.C.J. 472=3 C. 645=3 Sar. P.C.J. 769.

Guardian.

See ACT IX OF 1861, under Acts of the India Council, 1 A. 428=2 Ind. Jur. 146.

Haq-i-chaharum.

(1) *Based on contract—Suit of Small Cause nature—Second appeal.*—A suit by a Zamindar for haq-i-chaharum or one-fourth of the price of trees cut down by tenants is, when based upon a *razinama* or agreement, one of a nature cognizable by a Small Cause Court, and consequently, when the amount claimed in such a suit is below five hundred rupees, there can be no second appeal. HARI SINGH v. BALDEO SINGH, 2 A. 905 ... 1126

(2) Suit for, See LIMITATION ACT, 2 A. 358.

Havalat.

Whether a prison, See ACT XXVI OF 1870, 2 A. 301.

High Court.

(1) *Powers of superintendence—Stat. 24 and 25, Vic., C. 104, S. 15—High Court's jurisdiction to revise judicial proceedings.*—The powers of superintendence,

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conferred on the High Court by the Stat. 24 and 25 Vic., C. 104, S. 15, relate to administrative authority and not judicial powers. The administrative authority may be thus summarised. The High Court has power, under S. 15 of the High Courts Act—(1) to direct the exercise of a power of jurisdiction disclaimed by the lower Court; (2) to set aside the order made by the lower Court without jurisdiction.

The High Court has no power, where no appeal lies and when no power of interference is given by the C.P.C., to interfere, by way of revision, with the proceedings of subordinate Courts on the strength of these powers of superintendence. TEJ RAM v. HARSUKH, 1 A. 101 ... 52

(2) *Interlocutory order of—Appeal to Privy Council.*—Under the C.P.C., 1877, the High Court has no power to give leave to appeal to the Privy Council from an order of the High Court directing a hearing on the merits, that order not being a decree, but an interlocutory order. Nor has it any such power under cl. 31 of the Letters Patent, as its provisions have been, by implication, repealed by the C.P.C., 1877, and by Act VI of 1874. TETLEY v. JAI SHANKER, 1 A. 726 ... 529

(3) Revisional powers of, See CRIMINAL PROCEDURE CODE, 1872, 1 A. 1; 1 A. 139; 2 A. 276; 2 A. 398; 2 A. 336; 2 A. 448—High Court's powers of revision, See CRIMINAL PROCEDURE CODE, 1872, 1 A. 1.

(4) Reference to—by Sessions Court, See CRIMINAL PROCEDURE CODE, 1872, 2 A. 771.

(5) Jurisdiction, See REGISTRATION ACT, XX OF 1866, 15 B.L.R. 228=24 W. R. 75=3 Suth. P.C.J. 170=2 I.A. 210.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—DEBTS.
4.—GIFT.
5.—INHERITANCE.
6.—JOINT FAMILY.
7.—MAINTENANCE.
8.—MINORITY AND GUARDIANSHIP.
9.—PARTITION.
10.—REVERSIONERS.
11.—SELF-ACQUISITION.
12.—STRIDHAN.
13.—SUCCESSION.
14.—WIDOW.
15.—WOMAN'S ESTATE.

——1.—Adoption.

(1) *Adoption of only son.*—Held, by the Full Bench (Turner, J., *dissenting*), that the adoption of an only son is not altogether void, but that, having once been made, it is valid. HANUMAN TIWARI v. CHIRAI, 2 A. 164 ... 662

(2) When the adoption of a son has once been absolutely made and acted on for years, it cannot be cancelled or set aside at the suit of the adoptive father. SUKHBASI LAL v. GUMAN SINGH, 2 A. 366 ... 846

(3) *Inheritance.*—An adopted son succeeds to property, which has descended to his adoptive mother as heiress of her father. SHAM KUAR v. GAYA DIN, 1 A. 255=1 Ind. Jur. 198. ... 200

(4) *Jain Law.*—In questions arising between parties of the Jain sect, the custom of the sect should be inquired into and given effect to, although it may be at variance with Hindu Law. Under Jain Law, the adoption of a sister's son is valid. HASSAN ALI v. NAGA MAL, 1 A. 288 ... 245

Hindu Law—2.—Alienation. PAGE

(1) *Power of a father to alienate ancestral property—Immoral purposes.*—By the majority of the Full Bench (Spankie, J. and Oldfield, J.).

An alienation of ancestral property, made for immoral purposes by a father during the minority of his son, can be set aside wholly, even though the purchaser may have taken *bona fide* and for value; it is not valid even to the extent of the father's share.

Per Oldfield, J.—The law on the point has been settled by a course of decisions invalidating sales by one co-parcener without the consent, express or implied, of the others.

Per Pearson, J.—The purchaser, having acted in good faith, is entitled to take the father's share and to have it ascertained by partition. CHAMAILI KUAR v. RAM PRASAD, 2 A. 267=4 Ind. Jur. 251 ... 731

(2) *Father's power to alienate ancestral property.*—An alienation, made by a Hindu father, of joint ancestral property, which is not made with the consent of his son or for any purpose allowed by Hindu law, can be set aside, at the suit of his son, not only to the extent of the son's share, but altogether. GANGA BISHESHAR v. PIRTHI PAL, 2 A. 625=5 Ind. Jur. 212 ... 961

(3) *Mortgage of family dwelling-house—Sale in execution of mortgage decree—Right of widow to reside in dwelling-house.*—A mortgage, executed by a deceased Hindu, can be enforced in a suit and by sale in execution against his widow and his mother. BHIKKAM DAS v. PURA, 2 A. 141 ... 645

(4) *Reversioners, near and remote—Right of suit.*—A suit will lie by a person, though not the next reversioner, to set aside an alienation or other arrangement in respect of property made by the next reversioner in fraud of or to the prejudice of the reversionary interests of the former. GAURI DAT v. GUR SAHAI, 2 A. 41 ... 572

—3.—Debts.

Mitakshara—Mortgage of ancestral property by father—Sale of father's rights and interests in execution—Liability of son's share.—Where a Hindu father mortgages ancestral property, and, in execution of a decree on such mortgage, the rights and interests of the father only are sold, the purchaser cannot take possession of the whole estate; and in a suit against him by the sons for the recovery of their shares, it would be unnecessary to enquire into the nature of the debt on account of which the father's rights and interests were sold. BIKA SINGH *v.* LACHMAN SINGH, 2 A. 800 ... 1059

—4.—Gift.

(1) *Gift of separate immoveable property by husband to wife—Her rights therein—Stridhan—Alienation of gift by widow—Suit by reversioner—'Res judicata'—S. 2, C.P.C., 1859*—Under Hindu Law, the wife has no absolute power over immoveable property given to her by her husband. She holds the property on terms similar to those on which property inherited from her husband is held.

The reversioner has the same right to question her acts in relation to immoveable property gifted to her, as he has in relation to property inherited by her from her husband.

Where, in a former suit by a person against his brother's widow, for possession as heir of his deceased brother, it was decided, among other things, that the widow took only a life-interest in certain properties, *held*, in a subsequent suit by his son as reversioner against the same defendant for having certain alienations made by her declared invalid, that the decision in the former suit, as to the nature of the interest the defendant took in her husband's property, was not *res judicata*, as the plaintiff did not claim as heir of his

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father, the plaintiff in the former suit, but as the heir and reversioner of his uncle, the deceased husband of the defendant. RUDR NARAIN SINGH v. RUP KUAR, 1 A. 734 ... 537

(2) *Illegal and immoral consideration—Validity in absence of fraud.*—A gift made by a person to his kept mistress,—who lived with him as his wife "on condition of her continuing to be his wife and remaining obedient to him, her husband "—which is followed by possession enjoyed for a number of years, cannot, even assuming that the consideration for it was illegal or immoral, be set-aside, in the absence of fraud, in enforcement of a debt created subsequent to the gift. Such a gift cannot be held to be immoral solely on the strength of the words used in the deed of gift, where the donor had children by his mistress, and his object in making it appears to have been her continuing to remain with him and discharge her duties to such children, rather than the continuance of their illicit intercourse. LACHMI NARAIN v. WILAYTI BEGAM, 2 A. 433=4 Ind. Jur. 525 ... 844

(3) See HINDU LAW (JOINT FAMILY), 1 A. 429.

(4) See HINDU LAW (SELF-ACQUISITION), 1 A. 394.

—5.—Inheritance.

(1) *Illegitimate son—Sudra.*—There is no distinction between the illegitimate son of a Sudra by a female slave, and one by a concubine. Such a son is entitled to inherit his father's property in preference to the daughter of his father's legitimate son, who had pre-deceased his father. SARASUTI v. MANNU, 2 A. 134 ... 623

(2) *Rights of daughters and daughter's sons.*—A daughter's son is not entitled, by Hindu Law, to succeed as heir to his maternal grand-father's estate, so long as any daughter not disqualified, or in whom a right of inheritance has once vested, survives. BAIJNATH v. MAHABIR, 1 A. 608 ... 466

(3) *Woman's property—Unchastity.*—A woman is not debarred by unchastity from inheriting *Stridhan*. MUSSAMMAT GANGA JATI v. GHASITA, 1 A. 46 ... 69

(4) *Inheritance among Sanyasis.*—Among Sanyasis, a right of inheritance, strictly so called, to the property of a deceased *guru* depends upon nomination of a *chela* made by him in his own life-time, which nomination is generally confirmed by the *Mahants* of the neighbourhood assembled together for the purpose of performing the funeral obsequies of the deceased. Where no nomination has been made, the succession is elective, the *Mahants* and the principal persons of the sect in the neighbourhood choosing from amongst the disciples of the deceased *guru* the one who may appear to be the most qualified to be his successor, and installing him then and there as his successor. In the absence of these conditions, a *chela* cannot claim to succeed to the property of his *guru*. MADHO DAS v. KAMTA DAS, 1 A. 539 =2 Ind. Jur. 609 ... 426

(5) Disqualified heir, See EVIDENCE ACT, 2 A. 809.

(6) See HINDU LAW—ADOPTION, 1 A. 255, 1 Ind. Jur. 198.

—6.—Joint Family.

(1) *Family property—Presumption.*—In a Hindu family, living together or having their entire property in common, the ordinary presumption is that everything in the possession of any one member belongs to the common stock; such a presumption does not arise, if there has been a division of the family property and a separation in the family.

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In this case, the ordinary presumption of Hindu Law applicable to a joint family., was rebutted by the circumstances of the family, the *onus* of establishing the contrary, which lay on the member who disputed it, had not been discharged by him. MUSSUMAT BANNO v. KASHEE RAM, 3 Suth. P.C. J. 490=3 C. 315=3 Saraswati's P.C.J. 781 ... 414

(2) *Rights of father and son.*—In an undivided Hindu family, the sons acquire by birth an interest in the paternal as well as in the ancestral estate, and are entitled, in certain events, to interfere to prevent waste, or to enforce partition, in the lifetime and without the consent of the father ; but while their interest is proprietary, they have no dominion over the property. BALDEO DAS v. SHAM LAL, 1 A. 77 ... 71

(3) *Ancestral immoveable property—Son's right to demand partition.*—In the case of ancestral immoveable property, the sons in an undivided Hindu family, under the Mitakshara law, have an unqualified right to demand partition in the lifetime of the father. KALI PARSHAD v. RAM CHARAN, 1 A. 159 ... 118

(4) *Partition—Compromise—Obstructed inheritance.*—In a joint Hindu family, the father fully represents the estate which has devolved on, and would on partition fall to, the separate share of himself and his sons ; and a compromise entered into by him with reference to the partition of the property between himself and his co-parceners, is, in the absence of fraud or collusion, binding on his sons.

In the case of inheritance liable to be obstructed, the acts of the obstructing or intermediate heir with respect to the property, cannot be questioned by the next heir.

Where, therefore, a compromise was entered into by a father with respect to the partition of the separate property of his deceased issueless uncle, his son was not allowed to question it. PITAM SINGH v. UJAGAR SINGH, 1 A. 651... 507

(5) *Mitakshara—Mortgage, by father, of joint ancestral property—Sale of such property in execution of decree against father—Liability of son's share.*—Where a Hindu family is joint, and the joint property is in the father's possession and management, the whole of it is liable under a decree obtained against the father for money borrowed by him for the use of the joint family ; the suit and the decree in such a case must be regarded as against the father as representing the joint family. DEVA SINGH v. RAM MANOHAR, 2 A. 746. 1002

(6) *Personal decree against father—Sale of father's rights and interests in execution—Son's rights.*—Where, in execution of a personal decree for money against the father in a joint Hindu family, his rights and interests in the joint property are only sold, the purchaser cannot take possession of the whole property. If he does take possession, the sons would be entitled to recover their shares. CHANDRA SEN v. GANGA RAM, 2 A. 899 ... 1123

(7) *Assent of co-parcener to alienation.*—Neither a co-parcener, who makes an alienation to a stranger, nor the stranger who thus enters into the co-parcenary, can object to similar alienations by other members, on the ground that they were made without his consent. GANRAJ DUBEY v. SHEOZORE SINGH, 2 A. 898 ... 1118

(8) *Survivorship.*—In an undivided Hindu family, governed by the Mitakshara law, when a brother dies, leaving brothers and nephews (the sons of a predeceased brother), his interest in the joint property does not pass to his surviving brothers alone ; on partition, the whole estate is divisible, *per capita* among the brothers and *per stirpes* among the sons and grandsons of a deceased brother, the share of the latter two classes being the share, which the deceased would have taken, if alive at the time of partition. DEBI PARSHAD v. THAKUR DIAL, 1 A. 105 ... 79

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(9) *Effect of the introduction into it of strangers—Assent of co-parcener to gift.*—The joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connection among its members by blood, relationship and marriage. Property held in such co-parcenership will be joint family property; the introduction of strangers in blood by auction purchase, necessarily breaks up the family relationship. When the constitution of the family as an undivided family is modified and the character of the property as joint and undivided family property is destroyed, by the introduction of a stranger as auction-purchaser of a share of the property, the consent of the co-parcener, which. under Hindu Law, would be necessary to validate a gift by a member of the family, would no longer be necessary, and a gift made without such consent would not be invalid. BALLABH DAS v. SUNDER DAS, 1 A. 429 ... 316

(10) *Partnership—Agreement between parties.*—By an agreement, it was settled that each member of the family was to draw money at his discretion out of the family firm, and to employ that money in his separate trade or separate speculations, the firm not being responsible for the losses sustained, not being entitled to share in the profits arising from these speculations, but subject to this modification, all members of the family retained the interest which they had as joint members. Their Lordships conceived that the relation between the two brothers (the plaintiff and the defendant) could not be taken to be strictly that of members of a joint and undivided Hindu family; for although they were joint as to their general concerns, and in some sense joint as members of a firm, yet that relation was qualified by the provision that each member of the firm might take out and use assets derived from the firm for the benefit of his sole and separate speculations. The above arrangement, being of such an extraordinary character as to leave it in the power of each member to draw to an unlimited extent upon the assets of the firm, the Privy Council declined to extend the operation of such an agreement one *iota* beyond its terms, and were, therefore, of opinion that the High Court was right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm. RAI NURSINGH DOSS v. RAI NARAIN DOSS, 3 Suth. P.C.J. 349=Bal. 98 ... 217

(11) See PRACTICE AND PROCEDURE, 3 Suth. P.C.J. 304=26 W.R. 55=3 I.A. 259=3 Sar. P.C.J. 611.

—7.—Maintenance.

(1) *Widow's right to maintenance—Gift of whole estate by husband—Validity.*—Under the Hindu Law, a wife is, in a subordinate sense, a co-owner with her husband; he cannot, therefore, make a wholesale gift of his estate, so as to deprive her of her maintenance. The donee in such a case takes and holds the estate subject to her maintenance. JAMNA v. MACHUL SAHU, 2 A. 315 =4 Ind. Jur. 414 ... 772

(2) *Widow's right to maintenance—Ratio it must bear to family property.*—That a Hindu widow had a son, who died after his father, is no reason for reducing the maintenance she would be reasonably entitled to, if she had been a childless widow. The amount of a widow's maintenance must be fixed with reference to the amount of the family property or income, and upon equitable considerations based upon the circumstances of each individual case. NARHAR SINGH v. DIRGNATH KUAR, 2 A. 407 ... 788

(3) *Widow's maintenance.*—For reasons of convenience and to prevent the recurrence of litigation, it is better, in decreeing maintenance to a Hindu

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widow, that a reasonable fixed sum should be awarded, rather than a portion of the annual income of the family property. JHUNNA v. RAMSARUP, 2 A. 777 ... 1039

(4) *Decree for maintenance—Suit for reduction of rate.*—A suit will lie for reduction of the maintenance decreed in favour of a person on the ground of diminution of income. RUKA BAI v. GANDA BAI, 1 A. 594=2 Ind. Jur. 722 ... 458

(5) See HINDU LAW (WIDOW), 1 A. 170.

——8.—Minority and Guardianship.

Putting out of caste - Guardianship—Medical examination of a person as to impotence—Court's power.—A Hindu, who is outcasted by his community for attempting to marry his daughter, eleven years old, for a money consideration to an impotent old man of seventy, does not thereby lose his right to her custody as guardian. Even assuming that there is a rule to that effect, it cannot be enforced by the Courts. The Courts have no power to order the medical examination of a person as to his impotency. KANAHI RAM v. BIDDYA RAM, 1 A. 549=2 Ind. Jur. 834 ... 431

——9.—Partition.

(1) *Joint and undivided ancestral property—Definement of shares—Insufficient evidence of partition - Enjoyment of profits—Evidence of partition.*—The fact that there was a definement of shares followed by entries of separate interests in the revenue records, with respect to some portion only of the family property, is an important piece of evidence towards proving separation of title and interests; but it will not necessarily amount to such separation. It must be shown that there was an unmistakeable intention on the part of the share-holders to separate their interests, and that the intention was carried into effect. The best evidence would be separate enjoyment of profits and separate dealings with the property. AMBIKA DAT v. SUKHMANI KUAR, 1 A. 437=2 Ind. Jur. 179 ... 317

(2) See HINDU LAW (JOINT FAMILY), 1 A. 651.

——10.—Reversioner.

(1) *Suit by reversioner—Declaratory decree.*—A reversioner is entitled to sue for a declaration that an alienation by the present qualified owner in possession shall not be binding on him after the lifetime of the latter. MUSSAMAT JAGESRI KUAR v. RAM NATH BHAGAT, 1 A. 371=1 Ind. Jur. 742 ... 284

(2) See HINDU LAW (ALIENATION), 2 A. 41.

(3) See HINDU LAW (GIFT), 1 A. 734.

(4) See HINDU LAW (WIDOW), 1 A. 503=2 Ind. Jur. 465.

(5) See RES JUDICATA, 1 A. 282.

——11.—Self-acquisition.

Father's powers—Self-acquired property—Exclusive gift to one son—'Factum valet' (Acts done not void).—An exclusive gift of self-acquired immoveable property made by a Hindu father to one of his sons, to the prejudice of the rest, is not invalid. The prohibition of such a gift, that may be inferred from the Hindu Law books, rests on moral or spiritual grounds, and cannot affect the gift itself when made. SITAL v. MADHO, 1 A. 394 ... 312

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Stridhan—Property inherited by paternal grandmother from grandson.—In order to constitute property held by a woman "stridhan" devolving on her own heirs, it must be held by her unconditionally, and subject to no restrictions. Immoveable property inherited by the paternal grandmother from her grandson is not stridhan so as to devolve on her death on her heirs ; it devolves on the heirs of the grandson. PHUKAR SINGH v. RANJIT SINGH, 1 A. 661 = 3 Ind. Jur. 33 ... 481

——13.—Succession.

Right of succession of daughters to father's estate.—Comparative poverty is the only criterion for settling the claims of daughters, *inter se*, on their father's estate. AUDH KUMARI v. CHANDRA DAI, 2 A. 561 ... 925

——14.—Widow.

(1) *Hindu widow—Maintenance.*—A Hindu widow is not entitled to claim maintenance from her husband's relations, irrespective of the possession by them of any ancestral property, and solely on the ground of their relationship. (By the Full Bench.)

The circumstances that the father-in-law was possessed of ancestral immoveable property, at the time of his son's death, which he had subsequently sold away for paying his own debt, does not make him liable for maintenance personally. (By the Division Bench.) GANGA BAI v. SITA RAM, 1 A. 170 ... 134

(2) *Hindu widow—Family dwelling house—Right of residence.*—A Hindu widow, who was residing in her husband's house during the lifetime of her husband, is entitled to continue there after his death, and cannot be ousted by the auction-purchaser of the interest of her husband's nephew. GAURI v. CHANDRAMANI, 1 A. 262 ... 204

(3) *Hindu widow divesting herself of her rights—Rights of reversioners.*—The act of a Hindu widow. in divesting herself of her interest in her husband's property, does not operate as a forfeiture so as to bring in the next reversioner, who cannot, therefore, sue either for possession or for a declaration of his reversionary right. PRAG DAS v. HARI KISHN, 1 A. 503 = 2 Ind. Jur. 465 397

(4) *Widow's estate—Unchastity during widowhood—Forfeiture.*—Under the Hindu Law, governed by the Mitakshara, a widow who has once succeeded to the separate estate of her deceased husband, is not liable to forfeit that estate by reason of unchastity. NEHALO v. KISHEN LAL, 2 A. 150 ... 655

(5) *Widow's estate—Forfeiture—Unchastity during widowhood.*—Possession is not necessary to save a widow's estate from forfeiture for unchastity during widowhood ; it would be enough if property has vested in her before her misconduct. BHAWANI v. MAHTAB KUAR, 2 A. 171 ... 671

(6) See PRE-EMPTION, 1 A. 452.

(7) See RES JUDICATA, 1 A. 282.

——15.—Woman's Estate.

See ACT I OF 1869, 3 Suth. P.C.J. 474 = 1 C.L.R. 318 = 5 I.A. 1 = 3 Sar. P.C.J. 763 = Bal. 148.

Hundi.

Option of holder.—The holder of a hundi, or in other words, of a bill or note, is not bound, in the event of its dishonour, to sue all the parties liable to him under it, but he may, at his option, select his defendant or defendants, as he may judge best, for recovery of the money. BASANT RAM v. KOLAHAL, 1 A. 392 ... 302

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Husband & wife.

See LEGACY, 1 A. 762 and 1 A. 772.

Hypothecation.

See MONEY-DECREE, 1 A. 240.

Illustrations.

Legal character of, to sections—See SURETY, 1 A. 487=2 Ind. Jur. 420.

Impotence.

See HINDU LAW (MINORITY AND GUARDIANSHIP,) 1 A. 549=2 Ind. Jur. 834.

***In* forma pauperis.**

Application to sue—See CIVIL PROCEDURE CODE, 1877, 1 A. 745.

Instalment bond.

See LIMITATION ACT, 1877, 2 A. 322=4 Ind. Jur. 461.

Interest.

(1) *Reg. XV of 1793 and Reg. XVII of 1806—Conditional decree in redemption suit.*—Reg. XVII of 1806 is not inconsistent with Reg. XV of 1793, as the former refers to *accumulations* of interest, whatever the *rate* may be, and the latter to rates of interest.

A mortgagor, suing for redemption, cannot, as a matter of right, claim a conditional decree fixing a time for the payment of money. He should ordinarily be ready with the money; but it is proper and judicious for the Court to insert such a condition, and where the Court of first instance failed to do so, the appellate Court acts properly in inserting the condition. RAJA BARDA KANT RAI v. BHAGWAN DAS, 1 A. 344 ... 270

(2) See ACT XXIV OF 1870, 3 Suth.P.C.J. 562=5 I.A. 197=3 Sar.P.C.J. 843= Bal. 174.

(3) See ACT XVIII OF 1873, 1 A. 261.

(4) See PUNJAB CODE, 3 Suth. P.C.J. 85.

(5) See MORTGAGEE IN POSSESSION, 3 Suth. P.C.J. 195.

(6) See PENALTY, 2 A. 621=5 Ind. Jur. 154; 2 A. 639=5 Ind. Jur. 214; 2 A. 715; 2 A. 767.

Interlocutory order.

(1) See CIVIL PROCEDURE CODE, 1877, 2 A. 65=3 Ind. Jur. 419.

(2) Of High Court—See HIGH COURT, 1 A. 726.

Issue.

See PRACTICE AND PROCEDURE, 3 Suth. P.C.J. 304=26 W.R. 55=3 I.A. 259=3 Sar.P.C.J. 611.

Jain Law (Adoption).

See HINDU LAW (ADOPTION), 1 A. 288.

Jains.

See PRIVY COUNCIL, 1 A. 688=2 C.L.R. 193=5 I.A. 87=3 Suth.P.C.J. 529= 3 Sar.P.C.J. 807.

Joint decree.

See CONTRIBUTION, 1 A. 455.

Judgment.

Note to—See PENAL CODE, 2 A. 33.

Judicial Officer.

See ACT XVIII OF 1850, 1 A. 280.

Judicial Proceedings. PAGE

See CRIMINAL PROCEDURE CODE, 1872, 2 A. 276.

Jurisdiction (General).

(1) *Suit to establish right to attached property.*—In a suit to establish the plaintiff's right to property attached in execution of a decree, the jurisdiction of the Court must be decided with reference to the amount of the decree in execution of which the property is attached, and not the value of such property. GULZARI LAL v. JADAUN RAI, 2 A. 799 ... 1082

(2) In a suit for money charged upon immoveable property—See CHARGE, 2 A. 698.

(3) To entertain a suit to recover an excess payment made by mistake in execution of a decree--See C.P.C. (ACT XXIII OF 1861), 1 A. 388=2 Ind.Jur. 23.

(4) Valuation for purposes of—See MORTGAGE (REDEMPTION), 2 A. 773.

(5) Of High Court, N.W.P., under Act XX of 1866, S. 88, to direct the registration of an instrument the registration of which has been refused by the Registrar and the Registrar-General—See REGISTRATION ACT, XX OF 1866. 15 B.L.R. 228=24 W.R. 75=3 Suth. P.C.J. 170=2 I.A. 210.

(6) Of Magistrate—See CRIMINAL PROCEDURE CODE, 1872, 1 A. 129; and 1 A. 625.

(7) Of Superior Courts--See CRIMINAL PROCEDURE CODE, 1872, 1 A. 17.

(8) Of British Indian Courts over Ceded Territory—See CROWN, 2 A. 1.

(9) See ACT XXIV OF 1870 UNDER ACTS OF THE INDIA COUNCIL, 3 Suth. P. C.J. 562=5 I.A. 197=3 Sar. P.C.J. 843=Bal. 174.

(10) See APPEAL, 1 A. 620.

Jurisdiction (of Revenue Court).

(1) To entertain a suit for the money-equivalent of arrears of rent payable in kind—See ACT XVIII OF 1873, 1 A. 217.

(2) To entertain a suit by co-sharer against Lambardar's representative for share of profits—See ACT XVIII OF 1873, 1 A. 512.

Jurisdiction (of Civil Court).

(1) *Suit for ejectment and damages or mesne profits—Civil Court—Person entitled to claim right of occupancy in sir-land attached to mahal, not a trespasser.*—A suit to eject a trespasser and to recover mesne profits is a suit cognizable by a Civil Court, and is not the less so, because the defendant claims to have entered as an ex-proprietary tenant under S. 7 of the N.W. P. Rent Act. The jurisdiction of the Court arises from the frame of the suit as brought.

A proprietor of a mahal, who has parted with, or lost, his proprietary rights in it, and who, being in possession, even though constructively, is entitled to claim the occupancy as an ex-proprietary tenant, cannot be treated as a trespasser, and a suit to eject him cannot be maintained. BAKHAT RAM v. WAZIR ALI, 1 A. 448=2 Ind. Jur. 320 ... 347

(2) *Wrongful dispossession of land—Compensation—Act XVIII of 1873 (N.W.P. Rent Act), S. 95, cls. (m) and (n).*—When the lessee of an estate is an occupancy tenant of a portion of it, and, in execution of a decree obtained by the Zamindar, is ousted from the estate including the occupancy-holding, a claim for mesne profits (brought by him after the reversal of such decree) against the Zamindar in respect of the occupancy holding is cognizable by the Civil Courts, and such a remedy could not be sought by means of applications under cls. (*m*) and (*n*), S. 95 of the Rent Act, there being no wrongful dispossession within the meaning of that Act. SAWAI RAM v. GIR PRASAD SINGH, 2 A. 707 ... 997

Jurisdiction (of Civil Court)—*(Concluded).* PAGE

(3) In a suit for compensation for wrongful dispossession of lessee by lessor—See ACT XVIII OF 1873, 1 A. 338.

(4) A suit for a declaration of liability for revenue as between the parties only, without prejudice to the Government Revenue is not barred by S. 241, cl. (*b*) of Act XIX of 1873, and is cognizable by the Civil Courts—See ACT XIX OF 1873, 2 A. 415.

(5) See CONTRIBUTION, 1 A. 26.

(6) In a suit for declaration of Zamindari right to cesses—See REGULATION VII OF 1822, 1 A. 373.

(7) A Civil Court has no—in the matter of the formation of the record-of-right —See ACT XIX OF 1873, 1 A. 613.

Khalisa Mahal.

See CIVIL PROCEDURE CODE, ACT VIII OF 1859, 1 A. 400=2 Ind. Jur. 66.

Lambardar.

(1) *Claim to set off of revenue paid.*—A lambardar, who was an agent of the co-sharers of a village to make collections in the village, and after payment of the revenue to divide the profits, paid out of the collections of subsequent years, an arrear of Government revenue. In a suit by one of the co-sharers for his portion of the profits, *held*, the lambardar was entitled to claim a set-off of the revenue paid by him. There is nothing in the Revenue law which restricts a lambardar or other co-sharer, who may make collections, to discharge arrears of revenue out of the collections of the particular year in which the arrear may accrue. UDAI SINGH v. JAGANNATH, 1 A. 135 ... 114

(2) See ACT XVIII of 1873, 1 A. 512.

Landlord and tenant.

(1) *Act XVIII of 1873 (N.W.P. Rent Act)—Application under S. 39—Decision of title under lease—Res judicata.*—The decision of a revenue Court on a question of title under a lease, on an application under S. 39 of the Rent Act, is not *res judicata* in a subsequent civil suit, where the question is one peculiarly within the jurisdiction of a Civil Court, and not one which a Revenue Court is competent finally to decide on an application under S. 39, however sufficient the decision may have been for the purpose of disposing of such application. *Held*, accordingly, in a suit to have the terms of a lease corrected, by the cancelment or removal of a word fraudulently nserted in it, so as to alter its intended character, that a decision of the Revenue Court, upholding the claim of the defendants on the deed, as it stood, was not *res judicata*. HUSAIN SHAH v. GOPAL RAI, 2 A. 428 ... 813

(2) *Right to trees standing on land—Act XVIII of 1873 (N.W.P. Rent Act), S. 42 (a).*—Whatever rights a tenant has to standing trees can be exercised only during his tenancy. At the termination of the tenancy the trees pass to the landlord, being an accession to the soil; and the tenant cannot remove them, as he would be a trespasser. A purchaser of the tenant's rights after eviction can have no better rights.

The only rights reserved to an ejected tenant are to the growing crops or other ungathered products of the earth belonging to him and growing on the land at the time of his ejectment, and the right to use the land for the purpose of tending and gathering in such crops or other products, paying adequate rent therefor. RAM BARAN RAM v. SALIG RAM SINGH, 2 A. 896 ... 1117

(3) *Non-payment of rent—Adverse possession—Limitation.*—By the Full Bench, SPANKIE, J., dissenting. Once the relation of landlord and tenant is established, the mere non-payment of rent by the tenant, for over twelve years

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before the institution of the landlord's suit for possession and rent, is not sufficient to establish, either the cessation of the tenancy, or the tenant's title by adverse possession ; the cessation of the tenancy must be established by the tenant by means of affirmative proof, over and above the mere failure to pay rent. PREM SUKH DAS v. BHUPIA, 2 A. 517=4 Ind. Jur. 650 ... 902

Lease.

(1) *Suit for cancelment of lease—Breach of conditions involving forfeiture—Act XVIII of 1873 (N.W.P. Rent Act), S. 93, cl. (c).*—A lease is not liable to cancelment and forfeiture, if its terms are substantially complied with, though not literally in the manner stipulated for ; nor does an act or omission prohibited under it entail forfeiture, if no forfeiture is attached to such act or omission ; nor does a condition, to which forfeiture is attached, involve such forfeiture, if the object was simply to ensure due compliance with the terms of the lease. *Held*, accordingly, where a deed of perpetual lease stipulated for the payment of the rent annually, instalment by instalment, at the times fixed by the Government for the payment of instalments of revenue, that this was substantially complied with by payment of the instalments into the Government treasury, instead of to the lessor direct, as almost all the rent had to go towards revenue, and as such payment was in accordance with the arrangement previously made, as a matter of convenience between the lessor and the lessee ; that the planting of trees, sinking of wells, etc., in violation of a condition simply prohibiting such acts, did not entail a forfeiture : and that irregularity and unpunctuality in the payment of instalments of rent did not, where no arrears were due, involve forfeiture, though so stated in the lease-deed. ABLAKH RAI v. SALIM AHMAD KHAN, 2 A. 437 ... 847

(2) Of Zamindari rights—Wrongful dispossession of lessee by lessor—See ACT XVIII OF 1873, 1 A. 338.

(3) Of mortgaged property by usufructuary mortgagee to mortgagor—See CIVIL PROCEDURE CODE, 1877, 4 A. 180.

(4) Of Government Ferry—See CONTRACT ACT, 2 A. 411.

Legacy.

(1) *Real property—Legacy—Husband and wife.*—When property is devised to a married woman, so as to be absolutely for her sole use and benefit, and free from the control, debts and liabilities of her husband, its conversion into any other form of property does not change its character and conditions, even though such conversion may be made in anticipation of the legacy. A married woman entitled to such a legacy purchased real property by borrowing the purchase-money from her husband on the understanding that she would re-pay him when she obtained her legacy. In the deed conveying the property to her, it was not recited that it was to her separate use. She subsequently assigned her legacy, and with the moneys realized discharged the loan due to her husband. They were married before the Indian Succession Act came into force, and had acquired an Indian domicile. *Held*, that even if English law were applicable to the case, and any interest accrued to the husband in the property purchased by his wife, he, still, in consequence of the agreement between them, held it only in trust for her; and when the property was purchased in execution of a decree against the husband as his property, with notice that she claimed it as her separate property, the purchaser could not obtain a title to it as against the wife. BERESFORD v. CHARLOTTE HURST, 1 A. 772 ... 559

(2) See, also, HURST v. THE MUSSOORIE BANK, 1 A. 762 ... 303

Letters Patent.

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(1) *Cl. 10—Appeal—Division Bench.*—An appeal lies under Letters Patent, cl. 10, to the High Court only when there is such a judgment of a Division Bench as disposes of the suit on appeal before it. GHASI RAM v. MUSAMMAT NURAJ BEGAM, 1 A. 31 ... 57

(2) Cl. 10—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 181.

(3) Cl. 10, Appeal under—See LIMITATION, 2 A. 192.

Lien.

See CIVIL PROCEDURE CODE, 1877, 4 A. 180.

Limitation.

(1) *Mortgage—Redemption suit—Limitation prior to Act XIV of 1859—Acknowledgment of subsisting right—Act XIV of 1859, S. 1, cl. 15 and Act IX of 1871, Sch. II, Art. 148.*—Before the enactment of cl. 15, S. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property. So that, assuming the factum of a mortgage prior to that enactment, it would be unnecessary to enquire when the mortgage was effected; and, when there is an acknowledgment prior to 1859, the proof of the mortgage itself would be unnecessary. An acknowledgment, to save limitation, must be of a subsisting right, and not of a right already barred.

The provisions of cl. 15, S. 1, Act XIV of 1859, relating to suits against a mortgagor for the recovery of the immoveable property mortgaged, were modified by Art. 148, Sch. II, Act IX of 1871, principally in this respect, that the acknowledgment in writing of the mortgagor's title or right of redemption, from the date of which a new period of limitation is allowed to commence, is required to be made within the period of limitation originally prescribed and reckoned from the date of the mortgage. DAIA CHAND v. SARFRAZ ALI. 1 A. 425=2 Ind. Jur. 115 ... 297

(2) *Acknowledgment of debt.*—Where a letter, in acknowledgment of a debt due from B to S, was written under the directions of B by his agent, and was headed, "written by B to S", and the concluding portions of the letter were written by B in his own hand-writing; *held*, that there was sufficient evidence that the letter was written by an agent duly authorized, and that the heading was a "signature" within the meaning of the Limitation Act. MATHURA DAS v. BABU LAL, 1 A. 683 ... 527

(3) *Decree for money payable by instalments—Execution—Acknowledgment after decree barred—Limitation Act, S. 19.*—Where, in a decree for money payable by instalments, there is a proviso that, in default of payment of any one instalment, it should be executed for the whole amount, the decree-holder is strictly bound by its terms, and is bound to execute it in one lump; and an application for execution, made more than three years after the first default, would be barred, even though he may have received instalments in the interval.

An acknowledgment of his liability under the decree, made and signed by the judgment-debtor more than three years after the first default, could not save limitation. SHIB DAT v. KALKA PRASAD, 2 A. 443=4 Ind. Jur. 580 ... 852

(4) *Appeal under cl. 10 of the Letters Patent.*—Under the rules of practice of the 21st May, 1873, regarding the admission of appeals under cl. 10 of the Letters Patent, a copy of the judgment appealed from need not accompany the memorandum of appeal; therefore, in computing the period of limitation for such an appeal, the time for obtaining a copy of the judgment could not be deducted. FAZAL MUHAMMAD v. PHUL KUAR, 2 A. 192 ... 681

(5) *Execution of decree—Application to keep in force a decree.*—Per *Pearson* and *Oldfield*, JJ.—For purposes of limitation, an application under S. 216, C.P.

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Limitation—(*Concluded*).

C.[?] (1859), for the issue of a notice to the judgment-debtor (without any other prayer), is an application to keep in force a decree, and limitation should be computed from the date on which notice to the debtor was issued. Per SPANKIE, J., *contra*. BEHARI LAL v. SALIK RAM, 1 A. 675 ... 523

(6) *Several claims in one suit—Final decree of Appellate Court.*—When there are two decrees in the same suit, one of them being that of the District Judge with reference to one portion of the claim adjudicated on by the District Munsiff on remand and coming again before him on appeal, and the other being a later decree of the High Court, affirming the other portion of the claim, without disturbing the District Judge's order of remand, limitation for execution as to the two portions of the claim does not run from the dates of the two decrees respectively, but only from the date of the High Court's decree, which is the final decree of the Appellate Court in the suit. IMAM ALI v. DASAUNDHI RAM, 1 A. 508 ... 406

(7) *Confiscation and release of property by Government—Settlement of property after confiscation—Suit within 12 years therefrom—Limitation.*—Where Government confiscates property (as an act of State) and then releases its rights thereto, the question of limitation, in suits for the possession of such property between parties, must be decided, as if there never had been any confiscation. Where certain lands, which had been previously confiscated by Government, were settled with certain persons, by an order of Government, no question of limitation could arise in a suit for such lands, brought within 12 years from the date of such settlement, which alone could confer any title to such lands. PRINCE MIRZA JEHAN KADR BAHADUR v. NAWAB AFSUR BAHU BEGUM, 3 Saraswati's P.C.J. 865=4 C. 727=6 I.A. 76 ... 594

(8) *Constructive trust.*—In the absence of an actual and express trust, a constructive trust can be elicited by a Court, by an interpretation placed on the acts of parties and the circumstances of the case. Where certain persons were transported for life, and their near relations, who had been living with them on terms of close intimacy and mutual confidence took advantage of their absence and fraudulently appropriated to themselves the properties of the convicts; *held*, that the persons, who misappropriated, became, under the circumstances, trustees for the owners, and no limitation could affect the rights of the latter. DURGA PRASAD v. ASA RAM, 2 A. 361 ... 841

(9) See ACT XVIII OF 1873, 1 A. 512.

(10) See APPEAL, 2 A. 772.

(11) See BIRT TENURES, 3 Suth. P.C.J. 715=7 I.A. 17=4 Sar. P.C.J. 117=6 C. 210=6 C.L.R. 146.

(12) See CAUSE OF ACTION, 1 A. 325=4 I.A. 15=3 Suth. P.C.J. 357=3 Sar. P.C.J. 673.

(13) See CIVIL PROCEDURE CODE, 1859, No. 28, 1 A. 541=2 Ind. Jur. 680.

(14) See CIVIL PROCEDURE CODE, 1877, No. 13, 2 A. 832; 2 A.W.N. 82.

(15) See COURT FEE, 2 A. 241=4 Sar. P.C.J. 31=6 I.A. 126=4 C.L.R. 331=3 Suth. P.C.J. 627.

(16) See FRAUD, 1 A. 303.

(17) See REGISTRATION ACT, XX OF 1866, 15 B.L.R. 228=24 W.R. 75=3 Suth. P.C.J. 170=2 I.A. 210.

Limitation Act (XIV of 1859).

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(1) S. 1, cl. 15—See LIMITATION, 1 A. 425=2 Ind. Jur. 115.

(2) *Ss. 14, 20—Proceeding to enforce decree*—S. 14 of the Limitation Act, 1859, provides for the exclusion of the time during which the plaintiff, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action, *bona fide*, and with due diligence, in any Court, which, from defect of jurisdiction or other cause, was unable to decide upon it. And S. 20 of the Act, which applies to applications for execution, does not say that the applications to enforce or keep in force a decree must be in a Court having jurisdiction. It must follow, therefore, that the principle of S. 14 may be applied to S. 20, and that a proceeding, taken *bona fide* and with due diligence, before a Judge whom the party *bona fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree, within the meaning of S. 20. HIRA LAL v. BADRI DAS, 2 A. 792=3 Suth. P.C.J. 761=7 I.A. 167 =6 C.L.R. 561=4 Saraswati's P.C.J. 157=4 Ind. Jur. 426 ... 1028

(3) S. 20—See EXECUTION OF DECREE, 2 A. 285.

(4) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 350.

Limitation Act (IX of 1871).

(1) *Ss. 4 and 5—Admission of appeal after time—Single Judge and Division Bench.*—When an appeal is admitted, after time, by a single Judge sitting as an Admission Court, his order is liable to be questioned and set aside, at the hearing, by the Divisional Bench, on the ground that the reasons assigned for admitting it are erroneous or inadequate. DUBEY SAHAI v. GANESHI LAL, 1 A. 34 ... 60

(2) *S. 5 (a)—Institution of suit.*—Where the period of limitation prescribed for a suit expired when the Court was closed for the vacation, and the Court did not sit on the re-opening day, but on a later day according to an order of the Judge, *held* that the suit was within time on the actual opening day. BISHAN CHAND v. AHMAD KHAN, 1 A. 263 ... 205

(3) *S. 5 (b)—Appeal—Sufficient cause.*—An error in the calculation of the time for presenting an appeal is not a sufficient cause for presenting it beyond time. In admitting an appeal presented after time, the Court should record its reasons for being satisfied that there was sufficient cause for the delay. ZAIBULNISSA BIBI v. KULSUM BIBI, 1 A. 250 ... 194

(4) S. 10—See CO-SHARERS, 2 A. 394.

(5) *S. 15—Suits and applications.*—S. 15 of Act IX of 1871 must be held to apply to suits, as distinguished from applications, and that the word 'suit' therein used does not include an application for the execution of decree. Act IX of 1871 clears up what was obscure in Act XIV of 1859, under which the word "suit" has been used in a wide sense, so as to include an application to enforce execution of a decree. JIWAN SINGH v. SARNAM SINGH, 1 A. 97 ... 49

(6) S. 15—See XVIII OF 1873, 1 A. 254.

(7) Art. 10, Sch. II—See PRE-EMPTION, 1 A. 311; 1 A. 592.

(8) Arts. 15, 26, 61, 118, Sch. II—See ATTACHING CREDITOR, 1 A. 333.

(9) *Art. 62, Sch. II—Suit for money on account stated—Entry of balance due not signed by debtor—Stamp Act, XVIII of 1869, Sch. II, No. 5.*—Where, on a certain day, the book containing the accounts of two parties is examined, and a balance is struck in favour of one of them, and orally approved and admitted by the other, a suit, brought for such balance, "on the basis of

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***Limitation Act* (*IX of 1871*)—(*Continued*).**

the account book " is a suit on accounts stated within the meaning of the Art. 62, Sch. II of the Limitation Act, 1871, and would be within time, if it is within three years from the date on which the balance was struck and admitted.

An entry of the balance struck in the creditor's account, which is not signed by the debtor, is not a note or memorandum of the kind mentioned in No. 5, Sch. II of the Stamp Act, 1869. NAND RAM v. RAM PRASAD, 2 A. 641=5 Ind. Jur. 261 ... 964

(10) *Art. 75, Sch. II—Bond payable by instalments—Waiver—Cause of action.*—Where a bond for money payable by instalments, provides that, in default of payment of one or more instalments, the whole amount shall become payable, the mere acceptance by the obligee, of instalments after default, does not amount to a " waiver " of his right to enforce such provision, within the meaning of Art. 75, Sch. II, of Act IX of 1871. The most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach, and creating new relations with the party in default. In the case of such a bond, the cause of action arises, and limitation begins to run, when the first default is made. MUMFORD v. PEAL, 2 A. 857 ... 1091

(11) *Art 148—Redemption suit—Acknowledgment of the mortgagor's title and of his right of redemption* —The signature of the mortgagees in a record of rights, in which they are described as mortgagees of the estate, is a sufficient acknowledgment of the mortgagor's right to redeem, within the meaning of Act IX of 1871, Art. 148. DAIA CHAND v. SARFRAZ, 1 A. 117 85

(12) *Art. 148—Insufficiency of acknowledgment by agent.*—An acknowledgment of the title of the mortgagor or of his right of redemption, signed by the mortgagee's agent, is not sufficient, under Art. 148, Sch. II of Act IX of 1871, to create a new period of limitation. RAHMANI BIBI v. HULASAKUAR, 1 A. 642 ... 483

(13) *Art. 148, Sch. II—Redemption—Adverse possession.*—The mere assertion of an adverse title will not enable a mortgagee in possession to abbreviate the period of sixty years, which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit. Where, therefore, the mortgageee, in possession of certain property, purchased, before the expiry of the term fixed in the mortgage-deed, the equity of redemption of such property, from a person not entitled to sell it, set up a proprietary title to it and procured mutation of names, etc., *held*, in a suit for redemption brought by the party really entitled to it, more than twelve years after the sale of the equity of redemption, but only three years after the expiry of the term of the mortgage-bond, that the suit was not barred by limitation. ALI MUHAMMAD v. LALTA BAKHSH, 1 A. 655 ... 509

(14) Art. 148, Sch. II—See LIMITATION, 1 A. 425=2 Ind. Jur. 115.

(15) *Arts. 166 and 167, Sch. II—Execution of decrees obtained on bond specially registered—Act XX of 1866, Ss. 52 and 53.*—Applications for execution of decrees obtained on bonds specially registered under Act XX of 1866 are governed by Art. 167, and not 166, of Sch. II, Limitation Act. JAISHANKAR v. TETLEY, 1 A. 586 ... 443

(16) *Art. 167, Sch. II—" Date of applying ", Meaning of expression.*—By the Full Bench. "The date of applying to the Court" means the particular date on which the application is actually presented, and not the last day or any other day on which the application was pending.

Limitation Act (IX of 1871)—*(Concluded).*

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(By the Divn. Bench). An application by the decree-holder for the stay of execution proceedings is not an application to enforce or keep in force a decree. FAKIR MUHAMMAD v. GHULAM HUSAIN, 1 A. 580 ... 451

(17) *Art. 167, Sch. II—Execution of decree*—An application for the partial execution of a joint decree is not an application according to law, and has not the effect of keeping the decree alive. RAM AUTAR v. AJUDHIA SINGH, 1 A. 231 ... 158

(18) *Art. 167, Sch. II—C.P.C., Act VIII of 1859, S. 246—Execution of decree—Proceeding to enforce—Intermediate suit—Objector*—Where an application to execute a decree against the judgment-debtor's property was interrupted by the claim of an objector, which led to a suit by the decree-holder against the objector, decided against the latter; *held*, on a renewed application by the decree-holder for execution, more than three years from the former application, but within three years from the date of the decree in the above suit,—that the application was not barred under Act IX of 1871, Sch. II, Art. 167. *Held*, also, that the application under the above circumstances was not a fresh application, but a revival or continuance of the previous application which was interrupted.

Per Pearson, J.—The application was barred. PARAS RAM v. GARDNER, 1 A. 355 ... 280

(19) *Art. 167, Sch. II—Decree in favour of a firm in name of agent—Application for execution by his successor not named in decree—Effect of application to keep decree in force*—Where a decree is erroneously passed in favour of a firm in its agent's name and applications for execution are put in by its agent not named in the decree, such applications are not invalid, but are good and sufficient to keep the decree alive. LACHMAN BIBI v. PATNIRAM, 1 A. 510=2 Ind. Jur. 499 ... 407

(20) *Art. 167, Sch. II—Execution of decree—Application to enforce or keep in force a decree—C.P.C. (1859), Ss. 212 and 285.*—An application, under S. 285 of the C.P.C. (1859) for the transmission of a decree to another Court, together with a certificate of non-satisfaction of the decree, is an application to enforce or keep in force a decree within the scope and meaning of Art. 167, Sch. II of the Limitation Act (1871), and an application for execution made within three years from the date of such application is within time. HUSAIN BAKHSH v. A.D. MADGE, 1 A. 525 ... 412

(21) Art. 167, Sch. II, See EXECUTION OF DECREE, 2 A. 291.

(22) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), No. 38, 1 A. 350.

Limitation Act (XV of 1877).

(1) *S. 2, Arts. 62, 64, Sch. II—Suit for money due on accounts stated—Title acquired under previous Limitation Act—Right of action—Suit on accounts not signed by defendant.*—In a suit for money due on accounts stated when Act IX of 1871 was in force, it is not correct to say that the plaintiff's right to sue upon such accounts was a title acquired *under* Act IX of 1871, so as to save it from the operation of the repealing Act, XV of 1877. A right of action is one thing and the completion of title is another thing. A right of action arises from the acts of parties, and the limitation law simply provides a period within which such right of action must be exercised. Such a suit is, therefore, governed by Act XV of 1877.

Where the accounts are not signed by the defendant, Art. 64, Sch. II, does not apply, and the suit must be regarded as one for money lent. THAKURYA v. SHEO SINGH RAI, 2 A. 872 ... 1102

(2) *Ss. 4, 12, Art. 177, Sch. II—Application for leave to appeal to the Privy Council. Held, per Stuart, C.J., (Spankie, J. dissenting)* that, in computing the period

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Limitation Act (XV of 1877) – *(Continued)*.

of limitation prescribed by Art. 177, Sch. II. of the Limitation Act (1877), for an application for leave to appeal to the Privy Council, the time required for obtaining a copy of the judgment on which is based the decree sought to be appealed against, cannot be excluded under S. 12 of the Limitation Act, 1877. JAWAHIR LAL v. NARAIN DAS, 1 A. 644 ... 493

(3) *S. 14—Computation of limitation*—Under S. 14 of the Limitation Act, the only period of time which the plaintiff can claim to have excluded, is that during which he has been prosecuting his suit in a Court, which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. The time, during which he was not prosecuting his suit in any Court, or the period of such prosecution where the inability of the Court to entertain his suit arose from his own fault, such as mis-joinder of plaintiffs, cannot be excluded. RAM SUBHAG DAS v. GOBIND PRASAD, 2 A 622 ... 950

(4) S. 19—See LIMITATION, 2 A. 443=4 Ind. Jur. 580.

(5) S. 22—See ACT XV OF 1873, 2 A. 296.

(6) S. 22—See CIVIL PROCEDURE CODE, 1877, No. 8, 2 A. 487=4 Ind. Jur. 641.

(7) Art. 10, Sch. II—See PRE-EMPTION, 2 A. 237 ; 2 A. 409.

(8) *Art. 62, Sch. II—Suit for damages—Suit for money received to plaintiff's use.*—When the auction-purchaser at an execution sale of a decree for money realizes the amount of such decree, and, on such sale being set aside, the holder of the decree sues the auction-purchaser for the recovery of the money realized by him under the decree, the suit is not one for damages but is for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, to which the period of limitation applicable is three years. BHAWANI KUAR v. RIKHI RAM, 2 A. 354 ... 837

(9) *Arts. 62, 120, 132, Sch. II—Suit for "haqq-i-chaharam" based on custom.*—A suit for "haqq-i-chaharam" (one-fourth of the purchase-money due to the proprietor of a mohalla on the sale of a house situated in it) based upon custom, is not one for breach of contract, to which Art. 62, Sch. II of the Limitation Act applies, nor one to enforce a charge on immoveable property, to which Art. 132 applies. It is a suit of a class, for which there is no limitation expressly provided, and is, therefore, governed by Art. 120, Sch. II of the Limitation Act, 1877. KIRATH CHAND v. GANESH PRASAD, 2 A. 358 ... 839

(10) *Arts. 67, 68, 75, 80—Instalment bond—Cause of action.*—A bond, which stipulates for the repayment, within three years, of the principal, and every half year, of the interest thereon and of the premia of certain policies of insurance made over to the creditor as collateral security for the debt, and that, in default of such half-yearly payments, the whole amount of the debt shall become payable, but that it should be optional with the creditor to claim full payment on the failure of any one or more half-yearly payments or on the expiry of the period of three years, is not an instalment bond ; and, therefore, Art. 75, Sch. II, of the Limitation Act, 1877, does not apply to it.

Per Stuart, C.J. The cause of action for a suit on the bond arises at the end of three years allowed for the payment of debt.

Per Spankie, J. The bond does not fall under Arts. 67 and 68 of Sch. II of the Limitation Act, but belongs to the category of bonds mentioned in Art. 80, on which the cause of action arises when the bond becomes due, and it becomes due on default of payment of both interest and premia on the due date, and not of either of them only. BALL v. STOWELL, 2 A. 322=4 Ind, Jur. 461 ... 763

Limitation Act (XV of 1877)—(*Concluded*).

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(11) *Arts. 113, 136, 144, Sch. II—Sale of immoveable property—Suit for possession—Specific performance.*—Where land, the subject of a sale, was not in the possession of the vendor at the time of sale, but had been adjudged to him under a decree, against which an appeal was pending, a suit by the vendee "for possession agreed to be given" (there being no such agreement in the sale-deed), is not a suit for specific performance, to which Art. 113, Sch. II, of the Limitation Act, 1877, is applicable, but one for possession under the title conveyed by the sale, which is governed by Arts. 136 and 144 of the second schedule. SHEO PRASAD v. UDAI SINGH, 2 A. 718 ... 1009

(12) *Art. 167, cl. 2, Sch. II—Meaning of the words, "where there has been an appeal."*—The words "where there has been an appeal," in cl. 2 of the above article, contemplate and mean an appeal from the decree, and no other appeal. They cannot, therefore, apply to an appeal from the first Court's order, refusing the application of the defendant to set aside an *ex parte* decree. An application for execution will, therefore, be barred, if presented more than three years after an *ex parte* decree, though within three years from the appellate Court's order on appeal from an order of the original Court, dismissing an application to set aside such *ex parte* decree. SHEO PRASAD v. ANRUDH SINGH, 2 A. 273=4 Ind.Jur. 304 ... 734

(13) *Art. 179 (2).—Execution of decree.*—The words "appeal" and "Appellate Court" in Art. 179 (2) of the Limitation Act, 1877, include appeals to the Privy Council. So, the period of Limitation for an application to execute a decree of the High Court, from which an appeal has been preferred to the Privy Council, begins from the date of the order of the Privy Council. NARSINGH DAS v. NARAIN DAS, 2 A. 763=5 Ind. Jur. 269 ... 1019

Lis pendens.

(1) *Sale in execution of decree—Auction-purchaser*— Res judicata—*C.P.C. (1859), S. 2.*—Where an auction-purchaser in Court-sale purchased certain property with notice of a suit for such property pending in a Munsiff's Court which, however, had no jurisdiction (the value of the property being over Rs. 1,000), *held* that he was not bound to intervene or to contest it by appeal, and that his omission to do these things did not preclude him from suing the successful party in the previous suit for possession of the property purchased by him at the auction-sale.

Quære.—Does the doctrine of *lis pendens* apply to a purchase in execution of decree? ALI SHAH v. HUSAIN BAKHSH, 1 A. 588 ... 453

(2) *Mortgage—Condition against alienation—Purchase of equity of redemption—Extinguishment of security.*—Where land mortgaged first to one person with a condition against alienation is again mortgaged to another person, and afterwards sold to the first mortgagee pending a suit against the mortgagor on the second mortgage, the second mortgagee's right, under his mortgage, cannot be affected by the sale to the first mortgagee *pendente lite*, but neither can such purchaser deprive the first mortgagee of the rights he may otherwise have, by virtue of his prior mortgage and the condition against alienation. The purchase of the equity of redemption by the mortgagee does not necessarily extinguish the original security, when it is manifestly intended to keep it alive. LACHMIN NARAIN v. KOTESHAR NATH, 2 A. 826 ... 1065

(3) See OUDH TALUKDAR, 3 Suth. P.C.J. 60=6 I.A. 181=4 Sar. P.C. 10= Bal. 318.

Lord Canning's Proclamation.

Lord Canning's Proclamation of the 15th March, 1858—Effect.—Lord Canning's well-known Proclamation of the 15th March, 1858 had the effect of vesting the property, the subject of this suit, together with all other landed property

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***Lord Canning's Proclamation*—(*Concluded*).**

in Oudh, in the British Government, and all who claimed title to it had to claim through the Government. Whether or not the sunnuds under which plaintiff formerly held, would, if Oudh had remained under the old dynasty, have conferred upon her a life interest or an interest in perpetuity, it was clear that no more was granted to her subsequently by the officers of the British Government than a permission to occupy for her life the palace to which she now asserted a right in perpetuity. If the Acts of the Government officers allowing her so to occupy the palace, which she sought to impugn, were nullities, it would follow that she had no interest at all, but that her property remained in the British Government to which it was confiscated. NAWAB MALKA JAHAN SAHIBA v. THE DEPUTY COMMISSIONER OF LUCKNOW IN CHARGE OF THE NAZUL DEPARTMENT, 3 Suth. P.C. J. 584=6 I.A. 63=Bal. 194 ... 617

Lunatics.

See ACT XXXV OF 1858, 1 A. 476=2 Ind. Jur. 354.

Mahomedan Law.

1.—DIVORCE.
2.—DOWER.
3.—GIFT.
4.—INHERITANCE.
5.—MINORITY AND GUARDIANSHIP.
6.—PRE-EMPTION.
7.—WILL.

—1.—Divorce.

Husband and wife—Repudiation by ambiguous expression—Custody of minor daughter—Father's right thereto.—Under Mahomedan Law, ambiguous expressions, used by an angry husband intentionally, to the effect that he would regard her in any other relationship but that of a wife, amount to a divorce, and such a divorce becomes absolute if not revoked within the time allowed by law.

A member of the *Sunni* sect, who has divorced his wife, cannot claim the custody of his minor daughter until she attains puberty. HAMID ALI v. IMTIAZAN, 2 A. 71 ... 582

—2.—Dower.

(1) Under the Mahomedan Law of the *Shia* sect, a widow is entitled to claim the whole of the dower agreed by her deceased husband, at the time of the marriage, to be given to her, irrespective of his means at the time of marriage or at the time of his death. SUGRA BIBI v. MASUMA BIBI, 2 A. 573=5 Ind. Jur. 95 ... 386

(2) When, at the time of marriage, there has been no stipulation as to the nature of the dower, *i.e.*, whether it should be prompt or deferred, a portion of it should be deemed to be prompt; and custom cannot be referred to for deciding this question. What portion of the dower must be considered prompt, is a question to be decided with reference to custom, the position of the woman and the amount of the dower named in the contract. TAUFIK-UN-NISSA v. GHULAM KAMBAR, 1 A. 506 ... 405

(3) *Prompt or exigible dower—Restitution of conjugal rights—Act VI of 1871 (Bengal Civil Courts Act).—Pleas in such a suit*—When, at the time of marriage, there has been no express stipulation as to whether dower should be prompt or deferred, payment of a portion of it should be deemed to be prompt or payable on demand. What portion of the dower should be payable promptly

***Mahomedan Law—2.—Dower*—(*Concluded*).** PAGE

must be decided, in the first instance, according to custom and, in the absence of custom, with reference to the status of the woman and the amount of the dower.

A suit by a Mahomedan against his wife for restitution of conjugal rights must be decided with reference to the principles of Mahomedan Law and not by the general law of contract (Act VI of 1871).

The wife is not precluded, by the circumstance that she did not demand her dower before leaving her husband's house, from demanding it when restitution of conjugal rights is claimed; and the circumstance that they have already co-habited with consent since their marriage, does not preclude her from refusing further co-habitation until the portion of the dower payable to her is paid. EIDAN v. MAZHAR HUSAIN, 1 A. 483=2 Ind. Jur. 389 ... 378

(4) *Restitution of conjugal rights.*—Under Mahomedan law, a husband who has not paid dower which is "prompt," cannot, even after continued co-habitation with consent for five years, maintain a suit against his wife for restitution of conjugal rights. WILAYAT HUSAIN v. ALLAH RAKHI, 2 A. 831 1068

—3.—Gift.

(1) *Joint and undivided property—Gift of defined share.*—Under Mahomedan Law, the gift of joint and undivided property is open to objection; but a defined share in such property is separate property, and can be the subject of a valid gift. JIWAN BAKHSH v. IMTIAZ BEGAM, 2 A. 93 ... 613

(2) *Transfer of possession.*—Upon the evidence produced in the case, their Lordships were of opinion that there was no intention on the part of the donor to make an immediate transfer of the property to the donee, and that the donee must have perfectly understood that the transaction was not a real one. The deed was therefore held to be void and of no effect. NAWAB UMAT-UZ-ZOHARA v. NAWAB MIRZA ALI KADR, 3 Suth. P.C.J. 601=Bal. 208 ... 651

(3) *Gift by person labouring under fatal disease—Dower-debt.*—The provisions of the Mahomedan Law applicable to gifts made by persons labouring under a fatal disease, do not apply to a gift made in lieu of a dower debt, for such a gift really amounts to a sale. GULAM MULTAFA v. HURMAT, 2 A. 854 ... 1089

—4.—Inheritance.

See EVIDENCE ACT, 2 A. 625.

—5.—Minority and Guardianship.

(1) *Minor—Guardianship—Duty to discharge debts.*—When decrees were obtained by the creditors of a deceased Mahomedan against his two widows, and a sale deed of the deceased's properties was executed by the two widows, for themselves and for a minor daughter of their co-widow, in the assumed character of her guardians, *held*, in a suit by the minor for her share of the inheritance, that, if she was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, that it would seem she cannot be bound by the decrees nor by the sale subsequently effected, that she was entitled to recover her share, but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected. HAMIR SINGH v. MUSAMMAT ZAKIA, 1 A. 57 ... 77

(2) When a Mahomedan woman, who was in possession of immoveable property on her own account, and on account of her minor nephew and niece, of whose person and property she acted as *de facto* guardian, sold the property in good faith and for valuable consideration for the discharge of ancestral debts and for the necessary purposes of herself and the minors, *held* in a suit brought

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Mahomedan Law—5—Minority and Guardianship—(*Concluded*).

by the minors for cancelment of the sales and for possession, that the sales were proper and binding on the minors under Mahomedan Law, according to which the right of the heirs is connected with the estate on the sole condition of its being free from incumbrances. HASAN ALI v. MEHDI HUSAIN, 1 A. 533 ... 423

(3) *Guardianship of minor—Prostitution a disqualification to custody.*—Though a sister is, under Mahomedan law, *prima facie*, entitled to the custody and guardianship of her minor sister, yet the circumstance that she leads a life of prostitution may disentitle her to claim the same. ABASI v. DUNNE, 1 A. 598 ... 460

(4) See MAHOMEDAN LAW (DIVORCE), 2 A. 71.

—6.—Pre-emption.

(1) *Formalities—Agent—Relinquishment.*—The formalities to be observed under the Mahomedan Law by a person claiming a right of pre-emption, may be observed for him by his agent or manager. The right of pre-emption is void, if the pre-emptor relinquished the purchase in plain terms, and any indication of acquiescence in the sale to another on the part of the pre-emptor would also vitiate his claim. But a claim relinquished upon misinformation of the amount of sale consideration, or of the property sold may be resumed when the real fact become apparent. ABADI BEGAM v. IMAM BEGAM, 1 A. 521... 410

(2) No right of pre-emption is claimable in respect of the sale of house-materials, or of a house capable of being, and intended to be, removed; but such right can be claimed, when a house is sold as one to be inhabited on the spot, with such right of occupancy as the vendor had enjoyed, though without the right to the soil. ZAHUR v. NUR ALI, 2 A. 99 ... 626

(3) See PRE-EMPTION, 1 A. 207; 1 A. 283 and 1 A 564.

—7.—Will.

Testamentary disposition—Wajib-ul-arz—*Condition recorded valid.*—By the Mahomedan Law, no writing is required to make a will valid, and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained. Where a testatrix devises a certain disposition of her whole property in *wajib-ul-arz* relating to a portion of it, and independent evidence of her intention to make this disposition was produced, *held* that the disposition was valid against a claim for possession set up by rival claimants. MAHOMED ALTAF ALI KHAN v. AHMED BUKSH, 3 Suth. P.C. 235=25 W.R., Civil, 121 ... 99

Maxims.

"In pari delicto potior est conditio possidentis." See FRAUD, 1 A. 403.

Mesne-profits.

(1) *Claim for—against trespasser—Allowance for cost of collection, etc.*—Where a person enters upon, and holds possession of, lands of the lawful owner, in the exercise of a *bona fide* claim of right, he may be allowed such costs of collecting the rents of the lands as the owner might, if he had been in possession, have incurred. But, where he is in possession without any *bona fide* belief that he is entitled to do so, he cannot be allowed such costs, although he may still claim necessary payments such as Government revenue or ground rent.

Per Stuart, C.J.—Whether the trespasser is a *bona fide* trespasser or not, he must be allowed such costs of collection as the owner might have incurred. ALTAF ALI v. LALJI MAL, 1 A. 518=2 Ind. Jur. 500 ... 408

Mesne-profits—(*Concluded*). PAGE

(2) See CIVIL PROCEDURE CODE, 1877, No. 27, 2 A. 651.

(3) See REGULATION XXXIV OF 1803, 2 A. 593=4 Ind. Jur. 257=3 Suth. P.C.J. 708=7 I.A. 51=6 C.L.R. 257=4 Sar. P.C.J. 100.

Money-decree.

(1) *Construction of—Decree enforcing lien.*—Where, in a suit on a bond charging immoveable property, the defendant agreed to pay the amount claimed with costs and interest within a certain time, and that, in default of such payment, the plaintiff might bring the hypothecated property to sale, and the Court passed a decree for the amount claimed and costs with interest, "in accordance with such agreement"—*held* (Turner, J. and Oldfield, J. dissenting) that the decree was only a money-decree, and not one under which the lien could be enforced. JANKI PRASAD v. BALDEO NARAIN, 3 A. 216. 206

(2) *Auction-purchaser— Hypothecation — Subsequent mortgage—Prior simple mortgage—Condition against alienation.*—An auction-purchaser at a sale in execution of a mere money-decree acquires only the rights existing in his judgment-debtor at the time of sale.

Where the holder of a hypothecation bond obtains only a money-decree, and in execution of it attaches, brings to sale and purchases, the hypothecated property, he cannot successfully resist the claim of the holder of a subsequent mortgage created previous to the attachment and sale, to foreclose the same.

The holder of a money decree, obtained on a hypothecation bond, who purchases the hypothecated property in execution of that decree, cannot urge, against the holder of a subsequent mortgage created prior to the attachment and sale, a condition against alienation contained in his bond.

Observations of Turner, J. on the nature and incidents of a simple mortgage, and the rights of subsequent incumbrances. KHUB CHAND v. KALIAN DAS, 1 A. 240 ... 188

(3) *Passed on simple mortgage bond—Right of purchaser of decree.*—The purchaser of a simple money-decree passed on a simple mortgage bond does not acquire a lien upon the property mortgaged. GANPAT RAI v. SARUPI, 1 A. 446 ... 346

Mortgage.

1.—GENERAL.
2.—FORECLOSURE.
3.—REDEMPTION.
4.—SIMPLE.
5.—USUFRUCTUARY.

——1.—General.

(1) *Condition in mortgage-deed not to alienate—Equities in favour of the mortgagees.*—An alienation of mortgaged property in violation of a condition in the mortgage not to alienate, is not absolutely void, but voidable in so far as it is against the mortgagee's rights. In such a case, the mortgagee will have obtained all that in equity he is entitled to, if it is declared that the alienation against the terms of the mortgage shall not bind the auction purchaser, unless he desires its continuance. CHUNNI v. THAKUR DAS, 1 A. 126 ... 98

(2) *First and second mortgagees—Rights of their assignees.*—A sub-mortgagee of the rights and interests of the first mortgagee, who has purchased the same in execution of a decree obtained against the first mortgagee, is entitled to possession of the property as against the assignee of the interests of the second mortgagee. SAHAI PANDEY v. SHAM NARAIN, 2 A. 142 ... 646

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Mortgage—1.—General—(*Concluded*).

(3) See CAUSE OF ACTION, 1 A. 325=4 I.A. 15=3 Suth. P.C.J. 357=3 Sar. P. C.J. 673.

(4) See HINDU LAW (ALIENATION), 2 A. 141.

(5) See MONEY-DECREE, 1 A. 240.

(6) See REGISTRATION, 2 A. 392.

(7) See REGISTRATION ACT (XX OF 1866), 1 A. 236.

(8) See REGISTRATION ACT (VIII OF 1871), 2 A. 40=3 Ind. Jur. 220.

(9) See SUCCESSION ACT (1865), 1 A. 710=3 Ind. Jur. 72.

——2.—Foreclosure.

(1) When the whole of a mortgage-debt is due to the persons claiming under the mortgage, jointly and not severally, there cannot be a foreclosure as to a portion of the mortgagee, and a suit for possession of a portion of the mortgaged property is not maintainable. BISHAN DIAL v. MANNI RAM, 1 A. 297=1 Ind. Jur. 411 ... 246

(2) *Joint mortgage—Foreclosure as to portion.*—Where a mortgage is clearly a joint one, and the whole property mortgaged is made liable for the whole debt, without any specification that a particular portion of the property is liable for a particular portion of the debt, the mortgagee cannot claim to foreclose a portion of the mortgage against some of the mortgagors, exempting the rest. Such a foreclosure proceeding is irregular, and a suit for possession based on it is not maintainable. CHANDIKA SINGH v. POHKAR SINGH, 2 A. 906 ... 1127

(3) See REGULATION XVII OF 1806, 2 A. 313.

(4) Subsequent mortgagee, entitled to notice of foreclosure. See REGULATION XVII OF 1806, 1 A. 499=2 Ind. Jur. 464.

——3.—Redemption.

(1) *Joint mortgage—Purchase of share by a mortgagee—Redemption of share.*—The right of one mortgagor to redeem the whole of a joint mortgage rests upon its joint character; and, when that is broken by the mortgagee purchasing the share of one of the mortgagors, the right ceases, and, one of the mortgagors cannot redeem more than his share against the will of the mortgagee. KURAY MAL v. PURAN MAL, 2 A. 565=4 Ind. Jur. 653 ... 928

(2) *Suit for redemption of mortgage—Valuation for purposes of jurisdiction.*—In a suit for redemption of mortgage, the jurisdiction of the Court must be decided with reference to the subject-matter in dispute, that is, the mortgage and the mortgagee's rights under it, in other words, the amount expressed to be secured by the instrument of mortgage, and not the value of the property mortgaged. The defence set up has nothing to do with such a question. GOBIND SINGH v. KALLU, 2 A. 778 ... 1046

See ACT I OF 1869, 3 I.A. 85=3 Sar. P.C.J. 570.

(3) See INTEREST, 1 A. 344.

(4) See LIMITATION, 1 A. 425=2 Ind. Jur. 115.

(5) See REDEMPTION, 1 A. 194; 3 Suth. P.C.J. 637=6 I.A. 145=4 Sar. P.C.J. 17=5 C.L.R. 213.

(6) See REGULATION VII OF 1825, 1 A. 431=2 Ind. Jur. 146.

(7) See SURETY, 2 A. 562.

——4.—Simple.

(1) *Bond charging profits of immoveable property—Construction—Effect of condition not to alienate.*—Where a bond charged the profits of immoveable property with the re-payment of the loan, and stipulated that the obligee

***Mortgage*—*4.—Simple*—(*Concluded*).**

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should take the management of the property and render accounts to the obligor, that, if the loan was not paid when due, the latter should remain in possession till the loan was discharged, and also that the obligor should have no power to sell, mortgage or alienate the property till the discharge of the debt; *held*, that the bond created a mortgage of the profits only and not of the property itself and that, therefore, the obligee cannot sue for the sale of the property.

If there is a condition, in a bond for payment of money, not to alienate certain lands, it would constitute it a simple mortgage. GANGA PRASHAD v. KUSYARI DIN, 1 A. 611

(2) *Hypothecation*—An instrument, which recites that the obligor has received a certain amount of money and has mortgaged his house to the obligee, that the latter has been put in possession of the mortgaged property, that he promises to pay the sum to the mortgagee, within two years and redeem the mortgaged property, and that, if he fails to pay the mortgage-money within that time, the mortgagee shall be at liberty to recover the amount in any manner he pleases, creates a simple mortgage of the house, which can be enforced by sale. PHUL KUAR v. MURLI DHAR, 2 A. 527 ... 470

(3) See MONEY-DECREE, 1 A. 446. ... 905

—5.—Usufructuary.

(1) *Redemption—Conditional decree.*—Where a suit is brought for redemption on the footing that the defendants are usufructuary mortgagees, and that the mortgage has been satisfied out of the usufruct, and a decree is passed in favour of plaintiff on the footing that the mortgage had not been satisfied but that the plaintiff ought to pay a certain sum before redemption, such conditional decree is not improper. SAHIB ZADAH v. PARMESHWAR DAS, 1 A. 524 ... 411

(2) *Suit for enhanced Government revenue paid by mortgagee—Cause of action.*—Where, by the terms of a deed of usufructuary mortgage, the mortgagor accepts the liability for any enhanced revenue that may be paid by the mortgagee over and above the amount of such revenue entered in the mortgage-deed, and there is no provision or reservation for the adjustment of any such payments by the mortgagee to be made at the termination of the mortgage tenure, the mortgagee may sue during the currency of the mortgage for excess revenue paid by him. NIKKA MAL v. SULAIMAN SHEIKH GARDNER, 2 A. 193 ... 682

(3) *Usufructuary mortgage followed by sale—Revival of mortgage by cancelment of sale—Attachment in execution of decree—Claim to attached property—Effect of order under C.P.C., 1859, S. 246—Annual payments due from the mortgagee—Mortgagor's claim for deduction.*—When a sale made to a mortgagee in possession is cancelled, the mortgage is revived, and the possession of the property becomes one under the mortgage. Where, in such a case, after the cancelment of the sale at the suit of his sons, the vendor, a Hindu father, sued the mortgagee for possession of the property on the ground of such cancelment, and his suit was dismissed, on the ground that he could not be allowed to retain the purchase-money and eject the mortgagee-purchaser, and that he was also estopped from setting up the invalidity of his own sale; and the property, which thus continued to be in the possession of the mortgagee, was attached in execution of a decree held by a third party against the mortgagor and his sons; and the mortgagee objected on the ground that the judgment-debtors had no saleable interest in it, and his objections were overruled under S. 246 of the C.P.C., and the property was sold to the decree-holder; *held*, in a suit by the decree-holder as purchaser

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***Mortgage—5.—Usufructuary*—(*Concluded*).**

of the equity, for redemption of the mortgage, that he was entitled to such relief, and that the mortgagee, not having prosecuted, by means of a suit, his disallowed claim, could not urge, in this suit, the plea of *res judicata* or his claim for a lien for his purchase-money, or any other plea to the effect that he was anything more than a mortgagee.

Where the mortgagee has undertaken to make certain annual payments to the mortgagor, the latter or the purchaser of the equity of redemption is entitled to a deduction, from the amount due to the mortgagee, of such annual payments not made by him. BASANT RAI v. KANAUJI LAL, 2 A. 455=4 Ind. Jur. 583 ... 803

(4) *Mortgagee in possession—Usufruct—Interest—Construction of mortgage deed.*—A mortgagee in possession, desiring to have the usufruct of the property and also interest at the stipulated rate from the time of the mortgage down to the period of redemption, should show to the Court that such was the intention of the parties. RAJAH AMEER HUSSUN KHAN v. MUKHDOOM SINGH, 3 Suth. P.C.J. 195 ... 32

(5) See CIVIL PROCEDURE CODE, 1877, 2 A. 252.

Mortgagor and Mortgagee.

Constructive fraud—Attestation, effect of.—If a prior mortgagee, knowing that a second mortgage is going to be executed, simply keeps quiet, he is not guilty of constructive fraud, and does not lose his priority. Nor does his attestation to the second mortgage amount to constructive fraud, if he is unaware of its contents. If he attests the second mortgage, knowing its contents, and keeps silent, and thereby leads the second encumbrancer to believe that the property is unencumbered, and if the circumstances are such that the latter would not have advanced money on the property, if he had known of the prior encumbrance, the silence would amount to constructive fraud, and the prior mortgagee will lose his priority. SALAMAT ALI v. BUDH SINGH, 1 A. 303=1 Ind. Jur. 385 ... 229

Municipal Committee.

See ACT XV OF 1873, 1 A. 557=2 Ind. Jur. 790.

Murder.

See PENAL CODE, 2 A. 33.

Native Indian British subjects.

See ACT XI OF 1872, 2 A. 218.

Notice.

(1) Of suit. See ACT XV OF 1873, 1 A. 269.

(2) See RAILWAYS ACT (XVIII OF 1854), 1 A. 60.

Nuncupative will.

See PRIVY COUNCIL, 1 A. 638=2 C.L.R. 193=5 I.A. 87=3 Suth. P.C.J. 529=3 Sar. P.C.J. 807.

Occupancy-right.

Ex-proprietary tenant—Act XVIII of 1873 (N.W.P. Rent Act), Ss. 7 and 9.—The right of occupancy, which a person, who loses or parts with his proprietary rights in a mahal, acquires, by virtue of S. 7 of the N. W. P. Rent Act, in the land held by him as sir, in such mahal, at the date of such loss or parting, is a saleable interest, and can be transferred by private sale. MARKUNDI DIAL v. RAMBARAN RAI, 2 A. 735 ... 1036

Occupancy-tenant.

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Right of, See ACT XVIII OF 1873, 1 A. 353=1 Ind. Jur. 705 and 1 A. 547; 2 A. 145.

Officer.

appointed to consider and revise revenue assessed on certain estates—Government, proprietary rights of.—An officer appointed to consider and revise the revenue assessed on certain estates, is not empowered to convey away the proprietary rights of the Government in those estates. POORUN SINGH v. THE GOVERNMENT OF INDIA, 3 Suth. P.C.J. 141 ... 7

Oudh Estate.

See CLAIM, 3 Suth. P.C.J. 567=6 I.A. 1=4 C. 839=3 Sar. P.C.J. 873.

Oudh Proclamation, 1858.

See PRACTICE AND PROCEDURE, 3 Suth. P.C.J. 304=26 W.R. 55=3 I.A. 259 =3 Sar. P.C.J. 611.

Oudh Talukdar.

(1) *Implied trust for joint family—Act I of 1869—Retrospective effect.—Transfer 'pendente lite.'*—In a suit commenced before the passing of Act I of 1869, where their Lordships were of opinion that the circumstances of the case afforded sufficient grounds to justify them in presuming that it was the intention of the defendant that the villages included in the summary settlement and the sunnud should be held by him in trust for the joint family and as a joint family estate subject to the law of the Mitakshara, it was *held*, although the suit was not decided until after the passing of the Act, that the provisions of that Act did not operate so as to change the relative condition of the parties, and to put an end to the trust upon which the defendant had previously held the estate, and to convert it into an estate held by the defendant for his own sole use and benefit discharged from the trust. There can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the defendant. The villages granted to the defendant for loyal services rendered during the Mutiny of 1857 were held by their Lordships to have been granted to the joint family, inasmuch as the loyal services which the defendant rendered to the Government were rendered by means of the then joint family property, and in accepting the reward from the Government, he acted as the representative of the family.

The Court has nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, but the decree would be without prejudice to any question that may arise in respect to the said subsequent agreement or arrangement, if any. THAKOOR HURDEO BUX v. THAKOOR JOWAHIR SINGH, 3 Suth. P.C.J. 607=6 I.A. 161=4 Saraswati's P.C.J. 10=Bal. 318 ... 666

(2) *Sub-settlement—Construction.*—Their Lordships held the appellant entitled to a sub-settlement for life upon the construction of the terms of the letter of the late talookdar, which was binding not only upon him but upon his successor also. KISHNA NUND MISR v. THE SUPERINTENDENT OF ENCUMBERED ESTATES, MEHDOWNA, 3 Suth. P.C.J. 649=Bal. 278 ... 770

Pardon.

See CRIMINAL PROCEDURE CODE, 1872, No. 25, 2 A. 260=4 Ind. Jur. 250.

Parol Evidence.

See REGISTRATION ACT, VIII OF 1871, 1 A. 442.

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Parties.

(1) *Non-joinder of parties—Effect of—Adding parties in appeal.*—When the cause of action is jointly in favour of a number of persons, and not solely in favour of one, they must all be made parties. Failure to do so would involve the dismissal of the suit.

Though, in some instances, parties are allowed to be added in appeal, yet in a case, where the party seeking the addition has elected to go to trial without the amendment, the appellate Court may refuse to allow the addition of parties. DULAR CHAND v. BALRAM DAS, 1 A. 453 ... 357

(2) *Addition or substitution of parties—Powers of appellate Court—Execution of separate decrees—Sale of the same property on the same date thereunder—Separate sales, not an irregularity—Auction sale—Sale not confirmed—Suit by auction purchaser for refund of purchase-money.*—An appellate Court can add or substitute new appellants or respondents, even after the expiry of the period of limitation. Where the same property is ordered to be sold on the same date, by separate orders in execution of two decrees, it may be sold once for all in execution of both the decrees; and it is not an irregularity to sell it separately. Where, under the above circumstances, the first sale is confirmed and a certificate of sale granted to the purchaser under it, and the second sale also is confirmed in spite of the objections of the second auction-purchaser, the latter is entitled to sue for refund of the purchase-money paid by him. His suit is not open to the objection of *caveat emptor*, for, what was sold to him is not that which was advertised for sale, *viz.*, the right, title, and interest of the judgment-debtor as it existed before the first sale. Nor is it open to the objection that the confirmation of sale to him, under S. 257, in spite of his objections, having become final by his failure to appeal against it, he could not seek his remedy by suit; for, his objection to the confirmation of sale was not one contemplated by S. 256 of the C.P.C., to which alone the provisions of S. 257 apply, but it was one going to the root of the sale itself as being a nullity. THE COURT OF WARDS ON BEHALF OF THE RAJA OF KANTIT v. GAYA PRASAD, 2 A. 107 ... 629

(3) *To a suit—Political Agent—Superintendent of Estate.*—Where, at the request of a Raja, the Government of India provided for the due administration of his State by appointing a Political Agent or Superintendent to be in charge of the State, *held*, in a suit brought by such "Political Agent and Superintendent of the State on the part of the Government of India" for the recovery of certain moveable and immoveable properties belonging to the State that he had no *locus standi*, as, either the Raja, if he was the proprietor of the properties, or the Government of India, if his rights and interests had passed to them, could alone have a *locus standi* to sue. GIRDHARI DAS v. POWLETT, POLITICAL AGENT AND SUPERINTENDENT OF THE KOTA RAJ ON THE PART OF THE GOVERNMENT OF INDIA, 2 A. 690 ... 987

(4) See CHEQUE, 2 A. 754.

(5) See CIVIL PROCEDURE CODE, 1877, 2 A. 487=4 Ind. Jur. 641; 2 A. 738; 2 A. 904.

Partnership.

See HINDU LAW (JOINT FAMILY), 3 Suth. P.C.J. 349=Bal. 98.

Pauper petition.

See COURT-FEE, 2 A. 241=4 Sar.P.C.J. 31=6 I.A. 126=4 C.L.R. 331=3 Suth. P.C.J. 627.

Pauper suit.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), No. 39, 1 A. 230.

***Penal Code* (*Act XLV of 1860*).**

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(1) *Ss. 59, 377—Transportation in lieu of imprisonment, term of.*—When an offence is punishable, either with transportation for life or imprisonment which may extend to ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment. QUEEN v. NAIADA, 1 A. 43

(2) S. 65. See CRIM. PROCEDURE CODE, 1872, No. 22, 1 A. 461=2 Ind. Jur. 322. ... 67

(3) S. 71, See CRIM. PROCEDURE CODE, 1872, No. 24, 2 A. 644=5 Ind. Jur. 262.

(4) *S. 75—Enhanced punishment.*—Where it was proved that the appellant had, a few days before the trial of an offence of theft, been convicted, but it was not shown that he had been convicted of one of the offences mentioned in S. 75, nor that he had been convicted of any offence before the commission of the offence for which he had received the enhanced sentence, *held* that the enhanced sentence was not proper in the circumstances of the case. EMPREES OF INDIA *v.* MEGHA, 1 A. 637 ... 478

(5) *Ss. 147, 323—Rioting and causing hurt—Separate sentences.*—Rioting and causing hurt in the course of rioting are distinct offences and are, therefore, separately punishable. EMPRESS OF INDIA v. RAM ADHIN, 2 A. 139 ... 648

(6) *S. 161—Attempt to obtain illegal gratification—Crim. Pro. Code, 1872, Ss. 218, 351—Right of accused person to cross-examine witnesses for prosecution.* A clerk in the Pension Department, in an interview with an applicant for pension, referred to the difficulties in the way of getting the full pension already sanctioned, and, after mentioning two cases in which increased pensions had been obtained through his influence, informed him that anything might be effected by *Karrawai*, *i.e.*, by giving and taking money, and, on the overture being rejected, concluded by declaring that he would rue and repent the rejection, *held*, that the offence of attempting to obtain a bribe had been committed.

Where, after hearing the accused, his pleader, being given an opportunity to cross-examine the prosecution witnesses, refused to cross-examine them then, but said that he would apply to the Court after he had examined his witnesses, and the Magistrate discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence, *held*, that the accused was not entitled to have the prosecution witnesses summoned on the date fixed for the examination of the defence witnesses; *held*, also that the Magistrate was competent to record the evidence for the prosecution, both oral and documentary, after the case for the defence had been closed. EMPRESS OF INDIA v. BALDEO SAHAI, 2 A. 253 ... 723

(7) *Ss. 161, 165—Bribery.*—A police officer employed in a Criminal Court to read the diaries of cases investigated by the police, and to bring up in order each case for trial with the accused and witnesses, brought up, in the usual manner, a case in which two persons were charged with the offence of theft. After conviction and sentence of the accused in that case, a sum of money, the proceeds of the theft, was made over to the complainant. The police officer asked for and received from the prosecution a portion of that money. There was no evidence that the money was given with any of the objects mentioned in S. 161, Penal Code. *Held*, that the police officer could not be convicted under S. 161, I.P.C., as the money was not promised and given as a reward for his performance of his duty in Court, but was liable to be punished under S. 165. EMPRESS OF INDIA v. KAMPTA PRASAD, 1 A. 530=2 Ind. Jur. 466

(8) *S. 174—Power of Magistrate, before whom offence under section committed, to try case himself—Crim. Pro. Code, 1872, Ss. 471, 473.*—An officer should not try himself an offence under S. 174, I.P.C., in his capacity as a Magistrate, ... 421

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when the offence has been committed before him in his capacity as a Settlement officer. EMPRESS OF INDIA v. SUKHARI, 2 A. 405 ... 787

(9) *Ss. 188, 441--Plying boat for hire three miles from a public ferry—Disobedience to order duly promulgated by a public servant.*—The plying of a boat for hire, three miles from a public ferry leased to the complainant, would not constitute the offence of criminal trespass. But if, in spite of a prohibition from plying a boat for hire at or in the immediate vicinity of public ferries, a person continues to do so, he renders himself liable to punishment under S. 188, Penal Code, for disobedience of such order. MUTHRA v. JAWAHIR, 1 A. 527 ... 419

(10) Ss. 192, 193, 414, See CRIMINAL PROCEDURE CODE, 1872, 1 A. 379=1 Ind. Jur. 743.

(11) S. 193, Offender under, whether an offence in contempt of Court, See CRIMINAL PROCEDURE CODE, 1872, 1 A. 625.

(12) Ss. 193, 195, 211, See CRIMINAL PROCEDURE CODE, 2 A. 398.

(13) *Ss. 193, 511—Fabricating false evidence—False endorsement on a stamped paper.*—Where the accused, in order to injure the complainant, who had deposed against him in a Civil suit, induced another person to personate the complainant and to purchase a stamped paper, and in consequence of such personation, the stamp vendor made the usual endorsements on the stamp paper in the name of the complainant, *held*, that, inasmuch as the intention of the accused was to use the falsely endorsed stamp paper in a judicial proceeding, he was guilty of the offence of fabricating false evidence, and the other person was guilty of abetting the same. EMPRESS OF INDIA v. MULA, 2 A. 105 ... 615

(14) Ss. 196, 271, See CRIM. PRO. CODE, 1872, 1 A. 129.

(15) *S. 201—Causing disappearance of evidence of murder.*—S. 201, I.P.C., refers to persons other than the actual offenders. Where a person who has committed murder removes the corpse from one field to another, he does not cause any evidence of murder which that corpse affords to disappear, but his object is merely to divert suspicion from himself. EMPRESS OF INDIA v. KRISHNA, 2 A. 713 ... 1001

(16) *S. 211—False charge, what constitutes.*—The offence referred in S. 211, I.P.C., consists not in the prosecution of a false complaint, but in the making of it. EMPRESS OF INDIA v. ABUL HASAN, 1 A. 497=2 Ind. Jur. 463 ... 392

(17) *S. 211—False charge, what constitutes.*—If a false charge had been made and if it is not pending at the time of the trial of the accused, an offence under S. 211 has been committed. EMPRESS OF INDIA v. SALIK, 1 A. 527. 413

(18) *Ss. 299, 304, 304-A, 322, 325—Voluntarily causing hurt resulting in death.*—Where the accused struck the deceased on the ribs with a stick and inflicted a hurt which not only endangered his life, but actually caused his death, and which he must have known was likely to break a rib, if not worse injury, *held*, that the offence committed was grievous hurt, but not the offence mentioned in S. 304-A. *Held*, also, that the offence did not amount to culpable homicide, as the act was not done with any of the intentions mentioned in S. 299, I.P.C. EMPRESS OF INDIA v. O'BRIEN, 2 A. 766 ... 1020

(19) Ss. 299, 304, 321, 323, See CRIMINAL PROCEDURE CODE, 1872, 2 A. 522.

(20) *S. 302—Murder—Note to judgment, propriety of.*—When the deceased was returning from the bazaar to his house, two of the four accused struck him with a *lathi* causing him to fall to the ground, and then the other two accused struck him with their *lathi*; *held*, that inasmuch as it was doubtful whether the deceased was dead when they began to strike him, and as they did not commence the attack, the two latter would be adequately punished

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by the sentence of transportation for life and the former two deserve the sentence of death. *Per Oldfield and Pearson, JJ. (Stuart, C.J., dissenting).*

It is a most unwarrantable proceeding on the part of the Judge to add a note to his judgment, by which he tries to throw doubts on the conclusion at which he had arrived on the evidence. *Per Stuart, C.J.* EMPRESS OF INDIA v. CHATTAR SINGH, 2 A. 33 ... 568

(21) *Ss. 304, 317—Exposure of child knowing that death was likely to ensue.*—Where a mother exposed an infant child, knowing that such abandonment by her was likely to cause its death, and death ensued in consequence thereof, *held*, that she was properly convicted of culpable homicide under S. 304, but she could not be convicted under Ss. 304 and 317. EMPRESS OF INDIA v. BANNI, 2 A. 349 ... 833

(22) Ss. 363, 417, 420, See CRIMINAL PROCEDURE CODE, 1872, 2 A. 570.

(23) *S. 370—Slavery.*—S. 370 is only directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, service, or conduct in any respect. *Per* SPANKIE, J.

Where the accused obtained possession of a married girl of 11 years of age by false pretences and disposed of her to a third person for value, with a view to marriage, and the girl was received also with the same intention, *held* by the Full Bench that the accused was not guilty of an offence under S. 370, I.P.C. EMPRESS OF INDIA v. RAM KUAR, 2 A. 723 ... 1022

(24) *Ss. 372, 373—Offence under the sections, what constitutes.*—Where the accused, by falsely representing that a girl belonging to a low caste belonged to a higher caste, induced a member of a higher caste to take her in marriage and to pay money for her to the accused, in the full belief that the representations were true, *held* that the accused had not committed offences under Ss. 372, 373, I.P.C. EMPRESS OF INDIA v. SRI LAL, 2 A. 694 ... 989

(25) Ss. 378, 411, See ACT VI OF 1864 (WHIPPING), 1 A. 666.

(26) Ss. 380, 457, See CRIMINAL PROCEDURE CODE, 1872, 1 A. 413.

(27) *Ss. 425, 441—Mischief and criminal trespass—'Bona fide' claim of right—Crim. Pro. Code, 1872, S. 456—Criminal trespass and mischief—Sentence—Punishment.*—If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass, because the entry is not made with any such intent as constitutes the offence. So, also, if a person deals injuriously with property in the *bona fide* belief that it is his own, he cannot be convicted of the offence of mischief, because his act is not committed with intent to cause wrongful loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charge. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of the *bona fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

Where a person trespasses with the object of committing mischief, and commits criminal trespass and mischief, the Court is not precluded from passing sentences in respect of each offence established, but the collective punishment should not be more severe than that which might be awarded for either of such offences. EMPRESS OF INDIA v. BUDH SINGH, 2 A. 101 ... 627

(28) *S. 441—Criminal trespass—Term "annoy" explained—Possession contemplated by the section—'Bona fide' assertion of right.*—The word "annoy" in S. 441 must be taken to mean annoyance that would generally and

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reasonably affect an ordinary person, and not that which would specially and exclusively affect a particular individual.

The possession contemplated and intended by S. 441, I.P.C., must be actual in the sense and meaning of S. 530, Crim. Pro. Code, 1872.

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with the other persons, is not a criminal trespass, unless the intent to commit an offence, or to intimidate, insult or annoy is conclusively proved. IN THE MATTER OF THE PETITION OF GOBIND PRASAD, 2 A. 465 ... 856

(29) S. 442, See ACT XXVI OF 1870, 2 A. 301.

(30) *S. 494—Attempt to commit bigamy—Publishing the banns.*—The causing of the publication of banns of marriage is not an attempt to marry, but only a preparation for such an attempt. THE QUEEN v. PETERSON, 1 A. 316=1 Ind. Jur. 560 ... 256

(31) S. 497, See CRIMINAL PROCEDURE CODE, 1872, 2 A. 339.

(32) Ss. 503, 506, See CRIMINAL PROCEDURE CODE, 1872, 2 A. 351.

(33) See ACT XVII OF 1862, 1 A. 599=2 Ind. Jur. 723.

***Penalty*.**

(1) *Bond for money—Stipulation for compound interest.*—A stipulation in a bond for money that interest shall be payable half-yearly, and that, if not so paid, it shall be added to the principal and bear interest at the stipulated rate, is not one of a penal nature. TEJPAL, GUARDIAN OF KUNDAN LAL v. KESRI SINGH, 2 A. 621=5 Ind. Jur. 154 ... 949

(2) *Bond for money—Compound interest—Interest post diem.*—Where a bond for money stipulates for payment of interest at Rs. 1-12-0 per cent. per mensem, payable half-yearly, and, in default, for payment of compound interest in future, the stipulation for compound interest is not a penal one; and the bond contains a stipulation to pay *post diem* interest at the stipulated rate; and, even without it, the obligee would be entitled, after the due date, to interest at the same rate, which is not unreasonable. MATHURA PRASAD v. DURJAN SINGH, 2 A. 639=5 Ind. Jur. 214 ... 963

(3) *Bond—Interest.*—Where, in a bond under which the principal amount is payable without interest by instalments, and in default of such payment, with interest at Rs. 3-2-0 per cent. per mensem, sufficient immoveable property is hypothecated, and a surety is also furnished, the stipulation for interest at a high rate is of a penal nature; and reasonable interest alone could be allowed. CHUHAR MAL v. MIR, 2 A. 715 ... 1005

(4) *Bond for money interest.*—Where the amount of a bond for money payable at a certain time, comprised the principal amount of the loan and advance interest thereon at 2 per cent. per mensem up to the due date, stipulation in it that, in default of payment of the whole amount on such date, interest at 2 per cent. per mensem may be claimed from the date of the bond, was of a penal nature. MAZHAR ALI KHAN v. SARDAR MAL, 2 A. 769 ... 1027

***Plaint*.**

(1) Amendment of, as to price at last stage, See PRE-EMPTION, 1 A. 591.

(2) Order returning, after it was admitted and posted for evidence, See APPEAL, 1 A. 620.

(3) Return of, See CIVIL PROCEDURE CODE, 1877, No. 16, 2 A. 357=4 Ind. Jur. 469.

(4) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), No. 39, 1 A. 230.

(5) See CIVIL PROCEDURE CODE, 1877, 2 A. 669=5 Ind. Jur. 268; 2 A. 832; 2 A. 889.

(6) See CONTRACT ACT, 2 A. 671.

Post diem interest.

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(1) *Bond—Rate of interest in India.*—When, in a bond for repayment of money within a fixed time, with interest at a certain rate, there was a clause that in case of default, the holder of the bond was at liberty to recover the principal and interest, *held* there was an express contract for the payment of interest after the due date at the same rate.

Semble, where there is no such express agreement as to the rate of interest to be paid after the due date, an agreement to pay as to the rate stipulated for payment during the term of the bond cannot be implied. In such a case, interest should be awarded on the footing of damages, and when the interest stipulated in the bond is not excessive, it would be a fair measure of such damages.

In India, the ordinary rate of interest is 12 per cent. per annum, and Rs. 1-8-0 or Rs. 1-12-0 per mensem cannot be considered excessive. BALDEO PANDAY v. GOKAL RAI, 1 A. 603=2 Ind. Jur. 725 ... 462

(2) See DAMAGES, 2 A. 617=5 Ind. Jur. 154.

(3) See PENALTY, 2 A. 639=5 Ind. Jur. 214.

Practice and Procedure.

(1) *Private knowledge of Judge—Conflicting evidence of witnesses—Conduct of parties—New case—Calling fresh evidence, on an issue not proved by evidence originally adduced—Fresh evidence, rule* re*—Adjournment—Hindu law—Special mode of transfer—Act I of 1869, Ss. 16—19—Joint family—Oudh Proclamation, 1858—Confiscation—Grant to one member of family—Effect—Act I of 1869, S. 2—Hindu Wills.*—A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts, as the means of knowledge will not then be capable of being tested.

In case of conflicting evidence of witnesses who do not commend themselves by the manner in which they give their evidence, it is a safe rule to look to the conduct of the parties. It is always dangerous to allow parties to make a new case, and to call fresh evidence on an issue on which they have failed on the evidence originally adduced in support of it, and more especially is it so in the *Mofussil* Courts in India. The rule that a Court intending to call for fresh evidence should record its reasons for so doing, ought to be strictly adhered to. A Court should not adjourn a case for taking fresh evidence, and for allowing witnesses examined, to be re-called to amend their former evidence.

No special mode of transfer is required by the Hindu Law, even a verbal transfer is sufficient.

Ss. 16-19 of Act I of 1869 have no retrospective effect. They cannot be held to apply to a transfer made by a deed, will, or otherwise, before the passing of the Act.

On the confiscation under the Lord Canning's Proclamation of 1858, of property belonging to a joint Hindu family situate in Oudh, and on the subsequent re-grant of the same to one of the members of that family, *held* that it could scarcely be supposed that it was intended to injure any member of the loyal family, and by confiscation and re-grant to transfer the beneficial interest in the joint estate of the whole family from several members of it to a single member of the family for his own benefit.

The grant of a *sanad* to, and a summary settlement in respect of family property not coming under Lord Canning's Proclamation with, only one member of the family does not affect the rights of the members of the joint Hindu family in the said property.

Property granted by the Government to one member of a joint Hindu family, as a reward for loyalty and for the support and assistance rendered to British

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officers, during the Mutiny of 1857, could not be the self-acquired property of that member only within the meaning of the Hindu Law, as such assistance and support could not have been rendered without issue of funds which must be presumed to be those of the joint-family.

Act I of 1869 conferred title in landed property and in consequence of the Act, the grantee must be deemed to have acquired a permanent, heritable and transferable right in the estates which comprised the villages named in the lists attached to the agreements executed by him when the settlement was made, whether such villages were or were not previously part of family property. He had also power by will or by alienation in his life-time to transfer the estates which, by virtue of the Act, were not merely heritable but transferable.

By S. 2 of Act I of 1869, it is declared that the word "will" means the legal declaration of the intention of the testator with respect to his property affected by this Act which he desires to be carried into effect after his death. On the construction of certain documents which were in the form of letters written in answer to enquiries made by the Government, *held* that those documents when read together constituted a will within the meaning of S. 2 of Act I of 1869. *Held*, also, that the declaration in those documents of the wish of the proprietor, acted upon as it was by him and by other members of the family in his life-time, was evidence sufficient to prove an alienation *inter vivos*, which in his lifetime transferred the property to the family to be held as joint family property. HURPURSHAD v. SHEO DYAL, 3 Suth. P.C.J. 304=26 W.R. 55=3 I.A. 259=3 Saraswati's P.C.J. 611 ... 160

(2) See APPEAL TO PRIVY COUNCIL, 15 B.L.R. 221=3 Suth. P.C.J. 148=2 I.A. 205=3 Sar. P.C.J. 495.

(3) See CIVIL PROCEDURE CODE, ACT VIII OF 1859, No. 41, 26 W.R. 10=3 Suth. P.C.J. 342=3 I.A. 209=3 Sar. P.C.J. 663=Bal. 86.

(4) See DECREE, 1 A. 348=1 Ind. Jur. 704.

Pre-emption.

(1) *Hindu widow—Claim to pre-emption—Wajib-ul-arz.*—A Hindu widow holding her deceased husband's shares in a village, so long as she enjoys the estate, fully represents the estate and can claim to exercise all rights which would attach to it in the hands of a male owner. So, she is entitled to prefer a claim to pre-emption as a share-holder in such village. PHULMAN RAI v. DANI KUARI, 1 A. 452 ... 349

(2) *Founded on Mahomedan Law not claimable when vendor is a Hindu.*—When the vendor is a Hindu, no suit will lie to enforce a right of pre-emption based on Mahomedan Law. DWARKA DAS v. HUSAIN BAKHSH, 1 A. 564 ... 441

(3) *Mahomedan Law—Immediate demand.*—The right of pre-emption is considered not a strong right, and any one claiming it should be held bound by the conditions of the Mahomedan Law, and should promptly assert it by immediate demand. It is not the duty of the Courts to enlarge the conditions under which so inconvenient, and sometimes so oppressive, a right can be asserted. ALI MUHAMMAD v. TAJ MUHAMMAD, 1 A. 283 ... 242

(4) *Conditional decree—Final judgment and decree, what is.*—In decreeing a suit for pre-emption, the Court can fix a time, within which the purchase-money is to be deposited in Court, in default of which the plaintiff loses the benefit of the decree. Where there was a direction in such a decree, that the purchase-money should be deposited in Court within 31 days from the date of its becoming final, *held* that the decree did not become final until

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the time for the last appeal allowed by law had expired, or, if appealed from, has been decided by the ultimate appellate Court. SHAIKH EWAZ v. MOKUNA BIBI, 1 A. 132. (See also the next case.) ... 102

(5) *Conditional decree—Final judgment and decree.*—When the plaintiff, in a suit for pre-emption, obtains a conditional decree, to the effect that if the purchase money be not deposited in Court within a fixed time, the decree will become null and void, he loses the benefit of the decree by failing to deposit the money within the time.

When a suit was carried to the stage of special appeal to the High Court, but the appeal was withdrawn, *held* that the final judgment and decree in the case were those of the lower appellate Court. (1 A. 132, *Distd.*) HINGAN KHAN v. GANGA PRASHAD, 1 A. 293=1 Ind. Jur. 410 ... 236

(6) *Rights of persons equally entitled—Conditional decree in pre-emption suit.*—When, under the village administration-paper, a number of persons, holders of equal shares in the patti, are equally entitled to the right of pre-emption of a share, which is being sold, they are entitled to have equal portions of the share sold to them.

In a decree in a pre-emption suit, it is usual to fix a time within which to deposit the purchase money in Court. Where there are a number of claimants, it is proper to make a direction in the decree that, in the event of any one of the claimants failing to deposit his proportion of the purchase money, any other of them making the deposit within the time should be entitled to the share of the defaulters. MAHABIR PERSHAD v. DEBI DIAL, 1 A. 291=1 Ind. Jur. 409 ... 235

(7) *Stipulations in record-of-rights—Construction of—Minor—Legal disability—Limitation—Pre-emption under Mahomedan Law and in record-of-rights.*—In all cases, in which the right of pre-emption is asserted as based on a stipulation entered in the record-of-rights, which may be viewed as arising out of contract or as being a record of custom, the terms of the stipulation must be regarded and those conditions only imposed, which the language of the stipulation warrants.

Where the condition in a record-of-rights was clearly intended to take effect at the time of sale, and its language implied that those, in whose favour it was created, were to be persons competent, at the time, to make a binding contract of acceptance or refusal, *held* that no right of pre-emption could be afterwards claimed by a co-sharer, who, at the time of sale, was a minor, and was not represented by a person competent to make a binding contract for him.

Under Mahomedan Law, certain formalities are attached to the right of pre-emption, and, among other things, immediate demand is essential, as the nature of the pre-emption right is such as to require immediate assertion as a condition essential to its recognition. These do not necessarily apply to stipulations in the record-of-rights. RAJAH RAM v. BANSI, 1 A. 207 ... 147

(8) *based on agreement—Custom set up in special appeal.*—Where a suit to enforce a right of pre-emption, on the basis of an entry in the administration-paper as a matter of agreement and not of custom, has been tried and investigated, parties cannot be allowed on special appeal to set up a custom.

A claim based on the administration-paper does not exclude a claim under Mahomedan law. MARATIB ALI v. ABDUR HAKIM, 1 A. 567 ... 442

(9) *based on contract—Custom.*—A plaintiff, who fails in a suit for pre-emption based on the administration papers of the current settlement, cannot, in

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appeal, fall back on any condition of pre-emption entered in the previous administration paper, and claim the same relief on the basis of custom.

An entry of the right of pre-emption in a former administration-paper would not necessarily establish, though it may be evidence towards, such a custom. CHADAMI LAL v. MUHAMMAD BAKHSH, 1 A. 563 ... 440

(10) *Suit for—Amendment of plaint as to price at last stage—Court may refuse.* —In a suit for pre-emption, in which the plaintiff claimed the right on payment of a sum less than that mentioned in the sale-deed, on the ground that that was the actual price, and did not, in his plaint, say that he was ready and willing to pay whatever price the Court might find to be the actual price, *held* that the Court was not bound, as a matter of law, to allow him to suppiy this defect by amending the plaint at the very last stage, when the suit was about to be disposed of, and to bring in the very much larger price which he should have offered to pay when he brought the suit. DURGA PRASAD v. NAWAZISH ALI, 1 A. 591 ... 454

(11) *Limitation Act, IX of 1871, Sch. II, Art. 10—Actual possession.*—For computing the period of limitation for a suit for pre-emption, which commences when the purchaser takes "actual possession" of the property, the purchaser of the equity of redemption of immoveable property takes "actual possession," within the meaning of Art. 10, Sch. II of Act IX of 1871, when the equity of redemption is completely transferred to and vested in him. Full effect is given to the expression "actual possession" by holding that, when the nature of the subject of the sale admits of visible and tangible possession, limitation will run from the period when tangible possession is taken, but that when the nature of the subject of the sale does not admit of tangible possession, limitation runs from the time when the subject of sale is completely conveyed to and vested in the purchaser, and he has acquired such possession as, before the sale, was enjoyed by the seller.

Per STUART, C.J.—Such a purchaser does not take "actual possession" until he takes visible and tangible possession, or enjoys the rents and profits of the property, after redemption of the mortgage. JAGESHAR SING v. JAWAHIR SINGH, 1 A. 311 ... 239

(12) *Suit for—Limitation—Act IX of 1871, Sch. II, Art. 10.*—The period of limitation for a suit for pre-emption begins, not necessarily from the time when the defendant-vendor takes physical and tangible possession of the property, but from the date when the subject of sale is completely conveyed to, and vested in, the purchaser, and he has acquired such possession as, before the sale, was enjoyed by the seller. Where, therefore, the holder of a deed of conditional sale executed in 1861, foreclosed the conditional sale, and obtained a decree for possession of the property in 1874, obtained mutation of names in respect of such property in 1875, in which year he also got the property released from an attachment, made in 1865 in execution of a decree, by making arrangements for its satisfaction, and finally, in December 1875, acknowledged having received possession of the property in execution of his decree for possession; *held* in a suit for pre-emption against him, brought in November 1876, that the suit was barred, as it was brought more than one year from the date when he obtained such possession of the status of the owner as enabled him to procure mutation of names and exercise the rights of an owner. (1 A. 311, *F.*) BIJAI RAM v. KALLU, 1 A. 592 ... 455

(13) *Limitation—Act XV of 1877, Sch. II, Art. 10.*—Where property is mortgaged on condition that the mortgagor should remain in possession and pay

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interest annually to the mortgagee, and that, in default of such payment, the mortgagee might sue for actual possession, the cause of action for a suit for pre-emption arises on the date of the deed of mortgage, and not from any subsequent date, on which the mortgagee's name may be substituted for that of the mortgagor in the proprietary register; for, though the mortgagee may not have been in plenary possession of the property from the date of the deed, he had constructive possession of it by receipt of interest on the mortgage-money. GULAB SINGH v. AMAR SINGH, 2 A. 237 ... 720

(14) *Limitation—Act XV of 1877, Sch. II, Art. 10.*—A suit for pre-emption, where the property sought to be pre-empted has been purchased by the mortgagee in possession, is within the time, if brought within one year from the date when the contract of sale became completed by payment of the purchase-money, and not from the date of the sale-deed; for, the purchaser must be deemed to have obtained physical possession under the sale when the contract was completed. LACHMI NARAIN LAL v. SHEOAMBAR LAL, 2 A. 409 ... 739

(15) *Suit for—Pleader's fee—Principle of assessment.*—In a suit for pre-emption, when it is found that the actual price paid for the land is less than that entered in the sale-deed, the pleader's fee to be charged on the opposite party must be calculated, not on the amount entered in the sale-deed, which is found to be false, nor on the amount on which the Court-fee on the plaint was paid, but on the actual value found by the Court to have been paid for the property. DEBI SINGH v. BHOP SINGH, 1 A. 709. ... 496

(16) *Record-of-rights.*—Where the greater portion of land in a village is divided into a number of *thokes*, each *thoke*, belonging to a number of sharers, the remaining land being held in common by all the co-sharers in the village, and the record-of-rights provides for a right of pre-emption among sharers of the same *thoke*, such right cannot be claimed as regards a share in one *thoke* by a sharer in another *thoke*, on the ground that he is a sharer in the common lands along with all the sharers in the village. MAYA RAM v. LACHHO, 2 A. 631 ... 954

(17) See ACT XIX OF 1873, 2 A. 876.

(18) See CIVIL PROCEDURE CODE, ACT XXIII OF 1861, 1 A. 272; 1 A. 277 = 1 Ind. Jur. 269.

(19) See CIVIL PROCEDURE CODE, 1877, 2 A. 850; 2 A. 884.

(20) See HINDU LAW (JOINT FAMILY), 3 Suth. P.C.J. 490 = 3 C. 315 = 3 Sar. P.C.J. 781.

(21) See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 521; 2 A. 99.

Privy Council,

(1) *Special leave to appeal on questions of great general importance—Technical objections urged at a late stage—Permissibility—Declaratory decree—When to be given—Nuncupative will—Suit for declaration of its nullity, when lies—Usage of Jains—Estate of soniless widow—Rights of such widow—Alternative declaration.*—The defendant in a suit applied for and obtained leave to appeal to the Privy Council, which leave, however, became abortive owing to his failure to make the deposit for costs in due time. He then applied to the Privy Council for special leave to appeal on the ground that the suit was one concerning properties of large value, and involving questions of great importance to the sect to which he belonged. Special leave having been granted on the ground, the appellant urged, at the hearing before the Privy Council, certain preliminary objections to the maintainability of the suit, objections to which no reference had been made either in

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his application to the High Court for leave to appeal, or to the Privy Council for special leave. *Held* that, though it was not, by any means, intended to lay down, as a rule, that no questions can be raised at the hearing, which are not indicated in the petition for special leave to appeal, yet, in the present cases, considering the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, objections which altogether excluded the consideration and discussion of those very important questions, the appellant ought not, at that stage, to be allowed to insist that, by reason of these objections, the suit ought to be dismissed.

A declaratory decree ought not to be given unless there is a right to some consequential relief, which, if asked for, might have been given by the Court, or unless, in certain cases, a declaration of right is required as a step to relief in some other Court.

In cases where property may legally pass by an oral will, a suit may lie to have it declared null and void; for a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. A right to have a document or act which obstructs the title or enjoyment of property, cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

According to the custom obtaining among the Saraogi Agarwala Jains, a sonless widow takes a very much larger dominion over the estate of her husband than is conceded by Hindu law to widows among orthodox Hindus; she takes an absolute interest at least in the self-acquired property of her husband; she enjoys the right of adoption without the permission of her husband or the consent of his heirs; a daughter's son may be adopted, and, on adoption, takes the place of a son begotten.

With regard to the Jains, the Hindu law must be applied generally to their cases in the absence of custom varying that law.

In a suit by a Jain widow for the maintenance of her possession by the establishment of her exclusive right of inheritance to her husband's estate, and to have the adoption by her of a son, upheld, the adopted son was subsequently added as a plaintiff. The Court of first instance, granting all the reliefs asked for, declared that the widow was entitled to be maintained in possession as *proprietor*. The High Court, on appeal modified this by declaring that she was entitled to be maintained in possession, either as proprietor or as manager of the estate on behalf of the adopted son. *Held*, that, though the declaration, being in the alternative, was in one sense uncertain, yet, it was independent of the other declarations, which decided the rights of the parties as between the plaintiffs on the one side, and the defendant on the other, and repelled the defendant's pretensions. There being no conflict between the rights of the plaintiffs *inter se*, the decree was rightly framed in a form which avoided prejudice to those rights. SHEO SINGH RAI v. DAKHO AND MURARI LAL, 1 A. 688=2 C.L.R. 193=5 I.A. 87=3 Suth. P.C.J. 529=3 Saraswati's P.C.J. 807 ... 484

(2) *Order, grounds for re-opening.*—The finality of a judgment of the Privy Council, particularly after its confirmation by an order in Council, cannot be generally questioned. Such an order will not be allowed to be re-opened or varied, unless it is shown that, by some accident, without any blame and without any default on the part of the party himself, he has not been heard and an order has been inadvertently made as if he had been heard. MAHARAJAH PERTAB NARAIN SINGH v. MAHARANEE SUBHAO KOER, 4 C. 184=3 Suth. P.C. 553=5 I.A. 171=1 C.L.R. 113=3 Saraswati's P.C.J. 840 519

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(3) Application for leave to appeal to—See CIVIL PROCEDURE CODE, 1877, 2 A. 65=3 Ind. Jur. 413.

(4) Application for leave to appeal to—See LIMITATION, 1877, 1 A. 644.

(5) See HIGH COURT, 1 A. 726.

Profits.

(1) See ACT XVIII OF 1873, 1 A. 512.

(2) Suit for, of sir-land not included in Rent-roll—See SIR-LAND, 1 A. 659.

Promissory Note.

(1) *Negotiability—Chose-in-action or actionable claim—Defences in suit by assignee.*—A promissory note, not made payable to any other person than the payee, that is not made payable to "order," or "bearer," is not a "negotiable instrument." Such a pro-note is, however, an actionable claim or chose-in-action, and can be acquired. And, just as in England Courts of equity allow the assignee of a *chose-in-action* to sue in his own name, he can do so in this country, where the Courts are both Courts of law as well as Courts of equity.

The defendant, in a suit by the assignee, can set up, against the latter, all the defences that he would have had against the assignor, at any rate, those available to him up to the date when notice of the assignment was given to him. KANHAIYA LAL v. DOMINGO, 1 A. 732 ... 536

(2) Unstamped, See EVIDENCE, 1 A. 725.

Prostitution.

See MAHOMEDAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 598.

Public servant.

Disobedience to order duly promulgated by, See PENAL CODE, 1 A. 527.

Public thoroughfare.

See ENCROACHMENT, 1 A. 249.

Punjab Code.

S. 19, cl. 4—Mortgage—Interest—Discretion of Court.—According to the Punjab Code, it is declared that the period during which interest is demanded must not exceed 12 years. Where the Court thought 42 per cent. per annum (the rate of interest agreed upon in a mortgage) unjustly usurious, it, looking to s. 19, cl. 4, of the Puujab Code, allowed 12 years' interest at the rate of 12 per cent per annum. RAJAH MAHOMED AMEER HUSSUN KHAN v. THAKOOR MONOO SINGH, 3 Suth. P.C.J. 85 ... 4

Railways Act (XVIII of 1854).

S. 15—Goods of a dangerous nature—Duty of persons sending—Notice—Negligence—Act XIII of 1855—Suit for compensation for destruction of life.—A person, who sends, for conveyance by Rail, an article which he knows to be of a dangerous and explosive nature, is bound, both on the general principles of law, and by the special provisions of the Railway Act, XVIII of 1854, to give notice of its contents to the Company's servants. He is also bound to take all reasonable precautions to preclude the risk of accident. Failure to do either of these things will render him liable for the consequences, whether they occur in a manner he could have contemplated or not.

Mode of assessing damages in a suit for compensation or destruction of life under Act XIII of 1855 discussed. LYELL v. GANGA DAI, 1 A. 60 ... 25

Real property.

See LEGACY, 1 A. 762; 1 A. 772.

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Record-of-rights.

(1) *Entry in—Whether amounts to trust—Purchaser without notice.*—An entry in a village record-of-rights, caused by the recorded proprietors of a share to be made therein, to the effect that a certain person claimed a portion of such share, and that they were willing to admit his right, whenever he paid them a certain amount of money, does not amount to a declaration of trust in favour of such person, and cannot be regarded as evidence of any such trust. Even if it could be held to be a trust, the property cannot be followed in the hands of a purchaser for value without notice. KAMAL SINGH v. BATUL FATIMA, 2 A. 460 ... 321

(2) See ACT XIX OF 1873, 1 A. 613.

(3) See PRESUMPTION, 1 A. 207.

Redemption.

(1) *Burden of proof — Ownership — Evidence Act, I of 1872. S. 110—Partial relief on the footing of defendant's admission.*—In a suit for redemption of properties in the possession of the defendant, who sets up a sale, the burden of proving the mortgage is on the plaintiff.

Where the plaintiff sues for redemption of a mortgage of the whole property for a small amount and fails to substantiate his averments, he cannot, in that suit, fall back on the admission of the defendant, who admits the mortgage of a portion only, but for a very much larger amount, and claim to redeem that portion. RATAN KUAR v. JIWAN SINGH, 1 A. 194 ... 150

(2) *Purchase by mortgagee of subordinate tenure in respect of mortgaged property —Effect of sale of equity of redemption.*—Where the usufructuary mortgagee of a zamindari purchased with his own funds certain subordinate *birt* tenures that had existed in respect of it, and merged them in the taluk instead of keeping them alive as distinct sub-tenures, the mortgagor was held entitled to redeem, in the peculiar circumstances of the case, the subordinate tenures also, on payment to the mortgagee of the mortgage amount, *plus* the sums expended by him in purchasing the sub-tenures.

The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee, exercising the power, a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent encumbrancer, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the encumbrances.

Semble. 1.—Generally, most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of the security; and, similarly, any acquisitions by the mortgagee are accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption.

Semble 2.—Every purchase by a mortgagee, of a sub-tenure existing at the date of the mortgage, cannot be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms. RAJAH KISHENDATT RAM v. RAJAH MUMTAZ ALI KHAN, 3 Suth. P.C.J. 637=6 I.A. 145=4 Saraswati's P.C.J. 17=5 C. 198=5 C.L.R. 213 ... 713

(3) See ACT I OF 1869, 3 I.A. 85=3 Sar. P.C.J. 570.

(4) See APPEAL, 1 A. 620.

(5) See INTEREST, 1 A. 344.

(6) See LIMITATION, 1 A. 425=2 Ind. Jur. 115.

(7) Suit for, See LIMITATION ACT, IX OF 1871, 1 A. 117 ; 1 A. 655.

(8) See MORTGAGE (USUFRUCTUARY), 1 A. 524.

(9) See REGULATION VII OF 1825, 1 A. 431=2 Ind. Jur. 146.

Registration.

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(1) *Mortgage—Certificate of sale.*—An endorsement made and signed by a Judge on a deed of mortgage of immoveable property, certifying that the deed was purchased at a public sale, held in this Court, in execution of a decree, operates as a sale certificate, and, if it relates to immoveable property of the value of Rs. 100 and upwards, must be registered; and, if unregistered, is inadmissible in evidence. KANHIA LAL v. KALIDIN, 2 A. 392 ... 780

(2) *Sulehnama hypothecating immoveable property—Suit for money charged on immoveable property.*—A charge, exceeding Rs. 100 in value, created upon immoveable property by means of a sulehnama (with a half-rupee Court-fee stamp affixed) presented in Court in execution proceedings, cannot be enforced against such property, the document not being properly stamped and not being registered.

Observations, by Spankie, J., on previous decisions of the High Court in which sulehnamas were relied on as evidence of a separate oral agreement or were held not to require registration. SARJU PRASAD v. BHAWANI SAHAI, 2 A. 481 ... 867

(3) See REGISTRATION ACT, XX OF 1866, 15 B.L.R. 228=24 W.R. 75=3 Suth. P.C.J. 170=2 I.A. 210.

(4) Effect of improper, See REGISTRATION ACT, VIII OF 1871, 1 A. 465=3 Suth. P.C.J. 438=4 I.A. 166=3 Sar. P.C.J. 738.

(5) See RELEASE, 2 A. 554=5 Ind. Jur. 92.

Registration Act, XX of 1866.

(1) *S. 17—Mortgage-bond.*—A bond, charging immoveable property for the payment of both the principal and interest, and payable by instalments, under which the first instalment payable within three years with accumulated interest exceeds Rs. 100, creates an interest in immoveable property of the value of Rs. 100 and upwards, and must, under S. 17 of Act XX of 1866, be registered. BANNO v. PIR MUHAMMAD, 2 A. 688 ... 986

(2) *Ss. 19, 21, 36, 49, 88—Effect to be given to S. 49.*—It is not clear that the words "unless it shall have been registered in accordance with the provisions of this Act" in S. 49, are not, especially as regards strangers to the deed, confined to the procedure on "admitting to registration" without reference to any matters of procedure prior to registration or to the provisions of Ss. 19, 21 or 36 of the Act, or other provisions of a similar nature. In considering the effect to be given to S. 49, that section must be read in conjunction with S. 88, and with the words of the heading of Part X, "Of the effects of registration and non-registration."

It is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of Ss. 19, 21 or 36 or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in S. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. SAH MUKHUN LALL PANDAY v. SAH KOONDUN LALL, 15 B.L.R. 228=24 W.R. 75=3 Suth. P.C.J. 170=2 I.A. 210

(3) *Ss. 22, 24, 84, nature of—Registration—Limitation.*—Ss. 22 and 24 of Act XX of 1866 make it imperative that the instruments therein referred to shall be presented for registration within four or at most eight months, from the date of their execution: but the Act fixes no time within which the registration must be completed. ... 12

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***Registration Act, XX of 1866*—(*Concluded*).**

Where a deed of sale is presented for registration within the period required by S. 22, and is accepted by the Registering officer, who, without the vendors appearing, registers it by mistake, and the registration is declared by a competent Court to be invalid, the Registering officer may, although the period of four months has expired, proceed to compel the appearance of the vendors, and, on their admission, register the deed. Such registration may be effected by the Registering officer voluntarily, and without an order from the District Court under S. 84, notwithstanding that an application by the parties concerned to have it registered has been refused by the Registrar, and that the Registrar-General has deemed the first (invalid) registration to be due registration. SAH MUKHUN LALL PANDAY v. SAH KOONDUN LALL, 15 B.L.R. 228=24 W.R. 75=3 Suth. P.C.J. 170=2 I.A. 210 ... 12

(4) S. 52, See CIVIL PROCEDURE CODE. ACT VIII OF 1859, 1 A. 377.

(5) Ss. 52, 53, See APPEAL. 1 A. 583=2 Ind. Jur. 792.

(6) Ss. 52, 53, See LIMITATION ACT, 1871, 1 A. 586.

(7) *S. 53—Hypothecation—Mortgage—Sale in execution.*—A decree in a suit on a bond under S. 53 of Act XX of 1866, can properly only be a decree for money, and not for enforcing any lien against property hypothecated in the bond. Where it appears, on the face of the decree, that although it professed to declare the lien, it was passed under the special provisions of S. 53 of Act XX of 1866, it could only be held valid as a money decree.

A purchaser of immoveable property at auction in execution of a money decree acquires merely the rights and interests which the judgment-debtor had at the time of sale. AKHE RAM v. NAND KISHORE, 1 A. 236=1 Ind. Jur. 100 ... 186

(8) *S. 88—"District Court"—Jurisdiction of High Court, N.W.P.*—For the purposes of Act XX of 1866, "District Court" means the principal Court of original Civil jurisdiction in a district and includes the High Court in its ordinary original Civil jurisdiction.

The N.W.P. High Court having no ordinary original Civil jurisdiction is not competent, under Act XX of 1866, S. 88, to direct the registration of an instrument, the registration of which has been refused by the Registrar and the Registrar-General. SAH MUKHUN LALL PANDAY v. SAH KOONDUN LALL, 15 B.L.R. 228=24 W.R. 75=3 Suth. P.C.J. 170=2 I.A. 210 ... 12

Registration Act, 1871.

(1) *S. 17—Mortgage.*—A bond charging land with the payment of a principal amount of less than Rs. 100, in which there is no stipulation preventing the debtor from repaying the loan within the time fixed, need not be registered. But, if registered, it is entitled to take effect against a prior unregistered bond, which is not compulsorily registrable. AHMAD BAKHSH v. GOBINDI, 2 A. 216 ... 701

(2) *S. 17, cl. (2)—Charge.*—An instrument which creates a charge on immoveable property for the payment, in a given time, of Rs. 99 *plus* Rs. 6, interest for 3 months, thus making up over Rs. 100, must be registered under cl. (2), S. 17 of Act VIII of 1871. DARSHAN SINGH v. HANMANTA, 1 A. 274 ... 226

(3) *S. 17, cl. (2)—Charge.*—A bond, charging immoveable property for the payment on demand of an amount less than Rs. 100, with interest thereon, is only optionally registrable. KARAM SINGH v. RAM LAL, 2 A. 96=3 Ind. Jur. 470] ... 615

(4) *Ss. 17, 18.*—A document, by which the obligor, in consideration of a loan of a sum less than Rs. 100, agrees to lease certain lands to the obligee for one year, and undertakes to be responsible for any damages arising from failure

Registration Act, 1871—(*Continued*). PAGE

to comply with the terms of such agreement and hypothecates immoveable property till the conditions of the agreement should be fulfilled, is a hypothecation bond for the amount of the loan; and there being no stipulation for interest or any other sum by which the principal amount may be augmented, and the damages stipulated for depending on a contingency which may or may not happen, and respecting which nothing can be anticipated at the time of registration, the document is one which does not require registration. But it could not be used to enforce a lien against property hypothecated to any extent greater than the amount of the loan.

Per STUART, C.J.—Such an instrument is essentially a usufructuary mortgage.

Per OLDFIELD, J.—On the pleadings in the case, it is unnecessary to decide whether it should have been registered as a lease. BASANT LAL v. TAPESHRI RAI, 3 A. 1 ... 956

(5) *Ss. 17, 49—Registration of receipts—Inadmissibility of unregistered receipt—Admissibility of parol evidence, though receipt inadmissible.*—A receipt for payments made towards a bond, hypothecating immoveable property, must be registered under S. 17, Act VIII of 1871. An unregistered receipt is not admissible in evidence to prove the payment, under S. 49, Registration Act. In such a case, parol evidence is nevertheless admissible. DALIP SINGH v. DURGA PRASAD, 1 A. 442 ... 328

(6) *Ss. 17, cl. (2), 49—Mortgage.*—For the purposes of registration, the value of the interest created by a mortgage of immoveable property is not the amount of the principal, but such amount with the interest thereon payable at the time fixed in the bond. RAJPATI SINGH v. RAM SUKHI KUAR, 2 A. 40=3 Ind. Jur. 220 ... 572

(7) *Ss. 18 and 50—Registration Act (1877), Ss. 17, 18 and 50—Registered and unregistered instruments—Priority.*—Under the Registration Act, 1871, a subsequent registered instrument, compulsorily registered, does not take effect, with respect to the property, affected by it, as against a prior unregistered instrument affecting the same property, which is optionally registrable.

The provisions of S. 50 of the Registration Act, 1877, have no retrospective effect. BHOLA NATH v. BALDEO, 2 A. 198 ... 689

(8) *S. 35—Construction—Improper registration—Effect of.*—The words of the section, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed, which purports to be executed by several persons, if any one of these persons deny the execution or appears to be under any disability; such a construction, however, would cause great difficulty and injustice, which it cannot be supposed the Legislature contemplated; and would be inconsistent with the language and tenor of the rest of the Act. The words of the section must, therefore, be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons, who deny the execution of the deed, and *quoad* any persons, who appear to be a minor, an idiot or a lunatic. There appear to be no reasons for extending the clause further than this, so as to destroy the operation of the deed as regards those, who admit the execution, and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso to the 23rd section of the Act shows that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it.

The fact that some of the provisions of the Registration Act have not been complied with, does not render the registration of a document invalid. MUHAMMAD EWAZ v. BIRJ LAL, 1 A. 465=3 Suth. P.C.J. 438=4 I.A. 166=3 Saraswati's P.C.J. 738 ... 339

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Registration Act, 1871—(*Concluded*).

(9) Ss. 53 and 55, See CIVIL PROCEDURE CODE, ACT VIII OF 1859, 1 A. 377.

(10) *S. 73—Person "Claiming under document"—Petition to have document registered.*—Where it appears, on the face of a document, that the person applying for its registration is not a person "claiming" under it, his petition for its registration cannot be entertained.

Per Stuart, C.J.—The mere fact that it so appeared on the face of the document could not preclude the petitioner from applying to have the document registered.

Per Oldfield, J.—When the document is duly executed and the requirements of the law are fulfilled, it is the duty of the Court to order registration without going into the question whether or not the petitioner could claim under it. IN THE MATTER OF THE PETITION OF BISH NATH, 1 A. 318. 257

(11) See REGISTRATION ACT, III OF 1877, 2 A. 431=4 Ind. Jur. 524.

Registration Act, 1877.

(1) Ss. 17, 18, 50, See REGISTRATION ACT, 1871, 2 A. 193.

(2) *Ss. 36, 75 and 77—Contract of sale followed by conveyance—Suit to enforce such conveyance without resort to procedure under Registration Act.*—Where a contract of sale is followed by a conveyance, it is not incumbent on the vendee to take steps under the Registration Act to compel the registration of the conveyance, before suing in the Civil Court for such registration. The sections of the Registration Act, relating to procedure, to be followed for the registration of documents, are merely permissive, and do not exclude a suit for the enforcement of a contract, which includes an obligation to register the deed executed in pursuance of such contract. RAM GHULAM v. CHOTTY LAL, 2 A. 46 ... 575

(3) *S. 50—Optional and compulsory registration—Act VIII of 1871.*—A registered document, compulsorily registrable under Act III of 1877, takes effect, as regards the property comprised in it, against an unregistered document of a prior date relating to the same property, optionally registrable under Act VIII of 1871, which was then in force. GANGARAM, GUARDIAN OF KUARGIRPRASAD, A MINOR *v.* BANSI, 2 A. 431=4 Ind. Jur. 524 ... 834

(4) *S. 50—Optional and compulsory registration—Act I of 1868 (General Clauses), S. 6.*—Under S. 50 of the Registration Act, 1877, a document compulsorily registrable and registered under that Act, takes effect, in respect of the property comprised in it, as against an unregistered document relating to such property, executed while the Registration Act of 1871 was in force, and optionally registrable under that Act. S. 6 of the General Clauses Act (I of 1868) has no saving effect in such a case. LACHMAN DAS v. DIP CHAND, 2 A. 851 ... 1087

Regulation XV of 1793.

See INTEREST, 1 A. 344.

Regulation XIX of 1793.

(1) S. 1, See ASSIGNMENT, 2 A. 732.

(2) S. 10, See GRANT, 2 A. 545.

Regulation XLI of 1795.

S. 10, See GRANT, 2 A. 545.

Regulation XXXIV of 1803.

(1) *Usury laws—Mesne-profits in lieu of interest—Rendering of accounts whether and when necessary.*—Prior to, and subsequent to, the repeal of the Usury laws, a mortgage, under which the mortgagee was to enjoy mesne profits in

Regulation XXXIV of 1803—(*Concluded*). PAGE

lieu of interest, would have constituted a valid and legal contract and the mortgagee was not bound to account for such profits. But, under the usury laws, the rate of interest was limited to 12 *per cent.*, and securities might be avoided, if they contracted directly or indirectly for higher rate of interest ; and there were also provisions for the taking of accounts between mortgagor and mortgagee.

There is nothing in Reg. XXXIV of 1803, making it compulsory for the mortgagee to file accounts, whether they are required for the purpose of determining the rights of the parties in the suit or not. Accounts would be necessary, even if there were a stipulation to the contrary, if the contract had been made in evasion of the Regulation, and as a contrivance for giving the mortgagee a higher rate of interest than he is entitled to under the law. They may be, also, necessary, when the profits received by the mortgagee in possession are fluctuating in amount, to enable the Court to decide on the validity of the contract for interest. Where, therefore, under the terms of a deed of mortgage, the only sum that the mortgagee was to receive, over and above the interest allowed by law, was a fixed amount found to be necessary for costs of collection of the village jama, *held*, that a clause in the deed, making the rendering of accounts unnecessary, was not improper, and that the mortgage-deed was a sufficient answer to a suit based on the supposition (contrary to the terms of the agreement) that, if the accounts be taken, the mortgage would be found to have been discharged by debiting the mortgagee with the balance remaining over and above the interest, or so much of the balance as he could not account for. BADRI PRASAD v. MURLIDHAR, 2 A. 593=4 Ind. Jur. 257=3 Suth. P.C.J. 708=7 I.A. 51=6 C.L.R. 257=4 Saraswati's P.C.J. 100 ... 884

Regulation XVII of 1806.

(1) *S. 6—Oral conditional mortgage.*—Property made over to a person on the condition that, if the money borrowed from him be not re-paid within a certain time, it shall become his absolute property, becomes such property on failure to pay, without the issue of a notice of foreclosure under S. 6 of the Reg. XVII of 1806, the provisions of which apply only to holders of deeds of conditional mortgage. GOBARDHAN DAS v. GOKAL DAS, 2 A. 633 ... 955

(2) *S. 8—"Mortgagor's legal representative"—Subsequent mortgagee entitled to notice of foreclosure.*—The term "mortgagor's legal representative" used in the Regulation was intended to apply to all or any persons who, at the date of the notice of foreclosure, possesses a title to the equity of redemption, whether absolute or defeasible, of the mortgage. Accordingly, where land, the subject of a conditional sale, was mortgaged to a second mortgagee, *held* that the latter is entitled to notice of foreclosure ; and foreclosure proceedings taken without notice to him are invalid as against him. He is entitled to have the opportunity of coming in to redeem the mortgage by conditional sale so as to preserve his security. DIRGAJ SINGH v. DEBI SINGH, 1 A. 499=2 Ind. Jur. 464 ... 395

(3) *S. 8—Mortgage—Property situated in two Provinces—Foreclosure.*—According to S. 8 of Regulation XVII of 1806, where mortgaged property is situate in two Districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district. The same rule applied where the property is situate in two Provinces, and the Regulation was in force in both of them at the time of the foreclosure-proceedings. SURJAN SING v. JAGAN NATH SINGH, 2 A. 313 ... 771

(4) See INTEREST, 1 A. 344.

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Regulation VII of 1822.

S. 9, cl. I—Act XIX of 1873, S. 66—Suit for declaration of Zamindari right to cesses—Civil Court—Jurisdiction.—A Civil Court is not precluded by the terms of Reg. VII of 1822, S. 9, cl. I, from inquiring into and declaring a Zamindar's rights to cesses and collections, although not avowed and sanctioned, nor taken into account in fixing the Government jama at the time of settlement, and although they cannot be collected by the Zamindar until so avowed and sanctioned. AKBAR KHAN v. SHEORATAN, 1 A. 373=1 Ind. Jur. 778 ... 284

Regulation VII of 1825.

Redemption suit—Collective mortgage of lands situate in separate districts—Incidental questions.—Where the representative of the original mortgagors, who had made a collective mortgage of lands situated in the Mirzapur District and within the family domains of the Maharajah of Benares (the latter being within the exclusive jurisdiction of Court established under Reg. VII of 1825), sued for the redemption of the mortgage, so far as it concerned the lands situate in the Mirzapur District, *held*, that it was within the competency of the Mirzapur Court to decide incidentally, for the purposes of the suit, questions relating to mortgaged property held by the defendants in the family domains, the extent of it in their possession, and its profits, in order to make up the accounts of the entire mortgage, so as to ascertain if the entire mortgage debt has been satisfied, and if, therefore, the plaintiff has a right to recover the mortgaged property situated in Mirzapur. GIRDHARI v. SHEORAJ, 1 A. 431=2 Ind. Jur. 146 ... 325

Regulation VI of 1873.

See CONTRACT ACT, 2 A. 411.

Release.

Stamp—Registration—Reception in evidence of unstamped and unregistered document—Objection in first appeal—C. P. C., 1859, S. 350—C. P. C., 1877, S. 578—Agreement induced by fraud voidable.—A letter, by which a person releases his right to the security of certain immoveable property hypothecated to him, cannot operate as a release and be received in evidence, unless duly stamped and registered.

An appellate Court may admit and consider an objection to the reception, in evidence, of an unstamped and unregistered document.

A person, who is induced by fraud to relinquish a lien on immoveable property, in favour of an innocent subsequent purchaser in good faith, is entitled, when the true facts become known, to enforce the lien against such purchaser. SAFDAR ALI KHAN v. LACHMAN DAS, 2 A. 554=5 Ind. Jur. 92 ... 921

Relief.

See REDEMPTION, 1 A. 194.

Remand.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), No. 46, 1 A. 165.
(2) See CIVIL PROCEDURE CODE, 1877, No. 53, 2 A. 908.

Rent.

(1) *Suit for rent of a Small Cause nature—Incidental determination of title therein—'Res judicata.'*—The incidental decision on a question of title in a suit for rent of a Small Cause nature is not *res judicata*, when the same question arises in a subsequent suit on title. INAYAT KHAN v. RAHMAT BIBI, 2 A. 97 ... 625

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***Rent*—(*Concluded*).**

(2) See ACT X OF 1859, 1 A. 301.

(3) See ACT XVIII OF 1873, 1 A. 217.

(4) See LANDLORD AND TENANT, 2 A. 517=4 Ind. Jur. 650.

(5) See SURETY, 2 A. 582.

Repeal.

Repealing of old law—Effect of procedure under new law, See CIVIL PROCEDURE CODE, 1877, No. 46, 2 A. 94.

Res judicata.

(1) *Hindu widow—Reversioner.*—A Hindu widow succeeding to her husband's estate as heir, represents the estate fully; and reversioners, claiming to succeed after her, are bound by decrees relating to her husband's estate, obtained against her without fraud or collusion. NAND KUMAR v. RADHA KUARI, 1 A. 282 ... 234

(2) *Act XVIII of 1873 (N.W.P. Rent Act), S. 95, cl. (n)—Decision of title. Per* Pearson and Turner, JJ.—The determination of a question of title by a Revenue Court, on an application under Cl. (*n*), S. 95 of the Rent Act, by a dispossessed tenant, for recovery of the occupancy of land, is *res judicata*, and cannot again be raised in a Civil Court, as the Revenue Court could not have disposed of the application without determining such question of title. *Per* Spankie, J., and Oldfield J., *contra*. The jurisdiction of the Revenue Court in the matter of an application under Cl. (*n*), S. 95 of the Rent Act, is confined to the determination of the immediate matter of the application—the dispossession of the tenant otherwise than by law. SHIMBHU-NARAIN SINGH v. BACHCHA, 2 A. 200 ... 691

(3) *Act XIX of 1863, Ss. 8 and 9—Adjudication of title.*—An adjudication of title by a Collector under S. 8 of Act XIX of 1863, which, under S. 9, becomes final by not being appealed against, is *res judicata* and cannot be re-opened in a civil suit. HARSAHAI MAL v. MAHARAJ SINGH, 2 A. 294 ... 744

(4) See ACT XIX OF 1873, 2 A. 839.

(5) See CIVIL PROCEDURE CODE, ACT VIII OF 1859, 1 A. 75; 1 A. 316; 1 A. 480=2 Ind. Jur. 387; 1 A. 560.

(6) See CIVIL PROCEDURE CODE, 1877, 2 A. 843.

(7) See HINDU LAW (GIFT), 1 A 734.

(8) See LANDLORD AND TENANT, 2 A. 428.

(9) See LIS PENDENS, 1 A. 588.

(10) See RENT, 2 A. 97.

(11) See SURETY, 2 A. 582.

Restitution of conjugal rights.

See MAHOMEDAN LAW (DOWER), 1 A. 483=2 Ind. Jur. 389.

Revenue Court.

(1) See ACT XVIII OF 1873, 1 A. 217; 1 A. 338.

(2) See CIVIL PROCEDURE CODE, 1827, 2 A. 264.

(3) Jurisdiction of, See SURETY, 2 A. 582.

Review.

(1) See CIVIL PROCEDURE CODE, ACT VIII OF 1859, 1 A. 363=1 Ind. Jur. 818; 2 A. 287.

(2) See STAT., 24 & 25, VIC., C. 104, 1 A. 296.